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THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XXII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXII.

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In this Volume English Cases reported up to 1st April, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1800 (<i>e.g.</i> , [1801] A. C.)	Eng.
A. Jur. Rep. ...	Australian Jurist Reports	Aus.
A. L. T. ...	Australian Law Times	Aus.
A. R. ...	Ontario Appeals	Can.
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Ad. & El. ...	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam ...	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add. ...	Addams' Ecclesiastical Reports, 3 vols., 1822—1828	Eng.
Agra ...	Agra High Court	Ind.
Agra F. B. ...	Agra High Court, Full Bench	Ind.
Alc. & N. ...	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas. ...	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn ...	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All. ...	New Brunswick Reports (Allen)	Can.
Alta. L. R. ...	Alberta Law Reports	Can.
Amb. ...	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And. ...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr. ...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst. ...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas. ...	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep. ...	Appeal Court Reports	N.Z.
App. D. ...	South African Law Reports, Appellate Division	S. Af.
Architects' L. R. ...	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R. ...	Argus Law Reports	Aus.
Arkley ...	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O. ...	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn. ...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H. ...	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb. ...	Ashburner's Principles of Equity, 1902	Eng.
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Atk. ...	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan. ...	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par. ...	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B. ...	Barber's Gold Law	S. Af.
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B. & C. ...	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
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B. L. R. Sup. Vol. ...	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C. ...	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr. ...	Bacon's Abridgment	Eng.
Bail Ct. Cas. ...	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Baild. ...	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.

Bankr. & Ins. R.	...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	...	Eng.
Bar. & Arn.	...	Barron and Arnold's Election Cases, 1 vol., 1843—1846	...	Eng.
Bar. & Aust.	...	Barron and Austin's Election Cases, 1 vol., 1842	...	Eng.
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Batt.	...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	...	Ir.
Beat.	...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830	...	Ir.
Beav.	...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	...	Eng.
Beav. & Wal.	...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	...	Eng.
Beaw.	...	Beawes's Lex Mercatoria	...	Eng.
Bell, C. C.	...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	...	Eng.
Bell, Ct. of Sess.	...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	...	Scot.
Bell, Ct. of Sess. fol.	...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	...	Scot.
Bell, Dict. Dec.	...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	...	Scot.
Bell, Sc. App.	...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	...	Scot.
Bellewe	...	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	...	Eng.
Belt's Sup.	...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	...	Eng.
Ben.	...	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	...	Eng.
Benl.	...	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	...	Eng.
Ber.	...	New Brunswick Reports (Berton)	...	Can.
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Biss. & Sm.	...	Bisset and Smith's Digest	...	S. Af.
Bitt. Prac. Cas.	...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	...	Eng.
Bitt. Rep. in Ch.	...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	...	Eng.
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Dav. Ir. ...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611 ...	Ir.
Dav. Pat. Cas. ...	Davies' Patent Cases, 1 vol., 1785—1816 ...	Eng.
Day ...	Day's Election Cases, 1 vol., 1802—1803 ...	Eng.
Dea. & Sw. ...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857 ...	Eng.
Deac. ...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840 ...	Eng.
Deac. & Ch. ...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835 ...	Eng.
Dears. & B. ...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858 ...	Eng.
Dears. C. C. ...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856 ...	Eng.
Deas & And. ...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832 ...	Scot.
De G. ...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848 ...	Eng.
De G. & J. ...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859 ...	Eng.
De G. & Sm. ...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852 ...	Eng.
De G. F. & J. ...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862 ...	Eng.
De G. J. & Sm. ...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865 ...	Eng.
De G. M. & G. ...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857 ...	Eng.
Delane ...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835 ...	Eng.
Den. ...	Denison's Crown Cases Reserved, 2 vols., 1844—1852 ...	Eng.
Dick. ...	Dickens' Reports, Chancery, 2 vols., 1559—1798 ...	Eng.
Dirl. ...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677 ...	Scot.
Dods. ...	Dodson's Reports, Admiralty, 2 vols., 1811—1822 ...	Eng.
Donnelly ...	Donnelly's Reports, Chancery, 1 vol., 1836—1837 ...	Eng.
Doug. El. Cas. ...	Douglas' Election Cases, 4 vols., 1774—1776 ...	Eng.
Doug. K. B. ...	Douglas' Reports, King's Bench, 4 vols., 1778—1785 ...	Eng.
Dow ...	Dow's Reports, House of Lords, 6 vols., 1812—1818 ...	Eng.
Dow & Cl. ...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832 ...	Eng.
Dow. & L. ...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849 ...	Eng.
Dow. & Ry. K. B. ...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827 ...	Eng.
Dow. & Ry. M. C. ...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827 ...	Eng.
Dow. & Ry. N. P. ...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823 ...	Eng.
Dowl. ...	Dowling's Practice Reports, 9 vols., 1830—1841 ...	Eng.
Dowl. N. S. ...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843 ...	Eng.
Dr. & Wal. ...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841 ...	Ir.
Dr. & War. ...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843 ...	Ir.
Dra. ...	Draper's King's Bench Reports ...	Can.
Drew. ...	Drewry's Reports, Chancery, 4 vols., 1852—1859 ...	Eng.
Drew. & Sm. ...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865 ...	Eng.
Drinkwater ...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841 ...	Eng.
Drury temp. Nap. ...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859 ...	Ir.
Drury temp. Sug. ...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844 ...	Ir.
Dugd. Orig. ...	Dugdale's Origines Juridicales ...	Eng.
Dunl. (Ct. of Sess.) ...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862 ...	Scot.
Dunning ...	Dunning's Reports, King's Bench, 1 vol., 1753—1754 ...	Eng.
Durie ...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642 ...	Scot.
Dyer ...	Dyer's Reports, King's Bench, 3 vols., 1513—1581 ...	Eng.
E. & A. ...	Upper Canada Error and Appeal ...	Can.
E. & B. ...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858 ...	Eng.
E. & E. ...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861 ...	Eng.
E. B. & E. ...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860 ...	Eng.
E. D. C. ...	Reports of the Eastern Districts Court (Cape) from 1880 ...	S. Af.
E. D. L. ...	South African Law Reports, Eastern Districts Local Division ...	S. Af.
E. L. R. ...	Eastern Law Reporter ...	Can.
E. R. (or Eng. Rep.) ...	English Reports ...	Eng.
E. R. ...	Ontario Election Reports ...	Can.
Eag. & Y. ...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825 ...	Eng.
East ...	East's Reports, King's Bench, 16 vols., 1800—1812 ...	Eng.
East, P. C. ...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855 ...	Eng.

Eden	Eden's Reports, Chancery, 2 vols., 1757—1766	Eng
Edgar	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot
Edw.	Edwards' Reports, Admiralty, 1 vol., 1808—1812	Eng
Elchies	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	Scot.
Emden's B. C.	Emden's Building Contracts, Building Leases and Building Statutes	Eng.
Eng. Pr. Cas.	Roscoe's English Prize Cases, 2 vols., 1745—1858	Eng.
Eq. Cas. Abr.	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	Eng.
Eq. Rep.	Equity Reports, 3 vols., 1853—1855	Eng.
Esp.	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	Eng.
Ex. D.	Law Reports, Exchequer Division, 5 vols., 1875—1880	Eng.
Exch.	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	Eng.
Exch. C. R.	Exchequer Court Reports	Can.
F. (Ct. of Sess.)	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F.	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	S. Af.
F. & F.	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	Eng.
F. N. D.	Finnemore's Notes and Digest of Natal Cases, 1863—1867	S. Af.
Fac. Coll.	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	Scot.
Falc.	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	Scot.
Falc. & Fitz.	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	Eng.
Fenton	Fenton, Important Judgments	N.Z.
Ferg.	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev.	Fitzherbert's Natura Brevium	Eng.
Fitz-G.	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K.	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	Ir.
Fonbl.	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	Eng.
For.	Forrest's Reports, Exchequer, 1 vol., 1800—1801	Eng.
Forb.	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	Scot.
Fort. De Laud.	Fortesque, De Laudibus Legum Angliæ	Eng.
Fortes. Rep.	Fortescue's Reports, fol., 1 vol., 1692—1736	Eng.
Post.	Foster's Crown Cases, 1 vol., 1708—1760	Eng.
Fount.	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	Scot.
Fox & S. Ir.	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	Ir.
Fox & S. Reg.	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1880—1895	Eng.
Fras.	Fraser (Simon), Election Cases, 2 vols., 1793	Eng.
Freem. Ch.	Freeman's Reports, Chancery, 1 vol., 1660—1706	Eng.
Freem. K. B.	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	Eng.
G.	Gregorowski's Reports of the High Court of the Orange Free State from 1883	S. Af.
G. & R.	Nova Scotia Reports (Geldert & Russell)	Can.
G. I. Dig.	General Index Digest	Can.
Gal. & Dav.	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	Eng.
Gale	Gale's Reports, Exchequer, 2 vols., 1835—1836	Eng.
Gaz. L. R.	New Zealand Gazette Law Reports	N.Z.
Geld. Dig.	Geldert's Digest	Can.
Gib. Cod.	Gibson's Codex Juris Ecclesiastici Anglicani	Eng.
Giff.	Giffard's Reports, Chancery, 5 vols., 1857—1865	Eng.
Gilb.	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	Eng.
Gilb. C. P.	Gilbert's History and Practice of the Court of Common Pleas	Eng.
Gilb. Ch.	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	Eng.
Gilm. & F.	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	Scot.
Gl. & J.	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv.	Glanville, De Legibus et Consuetudinibus Regni Angliæ	Eng.
Glanv. El. Cas.	Glanville's Election Cases, 1 vol., 1623—1624	Eng.
Glascoc	Glascoc's Reports (Ireland), 1 vol., 1831—1832	Ir.
Godb.	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb.	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.

Gr.	...	...	Upper Canada Chancery (Grant) ...	...	...	...	Can.
Griffin's Patent Cases	...	...	Griffin's Patent Cases, 1884—1887	...	...	...	Eng.
Gwill.	...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	...	...	Eng.
H.	...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	...	...	S. Af.
H. & C.	...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	...	...	...	Eng.
H. & N.	...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	...	...	...	Eng.
H. & Tw.	...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	...	...	Eng.
H. & W.	...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	...	...	...	Eng.
H. B. R. (preceded by date)	...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (<i>e.g.</i> , [1915] H. B. R.)	...	...	...	Eng.
H. C.	...	...	Reports of the High Court of Griqualand West	...	...	...	S. Af.
H. E. C.	...	...	Hodgin's Election Reports	...	...	...	Can.
H. L. Cas.	...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	...	...	Eng.
Hag. Adm.	...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	...	...	Eng.
Hag. Con.	...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	...	...	Eng.
Hag. Ecc.	...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	...	...	Eng.
Hailes	...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	...	...	...	Scot.
Hale, C. L.	...	...	Hale's Common Law	...	...	...	Eng.
Hale, P. C.	...	...	Hale's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Han.	...	...	New Brunswick Reports (Hannay)	...	...	...	Can.
Har. & Ruth.	...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	...	...	...	Eng.
Har. & W.	...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	...	...	Eng.
Harc.	...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	...	...	...	Scot.
Hard.	...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	...	...	Eng.
Hare	...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	...	...	Eng.
Hawk. P. C.	...	...	Hawkins's Pleas of the Crown, 2 vols.	...	...	...	Eng.
Hay	...	...	Hay's Reports	...	...	...	Ind.
Hay & Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	Eng.
Hayes	...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	...	...	Ir.
Hayes & Jo.	...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	...	...	...	Ir.
Hem. & M.	...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	...	...	Eng.
Het.	...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	Eng.
Hob.	...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	...	...	Eng.
Hodg.	...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	...	...	Eng.
Hog.	...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	...	...	Ir.
Holt, Adm.	...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	...	...	...	Eng.
Holt, Eq.	...	...	W. Holt's Equity Reports, 2 vols., 1845	...	...	...	Eng.
Holt, K. B.	...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	...	...	Eng.
Holt, N. P.	...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	...	...	Eng.
Home, Ct. of Sess.	...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	...	...	Scot.
Hong Kong L. R.	...	...	Hong Kong Law Reports	...	...	...	Hong Kong
Hop. & Colt.	...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	...	...	...	Eng.
Hop. & Ph.	...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	...	...	Eng.
Horn & H.	...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	...	...	Eng.
Hov. Supp.	...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	...	...	Eng.
How. C.	...	...	Howard's Chancery Practice	...	...	...	Ir.
How. C. S.	...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	...	...	Ir.
How. E. E.	...	...	Howard's Equity Exchequer	...	...	...	Ir.
How. P. L.	...	...	Howard on the Popery Laws	...	...	...	Ir.
Hud. & B.	...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	...	...	Ir.
Hudson's B. C.	...	...	Hudson on Building Contracts, 2 vols.	...	...	...	Eng.
Hume	...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	...	...	...	Scot.
Hut.	...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	...	...	Eng.
Hy. Bl.	...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	...	...	Eng.
Hyde	...	...	Hyde's Reports	...	...	...	Ind.
I. C. L. R.	...	...	Irish Common Law Reports, 17 vols., 1849—1866	...	...	...	Ir.
I. Ch. R.	...	...	Irish Chancery Reports, 17 vols., 1850—1867	...	...	...	Ir.
I. Eq. R.	...	...	Irish Equity Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R.	...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	...	Ir.
I. L. R. (Vol.) All.	...	...	Indian Law Reports, Allahabad	...	...	...	Ind.
I. L. R. (Vol.) Bom.	...	...	Indian Law Reports, Bombay	...	...	...	Ind.
I. L. R. (Vol.) Calc.	...	...	Indian Law Reports, Calcutta	...	...	...	Ind.
I. L. R. (Vol.) Lah.	...	...	Indian Law Reports, Lahore	...	...	...	Ind.

xx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	Eng.
J. R.	...	Jurist Reports	...	...	...	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	...	...	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1810—1821	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	Ir.
Jebb, C. C.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	Eng.
Keil.	...	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Omblor's Election Cases, 1 vol., 1834—1835	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	Eng.
Knox	...	Knox's Reports	...	...	...	...	Aus.
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1900—1912	...	...	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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L. & G. <i>temp.</i> Plunk.	...	Lloyd and Goold's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Goold's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	Lower Canada Reports	...	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bcy.	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	Legal News	...	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	...	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	...	Eng.
L. T.	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	La Themis	...	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Ld. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1724—1758	...	Eng.
Lee <i>temp.</i> Hard.	...	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.
Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.

Lib. Ass.	...	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	...	Eng.
Lilly	...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	...	Eng.
Litt.	...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	Eng.
Lloyd, L. R.	...	...	Lloyd's List Law Reports, 1919—(current)	...	...	Eng.
Lloyd, Pr. Cas.	...	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	...	Eng.
Lofft	...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	...	Eng.
Long. & T.	...	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	...	Ir.
Lords Journals	...	...	Journals of the House of Lords	...	...	Eng.
Lud. E. C.	...	...	Luder's Election Cases, 3 vols., 1784—1787	...	...	Eng.
Lumley, P. L. C.	...	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	...	Eng.
Lush.	...	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	...	Eng.
Lut.	...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	...	Eng.
Lut. Reg. Cas.	...	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	...	Eng.
Lynd.	...	...	Lyndwood, Provinciale, fol., 1 vol.	...	...	Eng.
M.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	S. Af.
M. & S.	...	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	...	Eng.
M. & W.	...	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	...	Eng.
M. C. R.	...	...	Montreal Condensed Reports	...	...	Can.
M. H. C. R.	...	...	Madras High Court Reports	...	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	...	Montreal Law Reports, King's Bench or Queen's Bench	...	...	Can.
M. L. R. (Vol.) S. C.	...	...	Montreal Law Reports, Superior Court	...	...	Can.
M. M. Cas.	...	...	Martin's Reports of Mining Cases	...	...	Can.
Mac.	...	...	Macassey's New Zealand Reports	...	...	N.Z.
Mac. & G.	...	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1840—1852	...	...	Eng.
Mac. & H.	...	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	...	Eng.
M'Cle.	...	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	...	Eng.
M'Cle. & Yo.	...	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	...	Eng.
Macfarlane	...	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	...	Scot.
Macl. & Rob.	...	...	Maclcan and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	...	Scot.
Macph. (Ct. of Sess.)	...	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1802—1873	...	...	Scot.
Macq.	...	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	...	Scot.
Macr.	...	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	...	Eng.
Mad.	...	...	Madras High Court Reports	...	...	Ind.
Madd.	...	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	...	Eng.
Madd. & G.	...	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	...	Eng.
Madox	...	...	Madox's Formulæ Anglicanum	...	...	Eng.
Madox, Exch.	...	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	...	Eng.
Mag.	...	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	...	Eng.
Man. & G.	...	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	...	Eng.
Man. & Ry. K. B.	...	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	...	Eng.
Man. & Ry. M. C.	...	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	...	Eng.
Man. L. J.	...	...	Manitoba Law Journal	...	...	Can.
Man. L. R.	...	...	Manitoba Law Reports	...	...	Can.
Man. R. temp. Wood	...	...	Manitoba Reports temp. Wood	...	...	Can.
Mans.	...	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	...	Eng.
Mar. L. C.	...	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	...	Eng.
March	...	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	...	Eng.
Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	Eng.
Marsh.	...	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	...	Eng.
Marsh.	...	...	Marshall's Reports	...	...	Ind.
Mayn.	...	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	...	Eng.
Meg.	...	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	...	Eng.
Men.	...	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	...	S. Af.
Mer.	...	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	...	Eng.
Milw.	...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	...	Ir.
Mod. Rep.	...	...	Modern Reports, 12 vols., 1669—1755	...	...	Eng.
Mol.	...	...	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	...	...	Ir.
Mont.	...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	...	Eng.
Mont. & A.	...	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	...	Eng.

Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Myrne and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Myrne and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ...	Northern Ireland Law Reports, 1925—(current) (<i>e.g.</i> , [1925] N.)	Ir.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ...	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.) ...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.) ...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A. ...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B. ...	Nevile and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	Nevile and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	Nevile and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	Nevile and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas. ...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.

xxiv **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	...	Old Bailey Session Papers	Eng.
O. Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1668	Eng.
O. F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	...	Ontario Law Reports	Can.
O'M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	...	Ontario Reports	Can.
O. R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	...	Ontario Weekly Notes	Can.
O. W. R.	...	Ontario Weekly Reporter	Can.
Old.	...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	...	Prince Edward Island Reports	Can.
P. R.	...	Ontario Practice	Can.
P. Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	...	Perrault's Conseil Superieur	Can.
Per. P.	...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Pratt	...	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Prec. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.
Q. B.	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS:

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Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1879—1901 ...	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R.	Queensland State Reports	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1860—1892	Can.
R. P. C.	Reports of Patent Cases, 1884—(current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615—1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
Ridg. temp. H.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
Rom.	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.
Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R. ...	South Australian Law Reports ...	Aus.
S. A. L. R. ...	South African Law Reports ...	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. Af.
S. A. S. R. ...	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R. ...	Canada, Supreme Court Reports ...	Can.
S. L. T. ...	Scots Law Times, 1893 (current) ...	Scot.
S. Q. R. ...	Queensland State Reports ...	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports ...	Can.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk. ...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R. ...	Saskatchewan Law Reports ...	Can.
Sau. & Sc. ...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ...	Eng.
Saund. & B. ...	Saunders and Bidder's Locus Standi Reports, 1905—(current) ...	Eng.
Saund. & C. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	Scottish Law Reporter, 1865—(current) ...	Scot.
Sc. R. R. ...	Scots Revised Reports ...	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols., 1834—1840 ...	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ...	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742 ...	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & Macl. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ...	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ...	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699 ...	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670 ...	Eng.
Sim. ...	Simons' Reports, Chancery, 17 vols., 1826—1852 ...	Eng.
Sim. & St. ...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S. ...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin. ...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat. ...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ...	Ir.
Sm. & G. ...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B. ...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C. ...	Smith's Leading Cases, 2 vols. ...	Eng.
Smith, Reg. Cas. ...	C. L. Smith's Registration Cases, 1895—(current) ...	Eng.
Smythe ...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ...	Ir.
Sol. Jo. ...	Solicitors' Journal, 1856—(current) ...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports temp. Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.

Vern. ...	Vernon's Reports, Chancery, 2 vols., 1680—1719 ...	Eng.
Vern. & Scr. ...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788 ...	Ir.
Ves. ...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817 ...	Eng.
Ves. & B. ...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Ves. Sen. ...	Vesey Sen.'s Reports, 2 vols., 1747—1756 ...	Eng.
Vin. Abr. ...	Viner's Abridgment of Law and Equity, fol., 22 vols. ...	Eng.
Vin. Supp. ...	Supplement to Viner's Abridgment of Law and Equity, 6 vols. ...	Eng.
W. ...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857 ...	S. Af.
W. A. L. R. ...	West Australian Law Reports ...	Aus.
W. A. B. & W. ...	Webb, A'Beckett and Williams' Victorian Reports ...	Aus.
W. & W. ...	Wyatt and Webb ...	Aus.
W. C. C. ...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907 ...	Eng.
W. H. C. ...	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo. ...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640 ...	Eng.
W. L. D. ...	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R. ...	Western Law Reporter ...	Can.
W. L. T. ...	Western Law Times ...	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (<i>e.g.</i> , [1866] W. N.)	Eng.
W. N. ...	Calcutta Weekly Notes ...	Ind.
W. R. ...	Weekly Reporter, 54 vols., 1852—1906 ...	Eng.
W. R. ...	Sutherland's Weekly Reporter ...	Ind.
W. R. ...	Weekly Reporter, reporting cases in the Cape Provincial Division ...	S. Af.
W. W. & A. B. ...	Wyatt, Webb and A'Beckett ...	Aus.
W. W. R. ...	Western Weekly Reports ...	Can.
Wallis by Lyne	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855 ...	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840 ...	Ir.
Went. Off. Ex. ...	Wentworth's Office and Duty of Executors ...	Eng.
West ...	West's Reports, House of Lords, 1 vol., 1839—1841 ...	Eng.
West temp. Hard. ...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740 ...	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822 ...	Eng.
White ...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols. ...	Eng.
Wight ...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811 ...	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837 ...	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839 ...	Eng.
Willes ...	Willes' Reports, Common Pleas, 1 vol., 1737—1758 ...	Eng.
Wilm. ...	Wilnot's Notes of Opinions and Judgments, 1 vol., 1757—1770 ...	Eng.
Wils. ...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774 ...	Eng.
Wils. & S. ...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835 ...	Scot.
Wils. Ch. ...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819 ...	Eng.
Wils. Ex. ...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win. ...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl. ...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779 ...	Eng.
Wm. Rob. ...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund. ...	Williams' Notes to Saunders' Reports, 2 vols. ...	Eng.
Wolf. & B. ...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Wolf. & D. ...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll. ...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841 ...	Eng.
Wood ...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798 ...	Eng.
Y. A. D. ...	Young's Vice-Admiralty Reports ...	Can.
Y. & C. Ch. Cas. ...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843 ...	Eng.
Y. & C. Ex. ...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841 ...	Eng.
Y. & J. ...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B. ...	Year Books ...	Eng.
Y. B. (Rolls Series)	Year Books (Rolls Series) ...	Eng.
Y. B. (Sel. Soc.) ...	Year Books (Selden Society) ...	Eng.
Yelv. ...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You. ...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G.	for Attorney-General.
Act.	„ Actiengesellschaft.
Admlty.	„ Admiralty.
Affd.	„ Affirmed.
Affg.	„ Affirming.
Akt.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	„ Anonymous.
Apld.	„ Applied.
Appet.	„ Applicant.
Appln.	„ Application.
Appln.	„ Application to Register a Trade Mark.
Applt.	„ Appellant.
Apprvd	„ Approved.
Arbn.	„ Arbitration.
Archbp.	„ Archbishop.
Art.	„ Article.
Ass. Tax Case	„ Assessed Tax Case.
Assce.	„ Assurance.
Assocn.	„ Association.
B. C.	„ Borough Council.
Bkpcy.	„ Bankruptcy.
Bkpt.	„ Bankrupt.
Bldg. Soc.	„ Building Society.
Bp.	„ Bishop.
C. A.	„ Court of Appeal.
C. & S. L. Ry. Co.	„ City & South London Railway Co.
C. C. A.	„ Court of Criminal Appeal.
C. C. R.	„ County Court Rules.
C. C. R.	„ Court of Crown Cases Reserved.
C. L. P. Act.	„ Common Law Procedure Act.
C. L. Ry. Co.	„ Central London Railway Co.
C. O. R.	„ Crown Office Rules.
C. S. U. C.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	„ Caledonian Railway Co.
Ch.	„ Chancery.
Ch. Div.	„ Chancery Division.
Co.	„ Company.
Co-op. Assocn.	„ Co-operative Supply Association.
Comrs.	„ Commissioners.
Consd.	„ Considered.
Corpn.	„ Corporation.
Ct.	„ Court.
Ct. of Ch.	„ Court of Chancery.
Ct. of Eq.	„ Court of Equity.
Ct. of R.	„ Court of Review.
D. C.	„ Divisional Court.
Dbtd.	„ Doubted.
Def.	„ Defendant.

Distd.	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i>	„ <i>Ex parte.</i>
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Ext'd.	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i>	„ <i>Fieri facias.</i>
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insee.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L. J.	„ Lord Justice.
L. J. J.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgorg.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	„ Order.
Overd.	„ Overruled.

ABBREVIATIONS.

xxxi

P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quare</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assnut. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

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Part I.—General Principles.

SECT. 1.—APPLICATION OF RULES OF EVIDENCE.

1. **Civil & criminal trials distinguished.**—The principles of the laws of evidence are the same both in civil & criminal trials, but in the latter are not applied so rigidly against accused as against deff. in a civil trial.—*R. v. CHRISTIE*, [1914] A. C. 545; 10 Cr. App. Rep. 141; *sub nom. PUBLIC PROSECUTIONS DIRECTOR v. CHRISTIE*, 83 L. J. K. B. 1097; 111 L. T. 220; 78 J. P. 321; 30 T. L. R. 471; 58 Sol. Jo. 515; 24 Cox, C. C. 249, H. L. *Annotations*:—*Reid*, *Chantler v. Bromley* (1921), 14 B. W. C. C. 14. *Menté*, *R. v. Curnock* (1914), 111 L. T. 816; *Perkins v. Jeffery*, [1915] 2 K. B. 702; *R. v. Althuler* (1915), 11 Cr. App. Rep. 243; *R. v. Hall* (1915), 11 Cr. App. Rep. 221; *R. v. Smith* (1915), 114 L. T. 239; *R. v. Bovy* (1916), 12 Cr. App. Rep. 15; *R. v. Feigenbaum*, [1919] 1 K. B. 431; *R. v. Adams* (1923), 17 Cr. App. Rep. 77.

2. —[By a policy of insurance, underwriters insured the assured a jeweller, against loss of or damage to jewellery arising from any cause whatsoever except loss by theft or dishonesty of any servant in the exclusive employment of the assured. In an action upon the policy by the assured against one of the underwriters the evidence established a loss by theft & tended to implicate in the theft a servant in the exclusive employment of pltf. :—*Held*: (1) assuming the burden of

proving a theft by pltf.'s servant to lie on deff., he might establish such a theft by evidence which possibly might not be admitted or sufficient to convict in a criminal prosecution; (2) evidence of the servant's bad character was not admissible.—*HURST v. EVANS*, [1917] 1 K. B. 352; 86 L. J. K. B. 305; 116 L. T. 252; 33 T. L. R. 96.

Annotations:—*Generally*, *Menté*, *Compania Maritima of Barcelona v. Wishart* (1918), 87 L. J. K. B. 1027; *Munro, Brice v. War Risks Assocn.*, [1918] 2 K. B. 78.

3. **In prize cases.**—The principle that this ct. in matters of prize is not bound by the ordinary rules of evidence has been too firmly established for a long time to be now questioned (*LORD STERNDAL*, P.).—*THE DIRIGO, THE HALLINGDAL* (1919), as reported in 121 L. T. 477; 35 T. L. R. 533.

Annotations:—*Menté*, *The Drottning Sophia*, [1920] P. 200; *The Kim, The Björnstjerne Björnson, The Alfred Nobel*, [1920] P. 319; *Akt. Frostas Hudafær v. Procurator-General, The Falk* (1921), 90 L. J. P. 282; *The Falk*, etc., [1921] 1 A. C. 787.

See, generally, PRIZE LAW.

4. **Commercial list.**—The judge charged with commercial business has no further power of dispensing with the technical rules of evidence than any other judge of the High Ct., the power of so doing being that conferred by R. S. C., Ord. 30, r. 7, which has no special reference to the

PART I. SECT. 1.

a. *How far binding.*—When the aid of Cts. of Justice is invoked, the rules of evidence by which they are

governed must be complied with, even though in doing so some difficulties, delay, and expense disproportionate to the amount sought to be recovered may be occasioned.—*RAMABHAI GIRD-*

HARBHAI v. ALI AKBAR KAJRANI (1863), 1 Bom. 6.—*IND.*

b. —[It is not a valid objection to an award that the arbitrators have not acted in strict conformity

Sect. 1.—Application of rules of evidence. Sects. 2 & 3: Sub-sects. 1 & 2.]

Commercial Ct.—BAERLEIN v. CHARTERED MERCANTILE BANK, [1895] 2 Ch. 488; 65 L. J. Ch. 54; 72 L. T. 850; 43 W. R. 692; 11 T. L. R. 475; 39 Sol. Jo. 622; 1 Com. Cas. 96; 12 R. 581, C. A. Annotations:—*Mentd.* A. G. v. Willson (1900), 83 L. T. 569; Thompson v. Bath (1920), 124 L. T. 265.

Evidence in criminal trials.]—See CRIMINAL LAW, Vol. XIV., pp. 358 *et seq.*

SECT. 2.—BY WHAT LAW ADMISSIBILITY GOVERNED.

See, generally, CONFLICT OF LAWS, Vol. XI., pp. 488, 489.

Secondary evidence of documents.]—See Part IV., Sect. 5, *post*.

SECT. 3.—NECESSITY FOR BEST EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

5. General rule.]—The best evidence in possession of the parties must be produced. What may be the nature of that best evidence must depend upon circumstances. In most cases the original must be the best evidence, but circumstances may arise in which secondary evidence may be the best (*JERVIS, O.J.*).—*MACDONNELL v. EVANS* (1852), 11 C. B. 930; 3 Car. & Kir. 51; 21 L. J. C. P. 141; 18 L. T. O. S. 241; 16 J. P. 88; 16 Jur. 103; 138 E. R. 742.

Annotation:—*Refd.* Henman v. Lester (1862), 12 C. B. N. S. 776.

6. Primary & secondary evidence distinguished.]—LUCAS v. WILLIAMS & SONS, No. 1043, *post*.

SUB-SECT. 2.—AS TO FACTS.

7. Written records of living person—As evidence of own acts.]—Books of account kept by shop-keeper himself not allowed to be read in evidence.—*SOWTER v. BRADFELD* (1729), 1 Barn. K. B. 300; 94 E. R. 204.

8. ——— Person available as witness.]—A letter written by an agent or broker, by whom a contract has been made for the sale of goods, is not evidence where such agent or broker can be called as a witness.—*MAESTERS v. ABRAHAM* (1795), 1 Esp. 375, N. P.

Annotation:—*Refd.* Fairlie v. Hastings (1804), 10 Ves. 123.

9. ———.]—In trespass *quare clausum fregit* the defence was that M. P. was the owner of the *locus in quo*, & that deft. entered by the direction of M. P.:—*Held*: a declaration

by M. P. made subsequent to the act complained of was inadmissible.

M. P. ought to have been called as a witness (*WOOD, B.*).—*GARR v. FLETCHER* (1817), 2 Stark. 71, N. P.

Annotation:—*Refd.* Morse v. Apperley (1840), 9 L. J. Ex. 61.

10. ———.]—In an action of trover, brought to recover the value of goods distrained, on the ground that deft. was not pltf.'s landlord, pltf. proved payment of rent to another person. Deft. tendered in evidence accounts rendered to him from pltf.:—*Held*: the accounts were not admissible in evidence, the person who rendered them being alive, & capable of being a witness, & not identified in interest with pltf.—*SPARGO v. BROWN* (1829), 9 B. & C. 935; 4 Man. & Ry. K. B. 638; 8 L. J. O. S. K. B. 67; 109 E. R. 348.

Annotations:—*Refd.* Woolway v. Rowe (1834), 1 Ad. & El. 114; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360.

11. ——— Person not available as witness.]—The entries of a person still living, against his interest, are not evidence between other parties; though it be shown that he is abroad, having absconded from a criminal charge, & altogether out of the power of a party to produce him as a witness.—*STEPHEN v. GWENAP* (1831), 1 Mood. & R. 120, N. P.

12. ——— Action between strangers.]—SPARGO v. BROWN, No. 10, *ante*.

13. ———.]—STEPHEN v. GWENAP, No. 11, *ante*.

14. ——— Entries against interest.]—STEPHEN v. GWENAP, No. 11, *ante*.

Entries by deceased persons against interest, *see* Part II., Sect. 5, *post*.

15. ——— Receipt.]—Receipts given by the parish clerk for the use of the vicar for small tithes, the handwriting of the parish clerk being proved, were rejected as evidence on the ground that the parish clerk was living & his agency for the vicar could not be inferred but must be proved.—*THOMPSON v. PERRYMAN* (1832), You. 598; 159 E. R. 1130.

Annotation:—*Mentd.* Barnes v. Stuart (1834), 1 Y. & C. Ex. 119.

16. ———.]—The receipts of a steward or agent empowered to receive rents are not evidence against the principal, if the steward or agent can be produced as a witness.—*GIBBONS v. PATTISON* (1834), 3 L. J. Ex. 138.

17. ———.]—JONES v. POULSON (1843), 1 L. T. O. S. 231.

18. ——— Shorthand notes of evidence at trial.]—A shorthand writer having been allowed to refer to his notes, as to the testimony of witnesses at the trial of the indictment:—*Held*: such evidence was improperly received, as the witnesses themselves ought to have been called.—*WILLANS v. TAYLOR* (1829), 6 Bing. 183; 3 Moo. &

with the rules of evidence.—*SUPPU v. GOVINDACHARYAR* (1887), 1 L. R. 11 Mad. 85.—*IND.*

c. Improper application.]—RAM DAS SAHA v. MAN MAHINI DAS (1871), 7 B. L. L. App. 4.—*IND.*

PART I. SECT. 3, SUB-SECT. 1.

5 i. General rule.]—Where pltf. is disappointed in procuring testimony, he should withdraw his record or take a nonsuit, & deft., in the like case, should apply for a postponement. If, instead of so doing, he chooses to go to trial upon weak or insufficient evidence, he will not be relieved from an adverse verdict.—*LONGUEUIL CORPN. v. CUSHMAN* (1885), 24 U. O. R. 602.—*CAN.*

5 ii. ———.]—A party to an action

should produce all evidence necessary to establish his case, & the ct. will not grant him a fresh trial in order to bring further evidence unless he can prove that that evidence was unknown or impossible of production at the date of the first trial or for some other particular reason, as litigation would become unnecessarily prolonged & oppressive to the other parties to the action.—*CHALMERS v. Fysh* (1893), 1 Terr. L. R. 434.—*CAN.*

5 iii. ———.]—Although there may not be direct evidence connecting an alleged material irregularity in the publication or conduct of a sale under a decree with the inadequacy of price at such a sale as cause & effect, yet in order to enable the ct. to set aside a

sale there must be evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price at the sale was the result of the irregularity complained of.—*MAHABIR PRSEAD SINGH v. DHANUKDHARI SINGH* (1904), 1 L. R. 31 Calc. 815.—*IND.*

d. Definition.]—Positive evidence means evidence which goes expressly to the very point in question, & that which, if believed, proves the point without aid from inference or reasoning, as the testimony of an eye-witness to an occurrence, as distinguished from indirect or circumstantial evidence.—*LEGAL REMEMBRANCE v. MATILAL GHOSE* (1913), 1 L. R. 41 Calc. 173.—*IND.*

P. 350; 7 L. J. O. S. C. P. 250; 130 E. R. 1250; *subsequent proceedings, sub nom.* TAYLOR v. WILLANS (1831), 2 B. & Ad. 845.

Annotations.—*Mentd.* Broad v. Ham (1839), 5 Bing. N. C. 722; Shuffelbottom v. Alday (1857), 21 J. P. 263; Abrath v. N. E. Ry. (1883), 11 Q. B. D. 440.

19. — *Medical certificate.*]—A painter claimed compensation for a strained heart. The doctor was subpoenaed, but did not attend, & three certificates, though objected to, were admitted in evidence by the judge, who awarded for the workman:—*Held*: the certificates were inadmissible, & as they must have influenced the mind of the judge, a new trial was necessary.—RICHARDS v. SANDERS & SONS (1912), 5 B. W. C. C. 352, C. A.

— *As evidence of procedure at meeting—Vestry meetings.*]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 284, No. 729.

— *Company meetings—Meetings of shareholders.*]—*See* COMPANIES, Vol. IV., pp. 566, 581, 582, Nos. 3758, 3884, 3887, 3888, 3890.

— *Meetings of directors.*]—*See* COMPANIES, Vol. IV., pp. 471, 518, Nos. 3084, 3398.

See, generally, Part II., Sect. 3, *post*.

20. *Declaration, statement or admission of living person.*]—Where in an action by the indorsee of a bill, the defence is that debt. had settled it in account with the holder when due, & that pltf. took it after it became due, what was said by the person represented as the holder & indorsee when it became due, is not evidence; he should himself be called.—DUCKHAM v. WALLIS (1805), 5 Esp. 251, N. P.

21. —.]—HEALY v. JACOBS, No. 449, *post*.

22. — *In action between strangers.*]—A rated parishioner not being bound upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue, the weight due to which must depend upon his means of knowledge as to the facts so declared, & the genuineness of the declarations, to be collected from circumstances.—R. v. HARDWICK (INHABITANTS) (1800), 11 East, 578; 103 E. R. 1129.

Annotations.—*Refd.* Perham v. Raynal (1824), 2 Bing. 306. *Mentd.* R. v. Vickory (1848), 12 Q. B. 478; R. v. Petcherini (1855), 7 Cox, C. C. 79.

23. — *Not part of res gestæ.*]—A bond was given to A., B. & C. by pltf. & debt., who were sureties for D. Pltf. was obliged to pay the bond, & brought an action against his co-surety for contribution. A defence was set up, that the principal had paid money, specifically on account of this bond, to one of the obligees, & that such obligee had carried it to the account of the bond:—*Held*: any declaration of the

obligee, upon what account he received the money, or how he had applied it, unless such declaration were made at the time of payment, was not evidence, & such obligee must be called as a witness.—DUNN v. SLEE (1816), Holt, N. P. 399, N. P.; *subsequent proceedings* (1817), 1 Moore, C. P. 2.

24. —.]—In an action for slanderous words charging a baker with using adulterated flour, if the declaration allege as special damage that several persons, naming them, discontinued to take his bread, the person of whom they used to buy it cannot be asked what reason they gave for ceasing to take it any longer, but the persons themselves must be called to prove their motives.—TILK v. PARSONS (1825), 2 C. & P. 201, N. P.

25. —.]—In an action by the first indorsee against the acceptor of a bill of exchange, the declarations of the drawer made before indorsement, showing that the acceptor received no value for his acceptance, cannot be admitted in evidence, if the drawer be living at the time of the trial, because in such case he might be called as a witness.—HEDGER v. HORTON (1827), 3 C. & P. 179, N. P.

26. — *Declaration of bankrupt.*]—In trespass against the sheriff & an execution creditor for seizing goods of A., which pltf. claimed as assignees under a joint commission against A. & B., pltf., in support of the joint commission, gave evidence of acts & declarations of B., for the purpose of showing that he had become bkpt.:—*Held*: this evidence was inadmissible.—BERNASCONI v. FAREBROTHER (1832), 3 B. & Ad. 372; 110 E. R. 140.

Annotation.—*Mentd.* Wilton v. Chambers (1835), 1 Har. & W. 116.

See, further, BANKRUPTCY, Vol. IV., pp. 510 *et seq.*

27. —.]—A. was clerk to B. from the year 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that, B. dismissed A., & after his dismissal A. made an admission of various sums that he had not accounted for. In an action on the bond:—*Held*: this admission was not evidence against C., as A. was living at the time of the trial, & might have been called as a witness.—SMITH v. WHITTINGHAM (1833), 6 C. & P. 78.

Annotation.—*Refd.* Carmarthen & Cardigan Rty. v. Manchester & Milford Rty. (1873), L. R. 8 C. P. 685.

28. —.]—A witness, at the request of debt., called several times at the house of pltf., whom he saw twice, on the subject of a bill of exchange; on the last occasion he saw a servant, who stated that her master was within & went into the house as if for the purpose of delivering the message which had been given, when, in a

PART I. SECT. 3, SUB-SECT. 2.

20 i. *Declaration, statement or admission of living person.*]—On a petition for divorce on the ground that resp. had been guilty of rape, the offence must be proved by the person on whom the rape was committed, but her evidence may be taken *in camera*.—AYERS v. AYERS (1908), 4 Tas. L. R. 65.—*AUS.*

20 ii. —.]—BANTING v. NIAGARA DISTRICT MUTUAL FIRE ASSURANCE CO. (1866), 25 U. C. R. 431.—*CAN.*

20 iii. —.]—Pltf. sent a telegram by debt. from Hamilton, addressed to H., at New York, upon one of the blank forms furnished by debt., which he had been accustomed to use. The terms, printed on the form, on which the co. received the message, were that the co.

would not be liable for mistakes or delays in the delivery of unrepeated messages, beyond the amount received for sending them; " & the co. is hereby made the agent of the sender, without liability, to forward any message over the lines of any other co. when necessary to reach its destination." Pltf. sued debt., alleging that the message was never received, & that by debt.' neglect to deliver it he had lost the sale of certain wheat to which it related. Debt.' line terminated at Buffalo, where such messages were transferred to the Atlantic & Pacific Telegraph Co. H. having died, his clerk was called, who stated that he knew his business transactions that this message had not been received by H.; & that he inquired of the Atlantic & Pacific Telegraph Co., & was told that they had not received it either:—

Held: the evidence was insufficient to show the non-transmission of the message, & some one from the office of the Atlantic & Pacific Co. or of debt. should have been called.—BAXTER v. DOMINION TELEGRAPH CO. (1875), 37 U. C. R. 470.—*CAN.*

20 iv. —.]—On a question of demurrage & damages the log-book was referred to:—*Held*: the best way was to call those acquainted with the facts.—WRIGHT v. LIDDEL (1829), 5 Murr. 35.—*SCOT.*

e. *Criminal assault—Age of child.*]—It is not for the Crown to show that the evidence which is adduced as to the age of a child, in a case of criminal assault, is the best evidence procurable.—R. v. HOSGOOD (1884), 18 S. A. L. R. 123.—*AUS.*

Sect. 3.—Necessity for best evidence: Sub-sect. 2 & 3. Sect. 4: Sub-sect. 1.]

few moments, she returned & delivered an answer to that message:—*Held*: it was not competent to deft. to prove that answer to the message in any other manner than by the oath of the servant, as she alone could swear to its correctness.—*SIMMONS v. PAYNE* (1847), 10 L. T. O. S. 190.

—Evidence given by witness in former proceedings—Witness unavailable.]—*See* Nos. 1055, 1060, *post*.

In criminal cases—Forgery of signature—Signature in name of fictitious person.]—*See* CRIMINAL LAW, Vol. XV., p. 1047, Nos. 11,804–11,811.

29. Sale by broker—Entry in broker's book.]—Where a broker effects a sale between two parties the bought & sold notes delivered to them, & not the entry in his book, are the proper evidence of the contract.—*THORNTON v. MEUX* (1827), *Mood. & M.* 43, N. P.
Annotation.—*Consd. Stevwright v. Archibald* (1851), 17 Q. B. 103.

30. Infringement of copyright by cinematograph film—Whether production of film necessary.]—Pltf. claimed an injunction restraining defts. from infringing, by means of a cinematograph film, her copyright in a novel of which she was the author.

The proper mode of proving a cinematograph film is by the evidence of a witness who has seen a reproduction of the film, not by the production of the film itself.

I think the proposed evidence is not secondary evidence & is admissible, & being available is the only kind of evidence that in strictness can be given. The film itself is not primary evidence. I do not see how the infringement of a dramatic performance can be proved except by witnesses who have seen it (*YOUNGER, J.*).—*GLYN v. WESTERN FEATURE FILM CO.* (1915), as reported in 85 L. J. Ch. 261; 114 L. T. 354.

31. Fact of speaking in House of Commons.]—It was proved in the present case that on five days deft. spoke in the House of Commons. At first pltf. attempted to prove this by producing volumes of the official debates of the House of Commons, commonly called "Hansard," but I refused to receive these as evidence. The five occasions I have referred to were then spoken to by calling the shorthand writers of the staff of Hansard who produced their original shorthand notes of deft.'s speeches & who stated that they knew and identified deft. as having made from his place in the House of Commons the speeches that they reported. Inasmuch as by the custom of Parliament & the Standing Orders of the House of Commons a member desiring to address the House must rise in his place & address his observations to the Speaker, I do not think that better evidence of a member sitting in the House on a

particular day could be given than proof of his having on that day addressed the House (*Low, J.*).—*TRANTON v. ASTOR* (1917), 33 T. L. R. 383.

SUB-SECT. 3.—OF CONTENTS OF DOCUMENTS.
See Part IV., Sect. 5, *post*.

SECT. 4.—FUNCTIONS OF JUDGE AND JURY—QUESTIONS OF LAW AND FACT.

SUB-SECT. 1.—IN GENERAL.

32. Duty of judge.]—(1) If the evidence offered at the trial, by either party, is evidence by law admissible for the determination of the question before a jury, the judge is bound to lay it before them, & to call upon them to decide upon the effect of such evidence; but (2) whether such evidence, when offered, is of that character & description which makes it admissible by law, is a question which is for the determination of the judge alone, & is left solely to his decision (*TINDAL, C.J.*).—*LEWIS v. MARSHALL* (1844), 7 Man. & G. 729; 8 Scott, N. R. 477; 13 L. J. C. P. 193; 3 L. T. O. S. 261; 8 Jur. 848; 135 E. R. 293.

Annotations.—As to (2) *Reld. Hutchinson v. Tatham* (1873), 42 L. J. C. P. 260. *Generally, Mentd. Spall v. Bencke* (1850), 10 C. B. 212; *Kirchner v. Vonn* (1859), 12 Moo. P. C. C. 361.

33. —.]—There cannot be a nonsuit if there is any issue on which there is evidence for the jury, & pltf. declines to withdraw it from them.—*PAULE v. GODING* (1861), 2 F. & F. 585, N. P.

34. —.]—With regard to many matters of fact in common life, the jury may well be supreme judges, & there never was a more salutary part of our law than making them supreme judges as to what they consider the proper inference from the evidence brought before them, in matters of ordinary life, mercantile transactions & the course of business; but when the matter that is offered them in evidence is something in the nature of these royal grants, the cts. of law, for many centuries, have been in the habit of putting an interpretation upon them, & though the line of demarcation between where the province of the judge ends & the province of the jury begins ought to be clearly marked; & although the effect of these presumptions is for the jury, not for the judge, still it is one of those presumptions as to which if I was upon the jury, I should consider that the judge was much more likely to have a clear notion of the legal effect according to the laws & customs of England than if he interpreted the oral evidence of witnesses before him, on any of the more common transactions of life (*ERLE, C.J.*).—*LE STRANGE v. ROWE* (1866), 4 F. & F. 1048, N. P.

35. —.]—When there is a case tried before

PART I. SECT. 4, SUB-SECT. 1.

32 i. Duty of judge.]—An issue of cruelty in a suit for dissolution of marriage should not be left to the jury. It is a question for the judge alone whether there has been such cruelty.—*DORN v. DORN & NICHOLSON* (3) (1888), 9 N. S. W. L. R. (D.) 7; 5 N. S. W. W. N. 24.—*AUS.*

32 ii. —.]—*GORDON v. MURRAY* (1889), 15 V. L. R. 110.—*AUS.*

32 iii. —.]—It is a question for the judge, whether pltf. has made out a sufficient possession to entitle him to go to the jury.—*MARRATT v. QUINTON* (1837), *Ber.* 337.—*CAN.*

32 iv. —.]—It is the duty of the judge to determine whether there is sufficient *prima facie* evidence of felony to render a prosecution necessary.—*PHASE v. McALOON* (1840), 1 Kerr, 111.—*CAN.*

32 v. —.]—*INCHES v. FOGG & DOWLING* (1870), 3 Han. 149.—*CAN.*

32 vi. —.]—*FORREST v. ALMON* (1878), 3 R. & C. 110.—*CAN.*

32 vii. —.]—A verdict entered by the judge inconsistent with the findings of the jury on fact set aside.—*CRIEIGHTON v. SPINNEY* (1886), 19 N. S. R. (7 R. & G.) 102; 7 C. L. T. 145.—*CAN.*

32 viii. —.]—Where questions of fact are submitted to the jury by the

presiding judge which amply cover all the issues raised by the pleadings, & leave nothing necessary to be determined afterwards to settle the issues of fact involved in the pleadings, he may decline to put any further questions.—*DRES BARRES v. BELL* (1888), 20 N. S. R. (8 R. & G.) 482.—*CAN.*

32 ix. —.]—In trying a question of fact, no judge is justified in acting principally on his own knowledge & belief, or public rumour, & without sufficient legal evidence.—*MEETHUN BEEBE v. BUSHNEE KHAN* (1867), 7 W. R. 27; 11 Moo. Ind. App. 313.—*IND.*

a judge sitting with a jury, & there arises any question of law mixed up with the facts, the duty of the judge is to give a direction upon the law to the jury, so far as to make them understand the law as bearing upon the facts. Farther than that it is not necessary for him to go.—*PRUDENTIAL ASSURANCE Co. v. EDMONDS* (1877), 2 App. Cas. 487, H. L.

36. — Burden of proof.]—Burden of proof always remains the same as a matter of law. But while the learned judge has to direct a jury upon the burden of proof, as a matter of law, I take it not to be the duty of a learned judge under any circumstances to direct the jury as to the question of the burden of proof as to a matter of fact; that is a question for the jury, & beyond deciding the question which a judge must always decide, namely, whether there is any evidence at all to go to the jury, it seems to me on questions of fact the province of the learned judge does not entitle him to go (*THESIGER, L.J.*).—*PICKUP v. THAMES INSURANCE Co.* (1878), 3 Q. B. D. 594; 47 L. J. Q. B. 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. L. C. 43, C. A.

Annotations:—Mentl. Ajum Goolam Hosson v. Union Marine Ince., Hajoo Cassin Joosub v. Ajum Goolam Hosson, [1901] A. C. 362; Lindsay v. Klein, The Tatjana, [1911] A. C. 194.

37. —Whether there is reasonable evidence to be left to the jury of negligence occasioning the injury complained of, is a question for the judge. It is for the jury to say whether, & how far, the evidence is to be believed.

J. was a passenger by a railway; the carriage in which he rode was full. At station G. three persons forced themselves in, & were obliged to stand. There was no evidence that a complaint on this matter had been made to the railway officials, or that they knew of the fact. At station P. some other persons opened the door of the carriage, shut it again, & went away. There was, afterwards, a rush on the platform, & other persons opened the door of the carriage. J. stood up to prevent their entering, the train moved; J., to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, & slammed the door to, in doing which J.'s thumb was caught & crushed:—*Held:* this evidence did not establish such negligence on the part of the co. as could be said to have occasioned the mischief, & the Judge ought so to have directed the jury.—*METROPOLITAN Ry. Co. v. JACKSON* (1877), 3 App. Cas. 193; 47 L. J. Q. B. 303; 37 L. T. 679; 42 J. P. 420; *sub nom. JACKSON v. METROPOLITAN Ry. Co.*, 26 W. R. 175, H. L.

Annotations:—Consd. Maddox v. L. C. & D. Ry. (1878), 38 L. T. 458; *Leaver v. Pontypridd U. D. C.* (1910), 75 J. P. 25; *Banbury v. Bank of Montreal*, [1918] A. C. 626. *Refd. Finegan v. L. & N. W. Ry.* (1889), 53 J. P. 663; *Brearley v. L. & N. W. Ry.* (1899), 15 T. L. R. 237; *Toronto Ry. v. King*, [1908] A. C. 260; *Everett v. Griffiths*, [1921] 1 A. C. 631. *Mentl. Dublin, Wicklow & Wexford Ry. v. Slattery* (1878), 3 App. Cas. 1155; *Davey v. L. & S. W. Ry.* (1883), 11 Q. B. D. 213; *Wright v. Mid. Ry.* (1884), 51 L. T. 539; *Bullner v. L. C. & D. Ry.*

38 i. Question of law.]—The question whether there is sufficient evidence of a rape is a question for the judge, & should not be left to the jury.—(*GORDON v. FLUSKEY* (1841), *Ann. M. & O.* 155.—*IR.*

40 i. Question of fact.]—*STIMPSON v. NEW ENGLAND & NOVA SCOTIA S.S. Co.* (1873), 9 N. S. R. 184.—*CAN.*

40 ii. —The question in this case was simply one of fact, & the jury having found for pltf., the ct. refused

to set the verdict aside.—*O'MULLIN v. McDONALD* (1875), 10 N. S. R. (1 R. & C.) 46.—*CAN.*

40 iii. —*McLELLAN v. NORTH BRITISH & MERCANTILE INSURANCE Co.* (1891), 21 N. B. R. 283; 30 N. B. R. 363.—*CAN.*

40 iv. —Weight should not be attached to the finding of the trial judge on a question of fact where the reasons given disclose erroneous judgment in weighing the testimony.—

(1885), 1 T. L. R. 534; *Jones v. G. W. Ry.* (1886), 1 T. L. R. 333; *Margatroyd v. Blackburn & Over Darwen Tram. Co.* (1886), 3 T. L. R. 180; *Cathedral v. Money Ry.* (1887), 3 T. L. R. 508; *Esdaile v. Payne* (1889), 40 Ch. D. 530; *Pounder v. N. E. Ry.*, [1892] 1 Q. B. 385; *Cobb v. G. W. Ry.*, [1893] 1 Q. B. 459; *Benson v. Furness Ry.* (1903), 88 L. T. 268; *Bradley v. Wallaces*, [1913] 3 K. R. 629; *Jones v. Canadian Pacific Ry.* (1913), 83 L. J. P. C. 13; *Papworth v. Battersea B. C.* (1914), 79 J. P. 105; *Canadian Pacific Ry. v. Fréchet*, [1915] A. C. 871; *Craig v. Glasgow Corp.* (1919), 35 T. L. R. 214.

38. Question of law.]—A pltf. in *quare impedit*, after tracing his title through various steps, & averring the death of W., who had been shown to be a joint tenant with pltf. of a term of years in an advowson, alleged, "Whereupon & whereby pltf. became & still is possessed of the advowson as of an advowson in gross for the remainder of the term so theretofore granted": deft. pleaded, that he, as bishop of M., was seised of the advowson in gross in right of his see, without this, that pltf. was possessed of the advowson in manner & form as pltf. had alleged:—*Held:* a fine of the advowson in question levied in 1685 by one whose estate pltf. had, was not admissible in evidence under this or any similar issue, & if received, it ought not to be left to a jury to say whether it barred the action of *quare impedit*.

With respect to the question whether, if the fine were received in evidence, it ought to be left to the jury to say, whether it barred the action of *quare impedit*, we all think that the legal effect of such fine as a bar to the action of *quare impedit* is a matter of law merely, & not in any way a matter of fact; & consequently the judge who tried the cause, should state to the jury whether in point of law the fine had that effect, or what other effect, on the rights of the litigant parties, upon the general & acknowledged principle, "*ad questionem juris non respondent juratores*" (*TINDAL, C.J.*).—*MEATH (BP.) v. WINCHESTER (MARQUESS)* (1836), 3 Bing. N. C. 183; 10 Bl. N. S. 330; 4 Cl. & Fin. 445; 3 Scott, 561; 132 E. R. 380, H. L.

Annotations:—Refd. Carr v. Mostyn (1850), 10 L. J. Ex. 249. *Mentl. Wright v. Doe d. Tatham* (1837), 7 Ad. & El. 313; *Doe d. Neale v. Samples* (1838), 8 Ad. & El. 151; *Croughton v. Blake* (1843), 12 M. & W. 205; *Doe d. Jacobs v. Phillips* (1845), 8 Q. B. 158; *It. v. Koniworth* (1845), 7 Q. B. 642; *Sturgeon v. Wingfield* (1846), 15 M. & W. 224; *Cooke v. Blake* (1847), 1 Exch. 220; *Doe d. Shrewsbury & Allon v. Keeling* (1848), 17 L. J. Q. B. 199; *Potoz v. Glossop* (1848), 2 Exch. 491; *Vigers v. St. Pauls* (1849), 14 Jur. 1017; *Doe d. Arundel v. Fowler* (1850), 14 Q. B. 760; *Farry v. Thomas* (1850), 5 Exch. 37; *It. v. St. Mary's, Islington Overseers* (1852), 16 J. P. 760; *Doe d. Guttridge v. Sowerby* (1860), 7 C. B. N. S. 599; *It. v. Mytton* (1860), 2 E. & E. 557; *Carlisle v. Whaley* (1867), L. R. 2 H. L. 391; *Calcraft v. Guest* (1898), 78 L. T. 233.

39. — Interpretation of royal grant.]—*LE STRANGE v. ROWE, No. 34, ante.*

40. Question of fact.]—*TRIER v. LITTLETON* (*circa* 1615), 1 Brownl. 36; 123 E. R. 649.

41. —*LE STRANGE v. ROWE, No. 34, ante.*

42. — Where no conflict of evidence—Cumulative facts amounting to proof.]—*Semble:* when a number of facts, which singly may be ambiguous, amount collectively to an unequivocal proof of a fact, *e.g.* the surrender of a term, a judge is not

ZWICKER v. ZWICKER (1900), 33 N. S. R. 284; *revid.*, 29 S. C. It. 527.—*CAN.*

40 v. —Where the stenographic report of the evidence taken at a trial cannot be obtained, & the only report of the evidence available to the appeal ct. are the notes of the trial judge, his findings of fact should be taken as practically conclusive, unless his notes themselves show that he was in error.—*MCCORD v. ALBERTA & GREAT WATERWAYS Ry. Co.*, [1918] 3 W. W. R. 622; 49 D. L. R. 696.—*CAN.*

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-secs. 1 & 2.]

bound to submit them formally to a jury, unless counsel expressly desires it.—*REEVE v. BIRD* (1834), 1 Cr. M. & R. 31; 4 Tyr. 612; 3 L. J. Ex. 282; 149 E. R. 980.

43. ——— Fact uncontradicted.]—Where a fact is distinctly sworn to upon a trial, which is not contradicted by other evidence, & there is no doubt cast upon the credibility of the witnesses who attest it, the judge need not take the opinion of the jury upon it, though he may be requested to do so.—*MICHELL v. WILLIAMS* (1843), 11 M. & W. 205; 12 L. J. Ex. 193; 152 E. R. 777.

*Annotation:—*Consd. *Fraser v. Hill* (1853), 1 C. L. R. 7.

44. ——— Evidence admitting of two constructions.]—Whenever facts, which are not in conflict, admit of two reasonable constructions, one in favour of pltf. & the other in favour of deft., it is for the jury, & not for the judge, to draw the inference (*BOWEN, J.*).—*BROWN v. GREAT WESTERN RY. CO.* (1885), 1 T. L. R. 614, U. A.

45. ——— By request of counsel.]—*REEVE v. BIRD*, No. 42, *ante*.

46. ——— ———.]—*MICHELL v. WILLIAMS*, No. 43, *ante*.

47. ——— Where evidence conflicting.]—Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury.—*DUBLIN, WICKLOW & WEXFORD RY. CO. v. SLATTERY* (1878), 3 App. Cas. 1155; 39 L. T. 305; 43 J. P. 68; 27 W. R. 191, H. L.

*Annotations:—*Consd. *Davey v. L. & S. W. Ry.* (1883), 12 Q. B. D. 70; *Bettany v. Waine* (1885), 1 T. L. R. 588;

47 l. ——— Where evidence conflicting.]—Adultery was sought to be proved by the admission of resp., that co-resp. had had intercourse with her, but forcibly & against her will. Proof was given that after the intercourse she had been on friendly terms with co-resp., & had said nothing about same to persons in the house. The jury having found adultery against resp. on this evidence.—*Held:—*FAULKNER v. FAULKNER (1869), 3 S. A. L. R. 140.—*AUS.*

47 ii. ——— ———.]—Where A. sold & delivered timber to B. subject to re-survey by S., & it appeared that there were two S.'s.—*Held:—*the judge put it rightly to the jury to find which of the two S.'s the parties intended by their agreement.—*RANKIN v. EMERY* (1838), Ber. 507.—*CAN.*

47 iii. ——— ———.]—Rule to set aside a verdict for defts. in an action tried before a judge without a jury discharged with costs where there was a conflict of testimony on the main question on which pltf.'s right to recover depended, & no clear preponderance of evidence for pltf.—*BOWEN v. TROOP* (1879), 1 R. & G. 137.—*CAN.*

47 iv. ——— ———.]—Where pltf. proved a trespass committed by deft., & then called a witness, whose evidence, if true, showed that no trespass had been committed.—*Held:—*the question should be submitted to the jury.—*GETCHELL v. BURCHILL* (1883), 22 N. B. R. 631.—*CAN.*

47 v. ——— ———.]—The case, being one in which there was obscurity & evidence of a contradictory character, was peculiarly one for the consideration of the jury, & upon which they were especially competent to pass.—*MCLEOD v. INSURANCE CO. OF NORTH AMERICA* (1898), 30 N. S. R. 480; 29 S. C. R.

449.—*CAN.*

47 vi. ——— ———.]—Where the burden of proving a promise to pay was upon pltf. & the evidence on the point was contradictory & unsatisfactory, the finding of the trial judge was set aside.—*CRAIG v. MATHESON* (1900), 32 N. S. R. 452.—*CAN.*

47 vii. ——— ———.]—*SAWYER-MASSEY CO. v. HODGSON* (1909), 18 O. L. R. 333; 13 O. W. R. 980.—*CAN.*

49 i. ——— Evidence wholly in writing.]—*HAZELL v. DYAS* (1877), 11 N. S. R. (2 R. & C.) 36.—*CAN.*

f. ——— Performance of contract.]—It is a question for the jury whether a contract has been reasonably performed, & a judge is only entitled to nonsuit pltf., if the facts are such that there would be a consensus of opinion amongst all men of well balanced minds that the alleged performance is not a reasonable one.—*MACK v. MCPHILLAMY* (1889), 10 N. S. W. L. R. 187; 6 N. S. W. N. 40.—*AUS.*

g. ——— Fraud.]—Where a question of fraud arises on a bill of sale to a creditor, it is exclusively for the consideration of the jury.—*TARRATT v. SAWYER* (1835), 1 Thom., 2nd ed. 46.—*CAN.*

h. ——— ———.]—On a question, whether the sale of a horse was fraudulent or not, the jury having decided in the negative, the ct. refused to disturb the verdict; the question having been left broadly to the jury upon evidence which was reconcilable with either view of the case.—*LITTLE v. JOHNSON* (1842), 1 Kerr, 406.—*CAN.*

k. ——— ———.]—The question of fraud on a policy of insurance is one for the jury.—*RICE v. PROVINCIAL INSURANCE CO.* (1858), 7 C. P. 548.—*CAN.*

l. ——— ———.]—*CANN v. IMPERIAL*

Wright v. Mid. Ry. (1885), 1 T. L. R. 406, n.; *Wakelin v. L. & S. W. Ry.* (1886), 12 App. Cas. 41. **Fold.** *Finegan v. L. & N. W. Ry.* (1889), 53 J. P. 663. **Consd.** *Smith v. S. E. Ry.*, [1896] 1 Q. B. 178; *Cutsforth v. Johnson*, N. E. Ry., Third Parties (1913), 108 L. T. 138; *Banbury v. Bank of Montreal*, [1918] A. C. 626. **Reid.** *Clarke v. Mid. Ry.* (1880), 43 L. T. 351; *Williams v. Whitall* (1885), 2 T. L. R. 165; *Bentley v. L. & Y. Ry.* (1886), 3 T. L. R. 196; *Cohen v. Met. Ry.* (1890), 6 T. L. R. 146; *Toronto Ry. v. King*, [1908] A. C. 260; *Norman v. G. W. Ry.*, [1915] 1 K. B. 584; *Everett v. Griffiths*, [1921] 1 A. C. 631. **Mend.** *McKay v. McNally* (1879), 41 L. T. 230; *Lowery v. Walker*, [1910] 1 K. B. 173; *Grand Trunk Ry. v. McAlpine*, [1913] A. C. 838; *Canadian Pacific Ry. v. Fréchette*, [1915] A. C. 871; *Paul v. G. E. Ry.* (1920), 36 T. L. R. 344.

48. ——— ———.]—Where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the consideration of the jury.—*FINEGAN v. LONDON & NORTH WESTERN RY. CO.* (1889), 53 J. P. 663; 5 T. L. R. 598.

49. ——— Where evidence wholly in writing.]—Each of these questions, being one of fact, is for the jury, unless the evidence on either of them should consist of written documents only, in which case it must be determined by the ct. (*PATTESON, J.*).—*ASHPITEL v. SERCOMBE* (1850), 5 Exch. 147; 6 Ry. & Can. Cas. 224; 19 L. J. Ex. 82; 14 L. T. O. S. 448; 155 E. R. 63, Ex. Ch.

*Annotations:—*Mend. *Watts v. Salter* (1850), 20 L. J. C. P. 43; *Re Direct Birmingham, Oxford, Reading & Brighton Ry., Capper's Case* (1851), 1 Sim. N. S. 178; *Re Direct Birmingham, Reading & Brighton Ry., Schell's Case* (1851), 1 Sim. N. S. 187; *Johnson v. Goslett* (1857), 4 Jur. N. S. 50.

50. ——— ———.]—When the circumstance of an engagement & dismissal are all proved by written documents in evidence, the question becomes one for the decision of the ct. & not for the jury.—*MORGAN v. SAVIN* (1867), 16 L. T. 333, N. P.; *subsequent proceedings*, 16 L. T. 457.

FIRE INSURANCE CO. (1875), 1 R. & C. 240.—*CAN.*

m. ——— Agency.]—The question of agency is a question of fact for the jury.—*DE BLAQUIERE v. BECKER* (1859), 8 C. P. 167.—*CAN.*

n. ——— ———.]—*COOPER v. BLACK-LOCK* (1880), 5 A. R. 535.—*CAN.*

o. ——— Plea of non est factum.]—To a *sci. fa.* on a Crown bond, deft. pleaded *non est factum:—Held:—*it was a question for the jury upon the issue raised, whether defts. had executed the bond or not.—*R. v. ROBERTSON* (1864), 6 All. 113.—*CAN.*

p. ——— Weight of evidence.]—C. brought his clerks to R.'s hotel & engaged board for them, & said he would be responsible for payment. R. kept separate accounts with the clerks & made monthly settlements with them, but the balances were never charged against C. R. settled with C. for his own board after all the clerks had left, without making any claim on him for payment of the amount due for the clerks' board. The jury found that the credit was given to C.—*Held:—*the question as to whom the credit was given was properly left to the jury, but that their finding was against the weight of evidence, & there should be a new trial.—*RAYMOND v. CUMMINGS* (1877), 1 P. & B. 544.—*CAN.*

q. ——— ———.]—In an action for damages to pltf.'s mill property & privilege by a dam erected lower down the stream, & the diversion of a brook in such a manner as to raise the surface of the water in the pool below pltf.'s mill & so interfere with the working of his mill wheel, the jury found for deft. The judge who tried the cause after a lengthy analysis of the evidence concluded that there was not a single material fact in the case

51. **Mixed law & fact.**—PRUDENTIAL ASSURANCE CO. v. EDMONDS, No. 35, *ante*.

52. ———.]—RYDER v. WOMBWELL, No. 55, *post*.

53. **Power of court to draw inferences of fact.**—Upon a special case, though the ct. will, by consent of the parties, take upon themselves to draw inferences from the facts agreed upon, they will not do so where there are questions of fact to be decided upon the conflicting testimony of witnesses whose credit is made matter of question.—BROCKBANK v. ANDERSON (1844), 7 Man. & G. 295; 7 Scott, N. R. 813; 13 L. J. C. P. 102; 2 L. T. O. S. 458; 135 E. R. 124.

54. **At what stage evidence to be produced.**—It is in the discretion of the judge, subject to the review of the ct., to determine in what stage of the cause evidence may be produced.

In trespass for false imprisonment *deft.* pleaded, that *pltf.* had stolen *deft.*'s chaff; he further pleaded that his chaff had been stolen, & that he had reasonable ground to suspect *pltf.* *Pltf.* gave evidence, in the first instance, to account for her possession of chaff. *Deft.*'s witnesses proved that the chaff in *pltf.*'s possession was similar in quality to that lost by *deft.*, & *inter alia*, that in both there was linseed:—*Held*: the judge had rightly exercised his discretion in allowing *pltf.* to call a witness in reply to account for the presence of linseed in the chaff found in *pltf.*'s

possession.—WRIGHT v. WILLCOX (1850), 9 C. B. 650; 19 L. J. C. P. 333; 15 L. T. O. S. 228; 14 Jur. 746; 137 E. R. 1047.

Annotations:—*Consd.* Shaw v. Beek (1853), 8 Exch. 392. *Appl.* Adair v. Young (1879), 40 L. T. 61. *Consd.* MacLaren v. Davis (1890), 6 T. L. R. 372; R. v. Crippen, (1911) 1 K. B. 149. *Refd.* Penn v. Jack (1866), 14 L. T. 495.

Whether any evidence to go to jury.—See Sub-sect. 2, *post*.

SUB-SECT. 2.—WHETHER ANY EVIDENCE TO GO TO JURY.

55. **Duty of judge.**—Whether an article is "necessary" for an infant not only in the sense of being necessary for the support of life, but as fit to maintain him in the station of life in which he is, is a mixed question of law & fact, the latter to be determined by the jury subject to the control of the ct.; but there is in every case, & not merely in those arising on a plea of infancy, a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the judge ought to withdraw the question from the jury, & direct a nonsuit, if the *onus* is on *pltf.*, or a verdict for *pltf.*, if the *onus* is on *deft.*—RYDER v. WOMBWELL (1868), L. R. 4

in favour of *pltf.*, which was not conclusively shown by the witnesses for the defence:—*Held*: the verdict must be set aside, as the conclusion arrived at by the jury was not a conclusion at which reasonable men ought to have arrived on the evidence before them, & they had decided the issues submitted to them without giving sufficient weight to the uncontradicted testimony in favour of *pltf.*—Dwyer v. Gasper (1882), 3 R. & G. 344; 2 C. L. T. 605.—CAN.

r. ———.]—The question of the weight of evidence is entirely for the jury.—*It.* v. PHINNEY (No. 2) (1903), 36 N. S. R. 288.—CAN.

s. ———.]—SLATER v. WATTS (1911), 16 W. L. R. 234; 16 B. C. R. 36.—CAN.

t. ———.]—It is the exclusive province of the jury to determine on which side the weight of evidence preponderates.—WHITE v. GRIEVE (1854), 4 Nfld. L. R. 28.—NFLD.

a. ———.]—**Meaning of words.**—A vessel was loaded with a substance known in commerce as phosphate rock, or phosphate, which was used for fertilizing purposes; & scientific witnesses were not agreed as to a definition of it:—*Held*: it was a proper question for the jury whether it was known to the commercial world as "stone" at the time the policy issued, there being a warranty against loading with stone beyond the vessel's registered tonnage.—CHAPMAN v. PROVIDENCE WASHINGTON INSURANCE CO. OF PROVIDENCE (1883), 23 N. B. R. 105.—CAN.

b. ———.]—MONTGOMERY v. MIDDLETON (1862), 13 I. C. L. R. 173; 14 Ir. Jur. 370.—IR.

c. ———.]—**Nature of broker's terms.**—**Sale of lands.**—Matters in reference to the nature of the terms on which brokers were employed to sell lands should have been submitted with proper directions to the jury by the trial judge.—MCKENZIE v. CHAMFION (1884), 12 S. C. R. 649.—CAN.

d. ———.]—In an action by a real estate broker to recover from a firm of real estate brokers a commission of the sale of property owned by *h.*, the trial judge, upon contradictory evidence, found in favour of *deft.*: & the ct. *en banc* refused to

disturb his finding.—MCENROE v. TRUTHEVEY (1912), 21 W. L. R. 848; 4 D. L. R. 395.—CAN.

e. ———.]—**Not left to jury.**—KELLY v. RHODES (1886), 6 R. & G. 524; 6 C. L. T. 542.—CAN.

f. ———.]—**By trial judge.**—**Whether Court of Appeal can review.**—The ct. has power to review the findings of the trial judge on questions of fact.—MCCLURDY v. GRANT (1900), 32 N. S. R. 520.—CAN.

g. ———.]—**Mistake of trial judge.**—**Attention not drawn to mistake.**—A mistake of the trial judge as to a matter of fact about which there was no dispute could not be taken advantage of on appeal, unless it was shown that his attention had in fact been directed to such mistake.—MCLEOD v. INSURANCE CO. OF NORTH AMERICA (1901), 34 N. S. R. 88.—CAN.

h. ———.]—**Credibility of witnesses.**—Where both witnesses are equally credible it was a matter of fact under the circumstances for the judge or jury to find upon, & their findings would be determined according as to whether they give credit to one side or the other: the trial judge having found in favour of *pltf.* the judgment should not be disturbed.—WATT v. WATT (1909), 10 W. L. R. 699; 2 Sask. L. R. 141.—CAN.

j. ———.]—A new trial should not be granted where the jury has already decided by their verdict upon the credibility of evidence which was solely a question for them.—HAGEMER v. CANADIAN PACIFIC RY. CO. (1914), 29 W. L. R. 743; 7 W. W. R. 406; 25 Man. L. R. 1; 20 D. L. R. 20.—CAN.

k. ———.]—The amount of credit to a witness on the trial is for the trial judge, & the ct. on appeal should be bound by his decision.—MURRAY v. MUNRO (1916), 49 N. S. R. 501.—CAN.

53 i. **Power of court to draw inferences of fact.**—Where, under the practice of the Supreme Ct., the judge *at nisi prius* has power, after verdict & argument on motion for judgment, to draw all necessary inferences of fact, not inconsistent with the findings of the jury, & enter judgment for either party, an appeal lies direct to the High Ct. without the necessity of an inter-

mediate appeal to the full ct. of the State.—BUCHANAN v. BYRNES (1906), 3 C. L. R. 704.—AUS.

53 ii. ———.]—Where the jury, drawing inferences, adopted one of several theories respecting the determining cause of the accident through which *pltf.*'s injuries were sustained, & there was evidence to support their finding, the ct. refused to disturb the verdict.—WINNIPEG ELECTRIC CO. v. SCHWARTZ (1913), 27 W. L. R. 439; 49 S. C. R. 80.—CAN.

53 iii. ———.]—COCHLIN v. MASSEY HARRIS (1915), 30 W. L. R. 923; 8 W. W. R. 286.—CAN.

54 i. **At what stage evidence to be produced.**—**Semble**: the precise time at which, upon a trial, particular evidence may be introduced, is for the judge exclusively to determine.—ROBINSON v. RAPELJE (1848), 4 U. C. R. 289.—CAN.

54 ii. ———.]—Where evidence where offered is irrelevant & can only become material by the giving of subsequent testimony, it is discretionary with the judge whether to receive it or not.—DAVIDSON v. KING (1876), 3 Pug. 396.—CAN.

1. **Question of proof.**—**For jury.**—The question of proof is for the jury.—MORROW v. CANADIAN PACIFIC RY. CO. (1894), 21 A. R. 149.—CAN.

PART I. SECT. 4, SUB-SECT. 2.

55 i. **Duty of judge.**—It is not a question of law but for the decision of a jury under all the circumstances, whether there has been an immediate & continued change of possession, under an assignment sufficient to satisfy the statute.—WALDIE v. GRANGE (1859), 8 C. P. 431.—CAN.

55 ii. ———.]—Where in ejectment the question at issue was purely one of fact, involving no legal points whatever, & the judge left the whole charge over to the jury, who found for *pltf.*:—*Held*: the verdict could not be disturbed.—LYON v. MORTON (1874), 9 N. S. R. 459.—CAN.

55 iii. ———.]—An appeal ct. exercises different functions in dealing with a case tried by a judge from those exercised in jury cases. In the former case the ct. has the same jurisdiction over the facts as the trial judge, & can

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-sect. 2.]

Exch. 32; 38 L. J. Ex. 8; 19 L. T. 401; 17 W. R. 167, Ex. Ch.

*Annotations:—*Consd. *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; *Jenner v. Walker* (1868), 19 L. T. 398; *Young* (1870), L. R. 5 C. P. 122; *Gee v. Met. Ry.* (1873), L. R. 8 Q. B. 161; *Bridges v. North London Ry.* (1874), L. R. 7 H. L. 213; *Hill v. Arbon* (1876), 34 L. T. 125; *Met. Ry. v. Jackson* (1877), 3 App. Cas. 102; *Dublin, Wicklow & Wexford Ry. v. Slattery* (1878), 3 App. Cas. 1155; *Hall v. Jupe* (1880), 49 L. J. Q. B. 721; *Barnes v. Toye* (1884), 13 Q. B. D. 410; *Nash v. Inman*, [1908] 2 K. B. 1; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Evrett v. Griffiths*, (1921) 1 A. C. 631. *Reid. Blackman v. L. B. & S. C. Ry.* (1869), 17 W. R. 769; *Cockle v. L. & S. E. Ry.* (1870), L. R. 6 C. P. 457; *African Merchants Co. v. British & Foreign Marine Insee.* (1873), L. R. 8 Exch. 164; *Fingcan v. L. & N. W. Ry.* (1889), 53 J. P. 663; *Hiddle v. National Fire & Marine Insee. of New Zealand*, [1896] A. C. 372. *Mentd. Goror v. Readon* (1887), 20 L. T. 40; *Abbott v. Bates* (1874), 43 L. J. C. P. 150; *Johnstone v. Marks* (1887), 19 Q. B. D. 509; *Hewlings v. Graham* (1901), 70 L. J. Ch. 568.

56. What is evidence to go to jury—Evidence sufficient to support verdict.]—The meaning of the phrase "evidence to go to the jury" is such evidence that if the jury found in favour of the party for whom it was offered, the ct. would not upset the judgment.—*PARRATT v. BLUNT & CORNFOT* (1847), 9 L. T. O. S. 103; 2 Cox, C. C. 242.

57. — Including reasonable inferences of fact.]—He upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved, legitimate & reasonable inferences may be drawn; & hence, in discussing whether there is, in any case, evidence to go to the jury, what the ct. has to consider is whether, assuming the evidence to be true, & adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.—*PARFITT v. LAWLESS* (1872), L. R. 2 P. & D. 462; 41 L. J. P. & M. 68; 27 L. T. 215; 30 J. P. 822; 21 W. R. 200.

*Annotations:—*Mentd. *Hampson v. Guy* (1891), 64 L. T. 778; *Chaplin v. Brammall* (1907), 97 L. T. 860; *Howes v. Bishop*, [1909] 2 K. B. 390; *Craig v. Lamoureux*, [1920] A. C. 349.

58. —.]—It cannot with strict propriety be said, where the facts proved are not inconsistent either with the affirmative or the negative of the allegation sought to be established, that there is no evidence to go to the jury. That would exclude many cases where no doubt there would be evidence, though slight, which ought to be

submitted to the jury. Applying the maxim *de minimis non curat lex*, when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established (MAULE, J.).

JEWELL v. PARR (1853), 13 C. B. 909; 1 C. L. R. 454; 22 L. J. C. P. 253; 17 Jur. 975; 138 L. 1460.

*Annotations:—*Consd. *Banbury v. Bank of Montreal*, [1918] A. C. 626. *Reid. Ryder v. Wombwell* (1868), L. R. 4 Exch. 32; *Steward v. Young* (1870), L. R. 5 C. P. 122; *Gee v. Met. Ry.* (1873), L. R. 8 Q. B. 161; *Met. Ry. v. Jackson* (1877), 3 App. Cas. 193; *Dublin, Wicklow & Wexford Ry. v. Slattery* (1878), 3 App. Cas. 1155; *Hall v. Jupe* (1880), 49 L. J. Q. B. 721. *Mentd. Hall v. Conder* (1857), 2 C. B. N. S. 22.

59. —.]—*RYDER v. WOMBWELL*, No. 55, ante.

60. —.]—In a case where, though there is some evidence to go to the jury, yet it is of such a nature that the jury could not reasonably give a verdict for plff., the judge is justified in directing a nonsuit.—*HIDDLE v. NATIONAL FIRE & MARINE INSURANCE CO. OF NEW ZEALAND*, [1896] A. C. 372; 65 L. J. P. C. 24; 74 L. T. 204, P. C.

61. — Mere scintilla of evidence insufficient.]—On the first point the question is, whether the proof was such that a jury could reasonably come to the conclusion that plffs. knew of & acted upon the prospectus. This is now settled to be the real question in such cases by the decisions in the Exchequer Chamber, which have, in our opinion, so properly put an end to what had been treated as the rule, that a case must go to the jury if there was what had been termed a scintilla of evidence (*per CUR.*).—*WHEELTON v. HARDISTY* (1857), 8 E. & B. 232; 26 L. J. Q. B. 265; 20 L. T. O. S. 385; 3 Jur. N. S. 1169; 5 W. R. 784; 120 E. R. 86; *on appeal* (1858), 8 E. & B. 285, Ex. Ch.

*Annotations:—*Consd. *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32; *Blackman v. L. B. & S. C. Ry.* (1869), 17 W. R. 769. *Reid. Hall v. Jupe* (1880), 49 L. J. Q. B. 721. *Mentd. Liverpool Borough Bank v. Eccles* (1859), 4 H. & N. 130; *Roper v. London* (1859), 28 L. J. Q. B. 260; *Beachey v. Brown* (1860), 24 J. P. 518; *Behn v. Burness* (1863), 2 New Rep. 184; *Macdonald v. Law Union Insee.* (1874), L. R. 9 Q. B. 328; *Joel v. Law Union & Crown Insee.*, [1908] 2 K. B. 863; *Yorke v. Yorkshire Insee.*, [1918] 1 K. B. 662.

62. —.]—I think there was no evidence of negligence on the part of the co. or their servants which ought to have been submitted to the jury. It is not enough to say that there was some evidence, for every person who

deal with them as it chooses. In the latter the ct. cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision.

—*PHENIX INSURANCE CO. v. MCGHEE* (1890), 18 S. C. R. 61.—CAN.

55 iv. —.]—Whether or not there is an estoppel is a question of fact for the jury, & they having found affirmatively the ct. refused to disturb the verdict.—*TRUE v. TRUE* (1895), 33 N. B. R. 403.—CAN.

55 v. —.]—*DOMINION COAL CO. v. KINGSWELL S.S. CO.* (1900), 33 N. S. R.

55 vi. —.]—Where the act in respect of which the criminal proceedings were launched was done in the light of day, in open view of deft., & in pursuance of a statutory right, the trial judge was right in leaving it to the jury to say whether in the circumstances deft. really thought plff. was a thief.—*TANGHE v. MORGAN* (1911) B. C. R. 454; 3 W. L. R. CAN.

55 vii. —.]—The question of *bona fides* & of valuable consideration was a

question of fact & not of law & was properly left by the judge to the jury.—*GRAY v. DINNEN* (1840), 2 Jebb & S. 265.—IR.

55 viii. —.]—In an action for necessities provided by plff. for deft.'s wife, the substantial question was as to the fact of a marriage having taken place between deft. & his alleged wife. Plff. gave evidence for the purpose of showing that, according to the law of Scotland, a valid, though irregular marriage had been celebrated. Professional witnesses, called at either side, gave conflicting evidence respecting the state of the marriage law of Scotland as bearing upon the facts of the case:—*Held*: the judge was right in leaving it entirely to the jury as a question of fact to say whether the alleged Scottish marriage was a valid contract in accordance with the law of that country, & that he was not bound to have directed them as to what was the state of the law of Scotland with reference to the facts in evidence.—*THELWALL v. YELVERTON* (1862), 14 I. C. L. R. 188; 14 Ir. Jur. 347.—IR.

56 i. What is evidence to go to jury—Evidence sufficient to support verdict.]—In the case of a review from a Justice's ct. it is not a sufficient ground for reversing the judgment that the evidence to support the verdict is slight & contradicted by that on the other side, if the whole case be such as the justice was warranted in submitting to the jury for their decision.—*LEE v. BREEN* (1843), 2 Kerr, 323.—CAN.

m. —.]—Where a case has been properly allowed to go to the jury, & there is evidence before them from which they could reasonably draw the conclusion at which they arrived, the verdict should not be disturbed on an appeal.—*COTTINGHAM v. LONGMAN* (1913), 26 W. L. R. 659; 48 S. C. R. N.

—.]—*PURDON v. LONGFORD (EARL)* (1877), 1 R. 11 C. L. 267.—IR.

o. — Mere scintilla of evidence.]—Slight evidence of the absence of reasonable & probable cause is sufficient to prevent a nonsuit, although, if the case is left to the jury, plff. must clearly make out this issue.—*DENT v.*

has had any experience in cts. of justice knows very well that a case of this sort against a railway co. could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of defts. would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably & properly conclude there was negligence (WILLIAMS, J.).—TOOMEY v. LONDON, BRIGHTON & SOUTH COAST RY. CO. (1857), 3 C. B. N. S. 146; 6 W. R. 44; 140 E. R. 694; *sub nom.* TOONEY v. LONDON, BRIGHTON & SOUTH COAST RY. CO., 27 L. J. C. P. 39; 30 L. T. O. S. 135.

Annotations. *Consd. Cornman v. Eastern Counties Ry.* (1869), 8 H. & 81; *Colton v. Wood* (1860), 3 C. B. 568. *Bradd. Nicholson v. L. Y. Ry.* (1865), 3 C. B. 584; *Craff v. Met. Ry.* (1866), Har. & Ruth. Ex. 84; *Indormaur v. Dames* (1866), L. R. 1 C. P. 274; *Smith v. G. E. Ry.* (1866), L. R. 2 C. P. 4; *Ryder v. Wombwell* (1868), L. R. 4 Exch. 32; *Blackman v. L. B. & S. C. Ry.* (1869), 17 W. R. 769; *Goe v. Met. lty.* (1873), L. R. 8 Q. B. 161; *Dublin, Wicklow & Wexford Ry. v. Slattery* (1878), 3 App. Cas. 1155; *Hall v. Jupe* (1880), 40 L. J. Q. B. 721.

63. — — — What constitutes scintilla.]— Evidence has never been held to amount only to a scintilla where one witness has positively sworn to something having taken place within his own knowledge, however overwhelming the evidence on the other side may be.—*Re SIMPSON, Ex p. MORGAN* (1876), 2 Ch. D. 72; 45 L. J. Bcy. 36; 34 L. T. 329; 24 W. R. 414. (C. A.)

Annotations:—**Mentd.** *Sugden v. St. Leonards* (No. 1) (1876), 34 L. T. 369; *Brandon Hill v. Lano*, [1915] 1 K. B. 250; *Re Foster, Barnato v. Foster*, [1920] 2 K. B. 306.

64. — When evidence equally in favour of plaintiff & defendant.]—JEWELL v. PARR, No. 58, *ante*.

65. — — — Action for non-performance of contractual duty.]—In an action for non-performance of a duty arising out of a contract, if the whole evidence offered be as consistent with the duty having been performed as not, there is no case made out against deft., & the judge ought so to determine.—**MIDLAND RY. CO. v. BROMLEY** (1856), 17 C. B. 372; 3 Saund. & M. 139; 25 L. J. C. P. 94; 26 L. T. O. S. 272; 20 J. P. 118; 2 Jur. N. S. 140; 4 W. R. 258; 139 E. R. 1116.

Annotation.—**Mentd.** *Trow v. Railway Passengers Assco.* (1860), 29 L. J. Ex. 218.

66. — [Negligence.]—In an action for negligent driving the judge will not be justified in leaving the case to the jury where pltf.'s evidence is equally consistent with the absence as with the existence of negligence in defect.—*CORRON v. WOOD* (1860), 8 C. B. N. S. 568; 29 L. J. C. P. 333; 7 Jur. N. S. 108; 141 E. R. 1288.

Annotations :—**Consd.** *Scott v. London Docks Co.* (1884),

STANDARD LIFE ASSOCN. (1904), 4 then the ca
S. R. N. S. W. 560.—AUS. BODEN n. A

p. ———.]—Where pltf. relied upon a documentary title & failed in tracing it to the Crown, & gave doubtful evidence only as to the possession of one of the prior owners:—*Held*: this evidence ought to have been left to the jury.—*SHEP (LESSEE OF) v. CHISHOLM* (1853), James 52.—*CAN.*

q. — — —.] — Although a mere scintilla of evidence is not enough to support the judgment of a magistrate, if there is evidence which could go to a jury the decision of the magistrate upon matters of fact is binding upon the Supreme Ct. — *Young v. Turner* (1900), 18 N. Z. L. R. 827. — N. Z.

64 i. — *When evidence equally in favour of plaintiff & defendant.* — If the facts are shown in pltf.'s case leave open two views which might be reasonably taken of pltf.'s conduct.

11 L. T. 383. **Apprvd. Brigs v. Oliver** (1866), 4 H. & C. 103. **Conry, Marjorie** (1889), 13 Q. B. D. 165.
Apd. Jolly v. North Staffordshire Tram. Co. (1887), *Times*, July 27. **Reid, Hammack v. White** (1862), 11 C. B. N. S. 588; **Lovegrove v. L. B. & S. C. Ry.** (1864), 16 C. B. N. S. 669; **Smith v. G. E. Ry.** (1866), L. R. 2 C. P. 4; **Webber v. G. W. Ry.** (1860), 4 H. & C. 582; **Giblin v. McMullen** (1868), L. R. 2 P. C. 317; **Turner v. Ry.** (1875), 34 L. T. 22; **Allen v. New Gas Co.** (1876), 1 Ex. D. 251; **Crisp v. Thomas** (1890), 63 L. T. 756.

67. ————]—Where the evidence is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the question to the jury (PIGOTT, B.). —BRIGGS v. OLIVER (1866), 4 H. & C. 403; 35 L. J. Ex. 163; 14 L. T. 412; 30 J. P. 391; 14 W. R. 658.

Annotation :—**Mentd.** Tebbutt v. Bristol & Exeter Ry. (1871), 19 W. R. 383.

68. [—The case was as consistent with no negligence as with negligence. In that case the judge was right in withdrawing it from the jury (LOPES, L.J.).—JOLLY v. NORTH STAFFORDSHIRE TRAMWAYS Co. (1887), *Times*, July 27. D. O.

Annotation:—Mentd. *Downing v. Birmingham & Midland Trams, Dando v. Birmingham & Midland Trams* (1888), 5 T. L. R. 40.

See, further, NEGLIGENCE.

69 ——— Evidence leading only to conjecture.]—Is there in this case sufficient evidence to turn the balance of probability that the contract was rather with G. W. Ry. Co. than with the N. W. Ry. Co. We think there is. The way-bill was made out by the G. W. Ry. Co. in their office & in the form of their way-bills. That is a circumstance to the consideration of the jury (*per CUR.*).—WEBBER v. GREAT WESTERN RY. CO. (1866), 4 H. & C. 582, Ex. Ch.

70. —————.]—If the evidence lead only to conjecture, it is not fit for the consideration of the jury (*CRESSWELL, J.*).—*REID v. HOSKINS, AVERY v. BOWDEN* (1856), 6 B. & B. 953; 26 L. J. Q. B. 3; 28 L. T. O. S. 145; 3 Jur. N. S. 238; 5 W. R. 45; 119 E. R. 1119. Ex. Ch.

Annotations:—Consd. Webber v. G. W. Ry. (1866), 4 H. & C. 582; Phillips v. Hayter (1870), L. R. 6 C. P. 38. **Reld.** McMahon v. Lonnard (1858), 6 H. L. Cas. 970; Dawes v. Hawkins (1860), 8 C. B. N. S. 848. **Mentd.** Barrick v. Buba (1857), 2 C. B. N. S. 563; Crookewit v. Fletcher (1857), 1 H. & N. 893; Eposito v. Bowden (1857), 7 E. & B. 763; Erichen v. Barkworth (1858), 3 H. & N. 601; Hall v. Wright (1859), E. B. & E. 765; Roberts v. Brett (1859), 6 C. B. N. S. 611; Pole v. Cetcovich (1860), 30 L. J. C. P. 102; Danube & Black Sea Ry. & Kustendille Harbour Co. v. Xenos, Xenos v. Danube & Black Sea Ry. & Kustendille Harbour Co. (1862), 31 L. J. C. P. 284; Bartholomew v. Markwick (1864), 15 C. B. N. S. 711; Unwin v. Clark (1866), 7 B. & S. 400; Wilkinson v. Verity (1871), L. R. 6 C. P. 206; Frost v. ~~_____~~ (1871), L. R. 7 Exch. 111; Roper v. Johnson (____), C. P. 167; Hudson v. Hill (1874), 43 L. J. C. P. 273;

225.—CAN.

64 vi. ——— .] — NEWSON v.
MCLEAN (1893), 2 Terr. L. R. 4.—CAN.

64 vii. ———.}—SCRIVER v. LOWE
(1900), 32 O. R. 290.—CAN.

F. — Evidence not rebutted. — In an action to recover the price of logs, plff. in order to prove the quantity received by deft. showed the average size & number of logs put in & driven down a stream, at the mouth of which deft. had a saw mill, & that deft. had sawn a portion of them: **Held:** in the absence of any evidence by deft. the jury were justified in presuming he had received the whole quantity driven down the stream by plff. — **LESLIE v. HANSON** (1868), 1 Han. 262. — **CAN.**

8. ———. 1.—Where plff. furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that deft. does not call

then the case must go to the jury.—
BODEN v. ASSOCIATED GOLD MINES OF
W. A., LTD. (1906), 6 W. A. L. R. 214.—
AUS.

64 II. ———.]—Where the evidence called for *pltf.* is equally consistent with the wrong complained of having been caused by *pltf.* & with its having been caused by *def.*, the case should not be left to the jury.—FRASER v. VICTORIAN RAILWAY COMRS. (1909), 8 C. L. R. 54.—AUS.

64 III. ——— ———.]—STEVENSON v.
RAE (1853), 2 C. P. 406.—CAN.

64 iv. ———.]—JACKSON v. HYDE
(1869), 28 U. C. R. 294.—CAN.

64 v. ———.]—When the evidence is such that the jury might have found for either party, the ct. will not interfere with their verdict unless there is some substantial objection either to the admission of evidence or to the judge's charge.—BELYEA v. MERRITT (1883). 23 N. B. R.

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-sects. 2 & 3, A., B. & C.; sub-sect. 4, A.]

Byrne v. Van Tienhoven (1880), 5 C. P. D. 344; Johnstone v. Milling (1886), 16 Q. B. D. 460; Gueret v. Audouy (1893), 62 L. J. Q. B. 633; Curtis v. B.U.R.T. Co. (1912), 28 T. L. R. 353; Veithardt & Hall v. Rylands (1917), 86 L. J. Ch. 604; Naylor, Benzon v. Krainsche Industrie Gesellschaft (1918), 87 L. J. K. B. 1066.

71. — Statement by co-plaintiff.]—In an action in which K. & G. were plffs., deft. pleaded Stat. Limitations. Plffs. replied that at the time of the accrual of the cause of action they were beyond seas, & did not, nor did either of them, until within six years before the suit, come to this country. At the trial K. was called & proved his own absence from this country, & stated that G. was also absent. On cross-examination, however, he was asked how he knew of G.'s absence, & he said he saw G., abroad, during a great part of the time from day to day. He admitted that during the time in question G. was absent from time to time, & had been absent for as much as one month together, for the purposes of pleasure & recreation, & said he could not undertake to say that G. had not been in England during the time in question, although he had a moral conviction that he had not. Plffs.' correspondent in London was also called, & said that G. never came to London except on business; that when he came on business, he always came to him; & that he had not seen G. in London during the time in question:—*Held*: there was evidence to go to the jury of the absence from England of G. during the time in question, without calling G. himself.—*Koch v. Shepherd* (1856), 18 C. B. 191; 27 L. T. O. S. 108; 4 W. R. 520; 130 E. R. 1340.

SUB-SECT. 3.—INTERPRETATION.

A. Of Statutes.

See, generally, STATUTES.

72. General rule.]—In explaining an Act of Parliament, it is impossible to contend, that evidence should be admitted; for that would be to make it a question of fact in place of a question of law. The judge is to direct the jury as to the point of law, & in doing so, must form his judgment of the meaning of the legislature in the

evidence to controvert plff.'s evidence does not conclude the matter, for the jury might refuse to credit plff. & properly find a verdict for deft.—*Re Lewis v. Old* (1889), 17 O. R. 610.—*CAN.*

1. —.]—*VICTOR MANUFACTURING CO. v. REGINA TRADING CO.* (1913), 26 W. L. R. 157.—*CAN.*

PART I. SECT. 4, SUB-SECT. 3.—A.

72 1. General rule.]—It is the trial judge's province to construe a statute.—*Dunlop v. Canada Foundry Co.* (1913), 28 O. L. R. 140; 4 O. W. N. 791; 12 D. L. R. 791.—*CAN.*

72 1. —.]—It is doubtful whether the cts. of law are at liberty, in construing Acts of Parliament, to do so with reference to the course of previous legislation, or to inferences which they may be disposed to draw from previous statutes, as to the probable intentions of the legislature.—*Couper v. MacKenzie* (1906), 8 F. (Ct. of Sess.) 1202; 43 Sc. L. R. 416.—*SCOT.*

PART I. SECT. 4, SUB-SECT. 3.—B.

a. General rule.]—It is the duty of the judge to construe a written contract, & of the jury to decide upon surrounding facts & circumstances, if any, to vary it.—*Ireson v. Mason*

same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer a judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so at *Nisi Prius* & shows them to the jury they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down (*Eyre, C.B.*).—*A.-G. v. Cast-Plate Glass Co.* (1792), 1 Anst. 39; 145 E. R. 793.

Annotation:—Reid. Shore v. Wilson (1842), 9 Cl. & Fin. 355.

73. —.]—On the trial of an issue whether a railway was passing through a "town" within the meaning of Railway Clauses Consolidation Act, 1845 (c. 20), s. 11, the judge merely told the jury that the word "town" was to be understood in its ordinary & popular sense:—*Held*: this was a misdirection, inasmuch as the judge ought to have given such a definition of the word "town" as would have enabled the jury to decide the issue.—*Elliott v. South Devon Ry. Co.* (1848), 2 Exch. 725; 5 Ry. & Can. Cas. 500; 17 L. J. Ex. 262; 154 E. R. 683.

Annotations:—Mentd. R. v. Charlesworth (1851), 2 L. M. & P. 117; *R. v. Cottle* (1851), 16 Q. B. 412; *A.-G. v. Sillem, Alexandra Case* (1864), 33 L. J. Ex. 93; *Milton Comrs. v. Faversham Highway District Board* (1867), 32 J. P. 37; *Carlington v. Wycombe Ry.* (1868), 3 Ch. App. 377; *L. & S. W. Ry. v. Blackmore* (1870), 23 L. T. 504; *Collier v. Worth* (1876), 1 Ex. D. 464; *Deards v. Goldsmith* (1879), 40 L. T. 328; *Re Clout & Met. Dist. Rty.* (1882), 46 L. T. 141.

B. Of Documents.

See, generally, DEEDS, Vol. XVII., p. 243.

74. Contract contained in series of letters.]—

Where a contract is to be collected out of a variety of letters between the parties, it is a question for the jury, & not the ct., to decide its nature, & to say whether it is complete. It is also for the jury to determine which parts of the correspondence form portion of the contract, & which of them contain mere collateral information.—*Richards v. Hayward* (1841), 2 Man. & G. 574; *Drinkwater*, 130; 2 Scott, N. R. 670; 10 L. J. C. P. 108; 133 E. R. 875.

See, further, CONTRACT, Vol. XII., p. 79; DEEDS, Vol. XVII., p. 245.

(1862), 12 C. P. 475.—*CAN.*

b. —.]—The construction of an agreement is a matter for the ct.—*Whitehead v. Howard* (1874), 9 N. S. R. 458.—*CAN.*

c. —.]—The construction of a contract is for the ct.—*Nordheimer v. Robinson* (1878), 2 A. R. 305.—*CAN.*

d. —.]—The question as to whether or not there is an oral contract in addition to what appears in written instructions is a question that ought to be submitted to the jury.—*Dunsmuir v. Lowenberg, Harris & Co.* (1900), 30 S. C. R. 334.—*CAN.*

e. —.]—It is for the judge to determine whether a document is capable of bearing the meaning assigned to it, & for the jury to say whether, under the circumstances, it has that meaning or not.—*R. v. Kay* (1903), 23 C. L. T. 219; 5 O. L. R. 704; 2 O. W. R. 335.—*CAN.*

f. —.]—Where a statement of the contents of a written document is made by counsel and accepted by both sides as a correct version, although there is no evidence of its loss or destruction, the ct. must construe its meaning in the same manner as if it had been produced.—*O'Regan v. Canadian Pacific Ry. Co.* (1912), 41 N. B. R. 347; 11 E. L. R. 457.—*CAN.*

g. — Letter of challenge — To fight ducl.]—Whether a letter be a challenge to fight a duel or not, is a question for the jury.—*Dolby v. Kinnear* (1842), 1 Kerr, 480.—*CAN.*

h. — Existence of tenancy — Under assignment of lease.]—Plff. leased land to A. for two years from May 1, 1848, with an agreement to renew the lease or pay for the improvements. A. assigned to B., who remained in possession till Aug. 1851, & then assigned to deft., subject to the payment of the rent due. Before taking the assignment deft. wrote to plff., inquiring about his title to the land, & whether he, deft., would be safe in paying the rent to B. Plff. answered, that he thought he had a right to look to deft. for the rent; to which deft. replied, admitting his liability for the rent, & that plff. was the owner of the land:—*Held*: the letter admitted a tenancy from year to year, at the rent reserved in the lease to A., & it was properly left to the jury to find whether such a tenancy existed.—*Doe v. Pelletier* (1858), 4 All. 33.—*CAN.*

k. — Insurance policy — De-liverance of claim in reasonable time.]—Plffs., about eleven months after a fire, furnished a new & sufficient affidavit & certificate, & brought an

75. Construction of document.]—The construction of a doubtful document, given in evidence to defeat Stat. Limitations is for the ct., & not for the jury. If it be explained by extrinsic facts, they are for the consideration of the jury.—*MORRELL v. FRITH* (1838), 3 M. & W. 402; 8 C. & P. 246; 1 Horn & H. 100; 7 L. J. Ex. 172; 2 Jur. 619; 150 E. R. 1201.

Annotations.—*Mentd. Humphreys v. Jones* (1845), 14 L. J. Ex. 254; *Liddell v. Robinson* (1851), 17 L. T. O. S. 61; *Spencer v. Hemmerde*, [1922] 2 A. C. 507.

76. — Duty of judge in directing jury.]—In an action upon a covenant, or other written contract, it is the duty of the judge to state to the jury its construction, as a matter of law, or to explain to them how far its construction may be modified by evidence of usage, when such evidence is admissible; & in cases where such evidence is not admissible, & the construction of the contract is a question of law, his omitting to direct the jury as to its construction is a misdirection.—*GRIFFITHS v. RIGBY* (1856), 1 H. & N. 237; 25 L. J. Ex. 284; 27 L. T. O. S. 191 156 E. R. 1191.

C. Of Parol Agreements.

77. General rule.]—Where there has been a parol contract it is not for the judge to say what was its meaning. If the contract was by parol, it must go to the jury (*SMITH, L.J.*).—*MASKELYN v. STOLLERY* (1898), 15 T. L. R. 79, C. A.; *affd. sub nom. STOLLERY v. MASKELYNE* (1899), 16 T. L. R. 97, H. L.

action, in which defts. pleaded that pltf. did not as soon after the fire as possible deliver these papers. It appeared that when the first papers were furnished, defts. objected to their sufficiency, & that others were a few days after delivered, to which it was not shown that pltf. were notified of any objection until the first trial:—*Held*: the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances, & it was properly left to the jury to say whether, considering all the facts, pltf. had complied with the condition by furnishing the second set of papers, & was not a question of law upon which the judge should have decided.—*MANN v. WESTERN ASSURANCE CO.* (1859), 17 U. C. R. 190.—*CAN.*

1. — Answers to questions in proposal form.]—An insurance co. required application for insurance to be made on printed forms containing certain questions which were to be minutely answered, & were declared to form the basis of the insurance. One of the questions was: "Is the property involved in law, or mortgaged; if the latter, to whom, & for what amount?" The answer was: "There is a mtge. on the house for \$200"—which was untrue. This application was referred to in the policy, one of the conditions of which was, that if the buildings were described otherwise than as they really were, the insured should not be entitled to any benefit under the policy:—*Held*: the answer to this question amounting to a warranty, & being untrue, its materiality was not a question for the jury.—*MARSHALL v. TIMES FIRE INSURANCE CO.* (1860), 4 All. 618.—*CAN.*

m. — — — — —]—Pltf. having effected an insurance with defts. on his "stock manufactured & in process, used for the manufacture of agricultural machinery," afterwards insured with another co. his "agricultural

machinery in process of construction finished, & unfinished":—*Held*: the construction of the policy under the circumstances was for the ct., not the jury.—*BILLINGTON v. CANADIAN MUTUAL FIRE INSURANCE CO.* (1876), 39 U. C. R. 433.—*CAN.*

n. — Innuendoes in declaration.]—*JACKSON v. McDONALD* (1864), 1 U. C. R. 19.—*CAN.*

o. — Contract partly written — Partly oral.]—When a contract is to be made out partly by written documents & partly by parol evidence, the whole becomes a question for the jury.—*MACPHERSON v. FREDERICKSON BOOM CO.* (1869), 1 Han. 337.—*CAN.*

p. — Interpretation of technical words.]—On a sale of malleable iron works " & all machinery & tools in & about the said works connected therewith," the question was whether annealing pots used in the manufacture of iron would pass under the word "tools":—*Held*: this was for the jury to decide.—*FILSCHIE v. HOGG* (1874), 35 U. C. R. 94.—*CAN.*

q. — Erroneous statement of consideration — In mortgage.]—The consideration in the mtge. was stated as \$1,148; but it appeared in evidence that the amount actually owing was only \$1,030:—*Held*: the erroneous statement of the consideration was a circumstance for the jury to consider.—*HAMILTON v. HARRISON* (1881), 46 U. C. R. 127.—*CAN.*

r. — Waiver of cesser clause — In demurrage action.]—*LOVITT v. SNOWBALL* (1895), 33 N. B. R. 263.—*CAN.*

s. — Evidence of heirship.]—*HOVEY v. LONG* (1896), 33 N. B. R. 462.—*CAN.*

t. — Acceptance of bill of exchange.]—*WILKINSON v. STONEY* (1839), 1 Jebb & S. 509.—*IR.*

u. — Inducement for future co-habitation.]—*Semble*: it is a ques-

SUB-SECT. 4.—DECISION OF COLLATERAL ISSUES GOVERNING ADMISSION OF EVIDENCE.

A. In General.

78. General rule—Question for judge.]—All questions relative to the admissibility of evidence, & all preliminary matters of fact, are to be determined by the judge, not by the jury; & if evidence be tendered to show the evidence *prima facie* admissible ought to be rejected, it is the duty of the judge to receive the evidence so tendered, & decide upon it himself.

Where, in an action on an instrument purporting to be a foreign bill of exchange, & stamped accordingly, it was proposed on the part of deft. to show, that it was in reality an inland bill & therefore improperly stamped:—*Held*: the judge ought to have received the evidence, & decided for himself whether the bill was a foreign or an inland bill.—*BARTLETT v. SMITH* (1843), 11 M. & W. 483; 12 L. J. Ex. 287; 1 L. T. O. S. 149; 7 Jur. 448; 152 E. R. 895.

Annotations.—*Apld.* *Doe d. Jenkins v. Davies* (1847), 10 Q. B. 314. *Keld.* *Moore v. Garwood* (1849), 4 Exch. 681; *Arnold v. Hamel* (1854), 9 Exch. 404; *Boyle v. Wiseman* (1855), 11 Exch. 360; *Harris v. G. W. Ry.* (1876), 1 Q. B. D. 515; *It. v. Colclough* (1882), 15 Cox. C. C. 92.

79. — — — — —]—*LEWIS v. MARSHALL*, No. 32, *ante*.

80. — — — — —]—(1) Whether conditions precedent to the admissibility of evidence have been fulfilled, is a question for the judge who tries the cause. Thus, where declarations on the question of pedigree by a deceased member of the family are tendered in evidence, it is for the judge to decide whether the declarant has been proved

tion exclusively for the jury to determine whether the terms of a deed held out an inducement for future co-habitation.—*READE v. ADAMS* (1856), 9 Ir. Jur. 197.—*IR.*

b. — — — — —]—Parol evidence is always admissible to show what existing thing corresponds with any particular description in a document; but when the thing answering the particular description is ascertained, the question whether that description, as used in any particular instrument, is so controlled & limited as to comprise a part only of that which the uncontrolled description would embrace, is a question of construction, & therefore for the ct.—*DEVONSHIRE (DUKE) v. NEILL* (1876), 2 L. R. Ir. 132.—*IR.*

c. — — — — —]—The judge, instead of submitting the meaning of the words in a fee-farm grant as a question for the jury, ought to construe them himself.—*QUINN v. SHIELDS* (1877), 1 Ir. 11 C. L. 254.—*IR.*

d. — — — — —]—It belongs to the ct. to interpret an obligation.—*CALDER v. AITCHINSON & Co.* (1831), 9 Sh. (Ct. of Sess.) 777.—*SCOT.*

PART. I. SECT. 4, SUB-SECT. 4.—A.

78 I. General rule—Question for judge.]—When the admissibility of the evidence tendered depends upon questions of fact, it is for the judge to decide as to whether or not the circumstances are such as to justify the admission of the evidence so tendered. His decision in no way affects the right & the duty of the jury to give such weight to the evidence thus admitted as, under all the circumstances, they may decide it is entitled to.—*F. v. F.* (1920), 52 D. L. R. 440.—*CAN.*

e. Religious belief of witness—Competency—Examination *in voir dire*.]—It is not the duty of the trial judge to examine a witness on the *voir dire* as to his religious belief, for the purpose

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-sect. 4, A., B. & C.]

to be a member of the family; & it makes no difference that the legitimacy of the declarant happens to be, also, the only question in issue for the jury. Where the declaration was, that the declarant had received a document from her mother, who had told her it was her marriage certificate:—*Held*: this declaration was admissible.

(2) Declarations of relationship are not inadmissible on the ground that the parties have an interest in establishing the relationship, there being no *lis mota* at the time.

(3) There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, & competency, are conditions precedent to admitting *viva voce* evidence; & apprehension of immediate death to admitting evidence of dying declarations; & search to secondary evidence of lost writings; & stamp to certain written instruments; & so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides; & he has no right to ask the opinion of the jury on the fact as a condition precedent (LORD DENMAN, C.J.).—*DOE v. JENKINS v. DAVIES* (1847), 10 Q. B. 314; 16 L. J. Q. B. 218; 11 Jur. 607; 116 E. R. 122.

Annotation:—As to (2) Refd. Plant v. Taylor (1861), 7 H. & N. 211.

81. ———.]—All preliminary questions of fact on which the admissibility of evidence depends are to be decided by the judge, & not by the jury.

In an action by the indorsee against the acceptor of a bill of exchange dated abroad, deft. is not estopped from showing that the bill was drawn in England, & improperly stamped as an Inland Bill; & that is a fact to be determined by the judge.—*BENNISON v. JEWISON* (1848), 12 Jur. 485.

82. ———.]—(1) A judge at *Nisi Prius* is bound to try a collateral issue, where the reception of evidence depends on a preliminary question of fact.

A judge is bound to decide the preliminary question of fact whether a communication is privileged or not; (2) his decision if erroneous may be reviewed.—*CLEAVE v. JONES* (1852), 7 Exch. 421; 21 L. J. Ex. 105; 18 L. T. O. S. 332; 155 E. R. 1013.

Annotations:—As to (1) Refd. Boyle v. Wiseman (1855), 1 Jur. N. S. 894; *Re Daintrey, Ex p. Holt* (1893), 10 Morr. 158.

83. ———.]—It is the province of the judge at *Nisi Prius* to decide all preliminary questions of fact upon which the admissibility of the evidence depends.

In an action of libel, pltf., in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by deft. On the part of deft. a document was produced as the original:—*Held*: the judge was at that stage of the cause bound to hear the evidence on both sides, & to decide whether the

of testing his competency as a witness.—*GRAY v. MCCALLUM* (1892), 2 B. C. R. 104.—CAN.

PART I. SECT. 4, SUB-SECT. 4.—B.

1. Admissibility of secondary evi-

document offered was the original or not; & if it was, the secondary evidence was inadmissible.—*BOYLE v. WISEMAN* (1855), 11 Exch. 360; 3 C. L. R. 1071; 24 L. J. Ex. 284; 25 L. T. O. S. 203; 1 Jur. N. S. 894; 3 W. R. 577; 156 E. R. 870.

Annotations:—Consd. Re Daintrey, Ex p. Holt (1893), 10 Morr. 158. *Refd. Quilter v. Jorss* (1863), 3 F. & F. 614.

84. ———.]—A document sent by a debtor to a creditor may be looked at by the ct. for the purpose of deciding whether or not it amounts to a notice of suspension of payment within the meaning of Bkpcy. Act, 1883 (c. 52), sect. 4 (1), (H), although such document is headed "Private & Confidential: Without prejudice." The rule which excludes documents marked "without prejudice" has no application to a document which in its nature & character may prejudicially affect the person to whom it is addressed if he should reject the terms offered thereby; & it does not therefore apply to a notice of an act of bkpcy. Neither does the rule apply unless some person is in dispute or negotiation with another, & terms are offered for the settlement of the dispute or negotiation. The ct. is necessarily entitled, therefore, to look at the document in order to determine whether the conditions under which the rule alone applies, exist.—*Re DAINTREY, Ex p. HOLT*, [1893] 2 Q. B. 116; 62 L. J. Q. B. 511; 69 L. T. 257; 41 W. R. 590; 9 T. L. R. 452; 37 Sol. Jo. 480; 10 Morr. 158; 5 R. 414, D. C.

85. ———.]—Question amounting to decision of main issue.]—On the trial of an action on a policy of insurance, in which the existence of the policy was in issue, pltf., pursuant to notice to produce, called on deft. to produce the original policy. He declined, & they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document purporting to be a copy of the policy which they had received from deft.'s broker. Deft. objected, & requested the judge to hear evidence to show that no original policy was or ever had been in existence. The objection was overruled, & the alleged copy admitted. Later in the cause deft. gave evidence tending to prove that in fact there had never been any duly stamped policy, or indeed, any policy at all executed, & the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by deft. The jury found in the affirmative:—*Held*: the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties.—*STOWE v. QUERNER* (1870), L. R. 5 Exch. 155; 39 L. J. Ex. 60; 22 L. T. 29; 18 W. R. 466; 3 Mar. L. C. 341.

86. ———.]—Legitimacy of party making declaration.]—HITCHINS v. EARDLEY, No. 104, post.

B. As to Documents.

87. Admissibility of secondary evidence—Whether document lawfully out of party's possession.]—Where a document is called for after notice to produce by pltf., deft. may during pltf.'s case produce evidence to show the document lawfully out of his possession, & such evidence is solely for the judge to determine whether secondary evidence be admissible, & gives pltf.'s counsel no

Sufficiency of proof of loss of original.]—The sufficiency of preliminary proof of the loss of a document to entitle secondary evidence to be received, is a question for the judge at the trial to determine.—GILBERT v. CAMPBELL (1869), 1 Han. 471.—CAN.

88. ———.]—Copy of document.]—It is the duty of a judge before admitting a copy of an original document as evidence, to consider what weight & value ought to be given to it, & to test its authenticity by satisfying himself, that the grounds for not producing the

reply to the jury.—*HARVEY v. MITCHELL* (1841), 2 Mood. & R. 366, N. P.

88. — **Whether document ever existed.**—Deft. had written a letter to H., pltf.'s attorney, who stated in evidence that he had written a letter in answer to it, which he gave to deft. at his H.'s office on Apr. 4. This letter being called for under a notice to produce, deft.'s counsel stated that there was no such letter, & proposed to show by evidence that H. had not given his letter to deft. on Apr. 4, at his office, as stated, because deft. was at another place, & also because H.'s letter was dated on Apr. 6, & was sent by post on that day. The judge received the evidence thus proposed to be given for deft. before allowing pltf. to go into secondary evidence of H.'s letter of Apr. 4:—*Held*: such evidence was not evidence to the jury, but to himself only, & any part of it which was written evidence should not be read by the officer of the ct., but should be handed to the judge & then shown to the opposite counsel.—*SMITH v. SLEAP* (1843), 1 Car. & Kir. 48, N. P.

89. — **Whether document executed.**—*STOWE v. QUERNER*, No. 85, *ante*.

90. — **Sufficiency of search for original.**—*DOE d. HILL v. FRY* (1845), 6 L. T. O. S. 83.

91. — **Whether document produced original.**—*BOYLE v. WISEMAN*, No. 83, *ante*.

92. — **—**—A document being called for as a notice to produce, & such a document being produced, & it being alleged that it was not the document in question, the judge ruled that he must decide whether it was so before he would rule as to the admissibility of secondary evidence.—*FROUDE v. HOBBS* (1859), 1 F. & F. 612.
Annotation:—*Reid. Re Daintrey, Ex p. Holt* (1892), 10 Morr. 158.

93. **Validity of objection to sufficiency of stamp.**—*BARTLETT v. SMITH*, No. 78, *ante*.

94. — **—**—*BENNISON v. JEWISON*, No. 81, *ante*.
Admissibility of unstamped documents, *see* Part IV., Sect. 10, sub-sect. 4, *post*.

Whether document sufficiently stamped, *see* REVENUE.

95. **Whether document produced from proper custody.**—I rather think it is for the judge to say whether a document is produced from the proper custody or not (*PARKE, B.*).—*REES v. WALTERS* (1838), 3 M. & W. 527; 150 E. R. 1254; *sub nom.* *REECE v. WALTERS*, 1 Horn & H. 110; 7 L. J. Ex. 138; 2 Jur. 378.

Annotation:—*Reid. Doe d. Shrewsbury v. Keeling* (1848), 11 Q. B. 884.

96. **Whether document altered.**—*LÆSTEIN v. HUNT*, No. 106, *post*.

original are well founded so as to let in the copy as secondary evidence.—*RAM GOPAL ROY v. GORDON STUART & Co.* (1872), 14 Moo. Ind. App. 453; 17 W. R. 285.—*IND.*

h. **Comparison of handwriting.**—When collateral issues arise out of comparison of handwriting & evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it.—*ROYAL CANADIAN BANK v. BROWN* (1867), 27 U. C. R. 41.—*CAN.*

k. **Trial without jury—Refusal to call witnesses.**—In cases of trial without a jury the evidence ought to be fully given before the judge is called upon to decide: here deft. had deliberately refrained from calling witnesses whom he might have called & pltf. must therefore be protected.—*MACDONALD v. WORTHINGTON* (1882), 7 A. R. 531.—*CAN.*

l. **Whether document embodied whole contract.**—*Held*: it was a question of fact for the jury whether the written order embodied the whole contract, & therefore, their finding on this point was conclusive.—*ELLIS v. ABELL* (1884), 10 A. R. 226.—*CAN.*

m. **Identification of instrument.**—If the ct., after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably & probably have been the agreement between the parties, gauging the credibility of witnesses, paying due regard to their interest in the subject-matter, & weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it.—*CLARKE v. JOSEPHIN* (1888), 16 O. R. 68.—*CAN.*

n. **Genuineness of document—Used for comparison of handwriting.**—*Semle*: the genuineness of a docu-

ment not in issue, & used solely for the purpose of comparison of handwriting, is a question for the judge, & not for the jury.—*EGAN v. COWAN* (1857), 30 L. T. O. S. 223.—*IR.*

97. **Whether document privileged.**—*CLEAVE v. JONES*, No. 82, *ante*.

Privileged documents generally, *see* DISCOVERY, Vol. XVIII., pp. 120 *et seq.*

98. **Whether cheque post-dated.**—An objection that a cheque was post-dated arises on the issue denying the making, being an objection to the admissibility of the instrument in evidence, & it is for the judge to try & determine, as a collateral issue, whether it was post-dated or not.—*DUNSFORD v. CURLEWIS* (1859), 1 F. & F. 702.

Annotations:—*Mentd.* Whistler v. Forster (1863), 14 C. B. N. S. 248; Austin v. Bunyard (1864), 4 F. & F. 253; Austin v. Bunyard (1865), 6 B. & S. 687.

99. **By whom document written.**—When a document is tendered in evidence for the purpose of contradiction, & it is disputed whether it was written by the party, a collateral issue of fact, whether it was so, is raised.

Before the letter can be read, the collateral issue [by whom it was written] must be decided (*WIGHTMAN, J.*).—*COOPER v. DAWSON* (1859), 1 F. & F. 550.

100. **Whether contract reduced to writing.**—If, in examination in chief, pltf. is asked as to the contract, & denies that there was a contract in writing, deft. may interpose, & give evidence upon a collateral issue (*semle* for the judge to decide) as to whether there was a contract in writing or not before pltf. is allowed to give evidence of its terms.—*COX v. COUVELESS* (1860), 2 F. & F. 139.

101. **Whether production of document of state inadvisable—On ground of public interest.**—It is the duty of a judge, if it is sought to produce any official document of state at the trial of an action, to interpose & prevent its being produced or any secondary evidence of it being given.—*CHATTERTON v. SECRETARY OF STATE FOR INDIA IN COUNCIL*, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596; 11 T. L. R. 462; 14 It. 504, C. A.

—*See, generally*, DISCOVERY, Vol. XVIII., pp. 166 *et seq.*

C. As to Declarations.

102. **Whether position of declarant established.**—The declarations of an indorser of a bill, made whilst he was holder, are evidence to go to the jury against a holder under an indorsement made before the bill was due, if there be evidence which satisfies the judge that the indorsee is merely an agent to sue for the indorser; the jury are afterwards to judge, first, of the agency, & then

PART I. SECT. 4, SUB-SECT. 4.—C.

102.1. **Whether position of declarant established.**—Pltf. sued for the loss of his trunk, which he alleged contained several valuable papers, & among them the lease of a farm from his father to himself. Defts. resisted his claim as fraudulent, denying that they had ever received the trunk, & offered to prove, as tending further to show the dishonesty of the claim, that this farm had been the subject of a suit in chancery, in which it was decreed that pltf.'s father held the land only as agent for another, & should convey to him: & that pltf. was aware of the fact, having been examined as a witness in this case:—*Held*: such evidence was rightly received & was sufficient to

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-sect. 4, C., D. & E.; sub-sects. 5 & 6.]

of the effect of the declarations.—*WELSTEAD v. LEVY* (1831), 1 Mood. & R. 138, N. P.

103. Whether identity of declarant established.]—Where a question arose as to the identity of pltf. with a person who appeared in a dressing gown in the passage of pltf.'s house near the street door, & asked a party who called to make an inquiry from pltf. as to the solvency of an indorser of a bill, "what his business was":—*Held*: (1) without further evidence of who the person was, his identity with pltf. was not sufficiently established to let in evidence of what he said on that occasion; (2) it was for the judge & not for the jury to decide whether the identity was sufficiently proved, for the question of identity was preliminary to the admissibility or rejection by him of the declarations of the persons ought to be identified with pltf.—*CORFIELD v. PARSONS* (1833), 1 Cr. & M. 730; 3 Tyr. 806; 2 L. J. Ex. 262; 149 E. R. 593.

Annotation:—As to (2) *Reid*. R. v. Colclough (1882), 15 Cox, C. C. 92.

104. Admission of declaration on legitimacy of declarant—Legitimacy of declarant issue in action.]—The only question at issue before the jury in an administration suit was whether M., through whom debts. claimed, was legitimate. In the course of their case, which was opened first, they tendered his declarations in evidence. Pltfs. objected to the admissibility of these declarations, & tendered evidence on the *voire dire*, for the purpose of showing that the declarant was not a member of the family. The ct. being of opinion that debts. had made out a *prima facie* case of the declarant's legitimacy, admitted the evidence of the declarations, & rejected the evidence on *voire dire* tendered by pltfs.—*HITCHINS v. EARDLEY* (1871), L. R. 2 P. & D. 248; 40 L. J. P. & M. 70; 25 L. T. 163.

Annotation:—*Consd. Re Perton*, *Pearson v. A.-G.* (1885), 53 L. T. 707.

Dying declarations.]—See CRIMINAL LAW, Vol. XIV., p. 810, Nos. 8787-8793.

D. As to Acts not forming Part of Same Transaction.

105. Acts done in places other than place in dispute.]—Where evidence is offered of acts done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether

there is such a unity of character in the different parts, as to render evidence, affecting a part not in dispute, admissible with reference to the part in dispute, & whether the acts relied on amount to evidence of ownership (*BOSANQUET, J.*).—*DOE d. BARRETT v. KEMP* (1831), 7 Bing. 332; 5 Moo. P. 173; 9 L. J. O. S. C. P. 102; 131 E. R. 128; *subsequent proceedings* (1835), 2 Bing. N. C. 102, Ex. Ch.

Annotations:—*Reid*. *Brisco v. Lomax* (1838), 3 Nov. & P. K. B. 308; *Hardcastle v. Dennison* (1861), 10 C. B. N. S. 606; *University College v. Oxford Corp.* (1904), 68 J. P. 470; *Leeke v. Portsmouth Corp.* (1912), 106 L. T. 627.

E. Whether Reviewable on Appeal.

106. General rule.]—The question whether a note has been altered since it was made, so as to render it inadmissible as evidence, is for the judge at the trial, but the ct. will review his decision as they would that of a jury on any other question of fact.—*LESTER v. HUNT* (1845), 4 L. T. O. S. 419.

107. —.]—*CLEAVE v. JONES*, No. 82. *ante*.

108. —.]—When a question to determine the admissibility of evidence has been decided by a judge presiding at a trial by jury, the decision of the judge on such question may be reviewed by a ct. of appeal.—*FITZGERALD v. FITZGERALD* (1861), 3 Sw. & Tr. 400; 4 New Rep. 157; 10 L. T. 510; 164 E. R. 1330.

109. Where judge's discretion to admit statutory.]—Where a statute gives power to a judge at *Nisi Prius* to exercise a discretion as to the admission or non-admission of a document in evidence, his decision is subject to the general supervision & control of the ct. out of which the record comes, unless the express language of the statute makes his decision final.

Evidence on Commission Act, 1830 (c. 22), s. 10, makes the deposition of a witness taken under it inadmissible in evidence, unless it shall appear to the satisfaction of the judge that the deponent is unable from permanent sickness or other permanent infirmity to attend the trial:—*Held*: though it is competent to the ct. to review his decision, it is for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he shall think fit: & the ct. will not interfere, unless it be shown that the judge has been misled by false evidence, or that injustice has resulted from the course pursued at the trial.—*BEAUFORT (DUKE) v. CRAWSHAY* (1866), L. R. 1 C. P. 699; Har. & Ruth. 638; 35 L. J. C. P. 342; 14 L. T. 729; 12 Jur. N. S. 709; 14 W. R. 989.

support the decree, without the other proceedings in the suit.—*THOMAS v. GREAT WESTERN RY. CO.* (1857), 14 U. C. R. 389.—*CAN.*

1031. Whether identity of declarant established.]—Evidence of what took place at a meeting is admissible as proof that pltf. was the person intended by a resolution passed at it.—*TAYLOR v. MASSEY* (1891), 20 O. R. 429.—*CAN.*

a. Denial by plaintiff—Whether plaintiff can be contradicted.]—In trespass against the sheriff for taking goods, pltf. called the bailiff who made the seizure & sale. He swore that pltf., after giving notice of his claim to the goods, withdrew it, & that the sale went on. Pltf. offered to disprove the withdrawal:—*Held*: such evidence was admissible, as relevant to the issue, though contradicting pltf.'s own witness.—*ROBINSON v. REYNOLDS* (1864), 23 U. C. R. 560.—*CAN.*

b. —.]—Pltf. was called as a witness, & said: "I did not tell E.,

defts.' agent, I had not been burned out before. I was not asked by him." E. was called & it was proposed to ask him questions to contradict pltf. on this point:—*Held*: such evidence was properly rejected as raising a collateral issue.—*MCCULLOCH v. GORE DISTRICT MUTUAL FIRE INSURANCE CO.* (1872), 33 U. C. R. 610; (1874), 34 U. C. R. 384.—*CAN.*

a. Declaration by deceased as to intention—To dispose of proceeds—Of policy of insurance.]—*Re MILLS, NEWCOMBE v. MILLS* (1897), 23 O. R. 563.—*CAN.*

b. Settlement on terms—Documents showing parties not ad idem—Whether oral evidence admissible.]—Where a case had been adjourned to arrange the terms of a settlement between the parties, & certain negotiations followed, but it appeared from the draft consent & letters that the parties were never at any time *ad idem*, tho ct. refused to allow oral evidence to be given to prove that a

compromise had actually been arrived at.—*Re BEATTY, Ex p. BOVET* (1896), 31 L. T. 56.—*IR.*

PART I. SECT. 4, SUB-SECT. 4.—D.

1051. Acts done in places other than the place in dispute.]—Remarks upon the judge's charge as to "authorised" medical aid & upon the admission of evidence of cures believed to have been wrought by Christian Scientists, even as showing good faith.—*R. v. LEWIS* (1903), 23 C. L. T. 257; 6 O. L. R. 132; 2 O. W. R. 290, 566.—*CAN.*

PART I. SECT. 4, SUB-SECT. 4.—E.

a. Award of arbitrator.]—If intending to decide rightly, an arbitrator comes to a wrong decision, as to competency of a witness, admissibility of evidence or relevancy of allowing proofs of particular facts, the ct. will not review his decision or set aside award for mistake.—*SIMPSON v. NEW-FOUNDLAND GOVERNMENT* (1892), 7 Nfld. L. R. 637.—*NFLD.*

SUB-SECT. 5.—DIRECTION OF JURY.

As to interpretation.—See Sub-sect. 3, *ante*.

110. As to weight of evidence.—The due degree of weight to be given by a judge, directing the jury, to particular evidence, which has been properly admitted, must be left to his own discretion, & his direction in that respect will not be revised by the ct. above.—*A. G. v. GOOD* (1825), *McCle. & Yo.* 286; 148 E. R. 421.

Annotations.—*Consd.* *Simpson v. Clayton* (1836), 2 Bing. N. C. 467. *Mentd.* *Re Disputed Adjudication* (1850), 15 L. T. O. S. 8.

Sec, generally, Part III., Sect. 8, *post*.

In criminal proceedings.—See CRIMINAL LAW, Vol. XIV., pp. 296 *et seq.*

Misdirection of jury—As ground for new trial.—See PRACTICE.

SUB-SECT. 6.—IN PARTICULAR CASES.

111. Intention of parties to contract.—In *assumpsit* on a contract for the delivery of coals from a colliery, it appeared that the agreement for supplying such coals & for the demise of a coal wharf, purported to be made between pltf. & the partners in the colliery, three in number, & was executed by pltf. & two of the partners:—*Held*:

PART I. SECT. 4, SUB-SECT. 5.

t. General rule.—The judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, & the extent to which he should do so depends on the circumstances of the case.—*SPENCER v. ALASKA PACKERS' ASSOCN.* (1904), 35 S. C. R. 362.—**CAN.**

a. What is misdirection—Particular argument not left to jury.—It is no misdirection that the judge, in charging the jury, did not advance a particular argument, which the counsel thinks would have influenced the jury in his client's favour.—*ANNABLE v. McDONNELL* (1851), 8 U. C. R. 382.—**CAN.**

b. Defendant not called as witness—Judge's opinion of defendant's evidence.—Where deft. knew all the circumstances, & might have been called as a witness:—*Held*: it was not a misdirection to tell the jury they might infer that if deft. had been called his evidence would not have benefited his case.—*TUFTS v. HATHEWAY* (1858), 4 All. 62.—**CAN.**

c. Misstatement of legal proposition.—A misstatement of a legal proposition is not a misdirection unless it touches the very point of the case, going directly to the point which the jury has to determine, limiting & directing their verdict.—*PETERS v. SILVER* (1867), 7 N. S. R. 75.—**CAN.**

d. In trover for three sheep, pltf. alleged that she had brought two with her to the residence of M., with whom she was living when they were taken, & one she had purchased when there. The sheep were seized as the property of M. The sheep bore M.'s mark; pltf. had admitted that M. had appropriated to his own use her sheep, & said he was to have given her others, but had not done so. The judge, after referring to the conflicting evidence, told the jury that if defts.' evidence was true, it was matter of law that the sheep were not pltf.'s, & he recommended them to bring in a verdict for defts. upon the ground if they took the same view of the evidence, adding that it would be better for the parties that the jury should follow the law, as a departure from the rules of the ct. would only tend to prolong litigation.

tion:—Held: the verdict must be set aside on ground of misdirection.—*MCLELLAN v. INGRAHAM* (1882), 3 R. & G. 164.—**CAN.**

e. No direction as to effect of evidence.—It is a misdirection of judge not to charge the jury as to effect of certain evidence.—*McFARLANE v. FLINN* (1870), 8 N. S. R. 141.—**CAN.**

f. Strong observation on evidence.—Where defts. were indicted for obstructing a navigable river by the erection of a wharf, & there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shown only that prosecutor was prevented by it from landing there with his skiff, & the wharf was proved not to interfere with the navigation:—*Held*: the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty. Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection.—*R. v. PORT PERRY RY. CO.* (1876), 38 U. C. R. 431.—**CAN.**

g. When the judge in charging the jury told them that "putting out of consideration all admissions that had been contradicted, which on that account he thought they should dismiss from consideration, pltf. were in his opinion clearly entitled to recover":—Held: this was not a misdirection.—*MORRISON v. THOMPSON* (1877), 2 R. & C. 411.—CAN.****

h. The Supreme Ct. as an appellate ct. for the Dominion, should not approve of strong observations being made by a judge in effect charging upon defts. matters not set out in the pleadings & not legitimately in issue in the cause.—*HARDMAN v. PUTNAM* (1891), 18 S. C. R. 714.—**CAN.**

k. Judge's belief in credibility of witness.—It is not misdirection to tell the jury, in reference to deft.'s evidence, that a competent witness should be believed.—*BANK OF NOVA SCOTIA v. FISH* (1894), 32 N. B. R. 434.—**CAN.**

l. Non-direction on evidence of handwriting.—It is not misdirection to tell the jury that they may use their

own observation as to handwriting; nor is such a direction a withdrawal from the jury of the oral testimony given in the matter.—*KIBBY v. LEIGHTON* (1895), 33 N. B. R. 4.—**CAN.**

m. Expression of opinion on facts by judge—Not binding on jury.—It is a misdirection for the judge to express his opinion on various questions of fact without telling the jury that his opinion is not binding on them & that they are the sole judges of fact.—*NATABAR GHOSH v. R.* (1908), 1 L. R. 35 Calc. 531.—**IND.**

n. Practice in Ontario.—An objection was taken to the charge as being adverse:—*Held*: the charge could not be complained of here, for to give effect to the objection would be to compel the judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice in this Province.—*SCOUALL v. STAPLETON* (1886), 12 O. R. 206.—**CAN.**

o. Part of examination for discovery—Put in evidence by counsel—Right of judge to use whole.—A judge in charging a jury may read to them parts of an examination for discovery additional to parts put in evidence by counsel.—*ADAMS v. NATIONAL ELECTRIC TRAMWAY & LIGHTING CO.* (1893), 3 B. C. R. 199.—**CAN.**

p. No substantial wrong or miscarriage of justice caused.—*HOWELL v. LISTOWEL LINK CO.* (1887), 13 O. R. 476.—**CAN.**

q. The ct. will not set aside a verdict for misdirection unless there has been some substantial wrong or miscarriage.—*INSURANCE CO. OF NORTH AMERICA v. MCKEOD* (1898), 30 N. S. R. 480; 29 S. C. R. 449.—**CAN.**

r. Where a judge's direction to the jury, though not faultless, was on the whole calculated to meet the justice of the case an exception was disallowed.—*SUTTON v. AINSLIE* (1852), 1 Macq. 299.—**SCOT.**

s. Point not material to issue.—A verdict will not be set aside for misdirection by the ct. on a point not material to the issue.—*ROYAL CANADIAN INSURANCE CO. & ROBERGE* (1892), Q. R. 2 Q. B. 117.—**CAN.**

Reasonable time—For delivery or tender—Of goods.—*Sec Sale of Goods Act, 1893* (c. 71), s. 29 (4); **SALE OF GOODS.**

112. Idem sonantia.—If two names spelt differently necessarily sound alike, the ct. may, as matter of law, pronounce them to be *idem sonantia*; but if they do not necessarily sound alike, the question whether they are *idem sonantia* is a question of fact for the jury. Where therefore

Sect. 4.—Functions of judge and jury—Questions of law and fact: Sub-sect. 6. Sects. 5 & 6: Sub-sect. 1, A.]

the ct. of quarter sessions for Dorsetshire ruled as matter of law that Darius & Trius were *idem sonantia*, the conviction was quashed, although the case stated that Darius was pronounced in the Dorset dialect D'rius.—*R. v. DAVIS* (1851), 2 Den. 231; *T. & M.* 557; 4 New Sess. Cas. 611; 20 L. J. M. C. 207; 17 L. T. O. S. 135; 15 J. P. 450; 15 Jur. 546; 5 Cox, C. C. 237, C. C. R.

113. Reasonable & probable cause.]—If the facts are undisputed the judge may decide the question of reasonable & probable cause without taking the finding of the jury upon them.—*WILKINSON v. FOOTE* (1856), 20 J. P. 807; 5 W. R. 22.

See, generally, MALICIOUS PROSECUTION; TRESPASS.

114. Agreement to treat holiday as working day.]—The question whether an agreement to treat a holiday as a working day & so count it among the lay days ought to be inferred from the fact of working by consent is one not of law but of fact.—*NELSON (JAMES) & SONS, LTD. v. NELSON LINE (LIVERPOOL), LTD.*, [1908] A. C. 108; 77 L. J. K. B. 456; 98 L. T. 322; 24 T. L. R. 315; 52 Sol. Jo. 278; 11 Asp. M. L. C. 1; 13 Com. Cas. 235, 11. L.

Annotations.—Reid. British & Mexican Shipping Co. v. Lockett, [1911] 1 K. B. 264; *Mawson Shipping Co. v. Beyer*, [1914] 1 K. B. 304. *Mentd. Whittall v. Rahtken's Shipping Co.*, [1907] 1 K. B. 783; *Re Royal Mail Steam Packet Co. & River Plate S.S. Co.*, [1910] 1 K. B. 600.

Agency—Failure of agent to exercise care.]—*See AGENCY*, Vol. I., p. 430, Nos. 1215–1220.

Where agent apparently principal.]—*See AGENCY*, Vol. I., p. 628, Nos. 2521, 2522.

Factor's authority to make advances.]—*See AGENCY*, Vol. I., p. 380, No. 841.

Delegation.]—*See AGENCY*, Vol. I., p. 380, No. 923.

Duty of house agent.]—*See AGENCY*, Vol. I., p. 435, No. 1262.

Agent's liability to third parties.]—*See AGENCY*, Vol. I., p. 676, No. 2804.

Where managing committee pledges credit of committee man.]—*See AGENCY*, Vol. I., p. 360, Nos. 687, 688.

Revocation of authority.]—*See AGENCY*, Vol. I., p. 680, No. 2984.

Time limit for agent's commission.]—*See AGENCY*, Vol. I., p. 519, No. 1806.

Agriculture—Tenant's breach of covenant.]—*See AGRICULTURE*, Vol. II., p. 16, Nos. 75, 76.

Animals—Reasonableness of extra charge for carriage.]—*See ANIMALS*, Vol. II., p. 280, No. 545.

115. Whether dog under control.]—The question whether or not a dog is under control within Dogs Act, 1871 (c. 56), s. 3, is one of fact & not of law.—*WREN v. POCKOCK* (1876), 34 L. T. 697; 40 J. P. 646, D. C.

—See, also, ANIMALS, Vol. I., p. 248, No. 318.

Arbitration—Arbitrators bound by rules of evidence.]—*See ARBITRATION*, Vol. II., p. 434, Nos. 837–840.

Bailment—Bailor's duty of care.]—*See BAILMENT*, Vol. III., p. 89, No. 223.

Bankruptcy—Fraudulent preference.]—*See BANKRUPTCY*, Vol. V., pp. 859, 860, Nos. 7198–7201.

—Fraudulent conveyance.]—*See BANKRUPTCY*, Vol. IV., p. 70, No. 592.

Order & disposition.]—*See BANKRUPTCY*, Vol. V., p. 751, No. 6477.

Bills of exchange—Reasonable time for presentment of cheque.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 228, Nos. 1432, 1433.

Reasonable time for filling up blank promissory note.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 71, No. 573.

Whether notice of dishonour given in time.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 258, 259, Nos. 1683–1686.

Excuses for delay in giving notice of dishonour.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 265, Nos. 1723–1726.

Intention of indorsee paying bill.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 362, No. 2386.

Absence of consideration.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 154, No. 996.

Allegation of fraud.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 141, 175, Nos. 925, 1100.

Agreement for discharge of surety.]—*See BILLS OF EXCHANGE*, Vol. VI., p. 414, No. 2684.

Bills of sale—Chattels in apparent possession of grantor.]—*See BILLS OF SALE*, Vol. VII., p. 116, No. 676.

Building contracts—Employer's power to repudiate contract.]—*See BUILDING CONTRACTS*, Vol. VII., p. 443, No. 443.

Carriers—Passenger removed from tramcar—Motive of conductor.]—*See CARRIERS*, Vol. VIII., p. 114, No. 769.

Limitation of common law liability.]—*See CARRIERS*, Vol. VIII., p. 41, Nos. 240, 241.

Negligence.]—*See CARRIERS*, Vol. VIII., pp. 80, 86, Nos. 549, 594.

Whether rate reasonable.]—*See ANIMALS*, Vol. II., p. 280, No. 545; *CARRIERS*, Vol. VIII., p. 59, No. 389.

Whether luggage delivered to railway company.]—*See CARRIERS*, Vol. VIII., p. 124, No. 831.

Notice of refusal to take goods.]—*See CARRIERS*, Vol. VIII., p. 34, No. 196.

Whether painting within Carriers Act, 1830 (c. 68), s. 1.]—*See CARRIERS*, Vol. VIII., p. 50, No. 322.

Contract—Words amounting to tender.]—*See CONTRACT*, Vol. XII., p. 331, No. 2776.

Rescission by consent of parties.]—*See CONTRACT*, Vol. XII., p. 334, No. 2805.

Contrary to public policy.]—*See CONTRACT*, Vol. XII., p. 244, No. 1995.

Copyright—Infringement—By dramatic production.]—*See COPYRIGHT*, Vol. XIII., p. 214, No. 502.

—Piracy of engraving.]—*See COPYRIGHT*, Vol. XIII., p. 212, No. 475.

Coroners—Absence—Lawful or reasonable cause.]—*See CORONERS*, Vol. XIII., p. 240, No. 100.

Criminal law—Inducement by false pretences.]—*See CRIMINAL LAW*, Vol. XV., pp. 985, 986, Nos. 11,028–11,034; p. 1000, No. 11,197.

Act tending to public mischief.]—*See CRIMINAL LAW*, Vol. XIV., p. 117, No. 861.

Forgery by alteration of receipt.]—*See CRIMINAL LAW*, Vol. XV., p. 1043, No. 11,761.

Possession of parent in abduction.]—*See CRIMINAL LAW*, Vol. XV., p. 858, No. 9424.

Possession of stolen goods.]—*See CRIMINAL LAW*, Vol. XV., pp. 965, 966, Nos. 10,782–10,786.

Embezzlement—Who is a clerk or servant.]—*See CRIMINAL LAW*, Vol. XV., p. 921, Nos. 10,141–10,143.

Custom & usages—Existence of usage.]—*See CUSTOM & USAGES*, Vol. XVII., pp. 35, 36, Nos. 398–402.

Meaning of mercantile terms.]—*See*

CUSTOM & USAGES, Vol. XVII., p. 39, Nos. 433-436.

Damages—Whether liquidated damages or penalty.]—See DAMAGES, Vol. XVII., pp. 136, 137, Nos. 422, 423.

Deeds—Construction.]—See DEEDS, Vol. XVII., pp. 243 *et seq.*

Distress—Fraudulent removal of goods.]—See DISTRESS, Vol. XVIII., p. 360, No. 983.

Abandonment of.]—See DISTRESS, Vol. XVIII., p. 357, No. 941.

Expenses of sale.]—See DISTRESS, Vol. XVIII., p. 407, No. 1470.

Construction of term "lodger."—See DISTRESS, Vol. XVIII., p. 305, No. 414.

Easements—Acquisition of—Presumption of lost grant.]—See EASEMENTS, Vol. XIX., p. 148, No. 1011.

Bonâ fide use of.]—See EASEMENTS, Vol. XIX., p. 107, No. 683.

Reasonable use of.]—See EASEMENTS, Vol. XIX., p. 117, No. 779.

Elections—List of voters—Sufficiency of notice of objection.]—See ELECTIONS, Vol. XX., p. 30, No. 159.

Husband & wife.]—See HUSBAND & WIFE.

Infants—Necessaries.]—See INFANTS.

Landlord & tenant—Yearly tenant holding out

—Terms of tenancy.]—See LANDLORD & TENANT.

Libel & slander.]—See LIBEL & SLANDER.

Limitation of actions—Whether document sufficient acknowledgment.]—See LIMITATION OF ACTIONS.

Malicious prosecution.]—See MALICIOUS PROSECUTION.

Master & servant.]—See MASTER & SERVANT.

Money & money-lending—Whether transaction harsh & unconscionable.]—See MONEY & MONEY-LENDING.

Negligence.]—See NEGLIGENCE.

Patents.]—See PATENTS.

Sale of goods.]—See SALE OF GOODS.

Shipping—Construction of charter party.]—See SHIPPING.

Solicitors—Negligence.]—See SOLICITORS.

Trade & trade unions—Contracts in restraint of trade.]—See TRADE & TRADE UNIONS.

SECT. 5.—JUDGE SITTING WITH ASSESSORS.

116. General rule—Decision rests with judge.]—

If the judge of the ct. below differs from his assessors he is bound to decide in accordance with his own opinion.—*THE BERYL* (1884), 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. L. C. 321, C. A.

Annotations:—*Mentd.* *The Dordogne* (1884), 10 P. D. 6; *The John McIntyre* (1884), 9 P. D. 135; *The Stanmore* (1885), 54 L. J. P. 89; *Baker v. Theodore H. Rand* (Owners), *The Theodore H. Rand* (1887), 12 App. Cas. 247; *Liverpool, Brazil & River Plate Steam Navigation Co. v. Companhia Bahiana de Navegacao A. Vapor, The Memnon* (1889), 62 L. T. 84; *S.S. Lebanon v. S.S. Ceto, The Ceto* (1889), 14 App. Cas. 670; *The Oporto*, [1897] P. 249; *The Bellanoch*, [1907] P. 170; *S.S. Mondip Range v. Radcliffe*, [1921] 1 A. C. 556.

117. ———.]—The learned judge before whom this case originally came appears to have surrendered his own view to that of his nautical assessors. . . . It is the duty of a judge to form his own judgment (*LORD HALSBURY, C.*)—*GANNET (OWNERS) v. ALGOA (OWNERS), THE GANNET*, [1900] A. C. 234; 69 L. J. P. 49; 82 L. T. 320; 9 Asp. M. L. C. 43, H. L.

Annotation:—*Mentd.* *The Pitgaveney*, [1910] P. 215.

See, generally, ADMIRALTY, Vol. I., pp. 201, 202, Nos. 1203-1208.

118. Opinion of assessor—Power of Court of Appeal to consider.]—Where a trial takes place before a judge assisted by an assessor, & the assessor has given his opinion to the judge upon an appeal from the decision of the judge, the Ct. of Appeal has power to consider the opinion given by the assessor, & the reasons, if any, stated by him for that opinion.—*HATTERSLEY & SONS, LTD. v. HODGSON (GEORGE), LTD.* (1905), 21 T. L. R. 178; 22 R. P. C. 229, 240, C. A.

SECT. 6.—ONUS OF PROOF AND RIGHT TO BEGIN.

SUB-SECT. 1.—ONUS OF PROOF.

A. In General.

119. On party alleging affirmative issue—General rule.]—Def't. having pleaded an agreement made between ptlfs. & other creditors of def't., of the one part, & def't. of the other part; that

PART I. SECT. 6, SUB-SECT. 1.—A.

119 i. On party alleging affirmative issue—General rule.]—The offence of cutting away night soil without a licence is a quasi-criminal offence, it is therefore for complainant to prove that def't. has not a licence & has not given such security as is required by the local authority.—*MORRISON v. WOODGATE* (1878), 4 V. L. R. 430.—AUS.

119 ii. ———.]—In an action for breach of an implied warranty of authority to make a contract, ptlf. launched his case by showing that he entered into the contract with def't. as agent, who so described himself, & that def't. had not the authority he professed to have.—*Held: the onus of proving a defence that ptlf. was aware at the time of the want of authority would lie upon def't.*—*ADAMSON v. MORTON* (1881), 7 V. L. R. 307.—AUS.

119 iii. ———.]—The onus of proving an agency lies strictly on the party seeking to enforce a contract made with the alleged agent.—*ROBINSON v. TYSON* (1888), 9 N. S. W. L. R. 297.—AUS.

———.]—*Re GREY* (1900), 26 V. L. R. 214.—AUS.

119 v. ———.]—*HICKS v. TRUSTEES, EXECUTORS & AGENCY CO.* (1900), 26 V. L. R. 339.—AUS.

119 vi. ———.]—The onus of proof

that accused is a prohibited immigrant lies upon the prosecution.—*MAN KIT v. SAMPSON* (1901), 3 W. A. L. R. 71.—AUS.

119 vii. ———.]—In determining which of two persons having equitable interests in property should have priority, it lies upon the person having the latter interest to show that the other has done or omitted to do something which would deprive him of his advantage.—*GENERAL FINANCE AGENCY, ETC. CO. (IN LIQUIDATION) v. PERPETUAL EXECUTORS & TRUSTEES ASSOCN., ETC.* (1902), 27 V. L. R. 739.—AUS.

119 viii. ———.]—*HANSEN v. MILLAR'S KARRI & JARRAH CO.* (1905), 7 W. A. L. R. 266.—AUS.

119 ix. ———.]—The onus is upon the person attacking the transaction to prove affirmatively that resp. acted in bad faith.—*Re DONOVAN* (1910), 10 S. R. N. S. W. 532; 27 N. S. W. W. N. 157.—AUS.

119 x. ———.]—*HART v. MACDONALD* (1910), 10 C. L. R. 417.—AUS.

119 xi. ———.]—*JONES & CO., LTD. v. NEW ZEALAND SHIPPING CO.* (1916), 12 Tas. L. R. 112.—AUS.

119 xii. ———.]—Where a vessel is seized as not being British built, claimant in order to recover must prove that the vessel was built at a British port.—

It. v. NASH (1825), Tay. 197.—CAN.

119 xiii. ———.]—Where ptlf. sues upon a covenant for right to convey land, alleging as a breach that def't. had no such right, & def't. pleads that he had, the proof of title lies upon def't.—*MILLS v. WIGLE* (1862), 22 U. C. R. 168.—CAN.

119 xiv. ———.]—*MANLEY v. COLLOM* (1900), 8 B. C. R. 153; 1 M. M. Cas. 487.—CAN.

119 xv. ———.]—*HENDERSON v. INVERNESS RAILWAY & COAL CO.* (1914), 14 E. L. R. 203; 16 D. L. R. 420; 47 N. S. R. 530.—CAN.

119 xvi. ———.]—Where intestate has established a domicile of choice, the onus that she had changed it to her domicile of origin is upon those seeking to prove such change, & it must be proven with "perfect clearness & satisfaction."—*FORBES v. BAILEY* (1914), 14 E. L. R. 514.—CAN.

119 xvii. ———.]—Ptlf., who with her brother owned all the stock equally in a limited co., brought an action against her brother under an alleged verbal agreement whereby he was to purchase all her shares in the co.:—*Held: the onus of proof of the contract alleged was on ptlf.*—*CAMPBELL v. STOREY* (1921), 33 B. C. R. 354.—CAN.

119 xviii. ———.]—Where an instrument is shown to be false, it lies on

Sect. 6.—Onus of proof and right to begin: Sub-sect. 1, A.]

deft. should assign certain credits & effects to two persons upon certain trusts, & that pltf. agreed to accept those conditions in discharge of their demand, provided all the creditors assented; that deft. did assign, & that all the creditors assented. The replication denied that all the creditors assented:—**Held:** the affirmative of the issue being on deft., he was bound to prove the assent of all his creditors.—**CATHERWOOD v. CHABAUD** (1823), 1 B. & C. 150; 2 Dow. & Ry. K. B. 271; 1 L. J. O. S. K. B. 66; 107 E. R. 56.

Annotation:—Mentd. *Clay v. Willis* (1823), 2 Dow. & Ry. K. B. 539.

120. ———.]—Where on the pleadings the affirmative is on deft., pltf. need give no evidence.—**GRAY v. ATKINS** (1830), 8 L. J. O. S. C. P. 132.

121. ———.]—The *onus probandi* is on the person asserting the affirmative.—**WING v. ANGRAVE** (1860), 8 H. L. Cas. 183; 30 L. J. Ch. 65; 11 E. R. 397, H. L.; *affg.* S. C. *sub nom.* **UNDERWOOD v. WING** (1854), 4 De G. M. & G. 633, L. C.

Annotations:—Refld. *Barnett v. Tugwell* (1862), 31 Beav. 232; *Re Green's Settlement* (1865), L. R. 1 Eq. 238; *Re Phené's Trusts* (1870), 5 Ch. App. 139. **Mentd.** *Tennant v. Heathfield* (1855), 21 Beav. 255; *Hall v. Warren* (1861), 9 H. L. Cas. 420; *Evans v. Stratford* (1864), 2 Hem. & M. 142; *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88; *Re Tredwell, Jeffrey v. Tredwell*, [1891] 2 Ch. 640; *In the Goods of Alston* (1892), 66 L. T. 591; *Sachcharin Corp'n. v. Quincey*, [1900] 2 Ch. 246.

122. ———.]—**Whether rule absolute.]—**The burden of proof lies upon the party who affirms, not upon the party who denies, but the rule is not unqualified, nor is it without exception (**KNIGHT BRUCE, V.-C.**)—**STIKEMAN v. DAWSON** (1847), 1 De G. & M. 90; 4 Ry. & Can. Cas. 585; 16 L. J. Ch. 205; 8 L. T. O. S. 551; 11 Jur. 214; 63 E. R. 984.

Annotations:—Mentd. *Wright v. Leonard* (1861), 11 C. B. N. S. 258; *Miller v. Blankley* (1878), 38 L. T. 527; *Stocks v. Wilson*, [1913] 2 K. B. 235; *Leslie v. Sheill*, [1914] 3 K. B. 607.

123. ———.]—**Though negative in form.]—**In *assumpsit*, the declaration stated that deft. agreed to build houses according to a specification. Breach that he did not build according to the specification. Plea, that deft. did build according to the specification:—**Held:** on this issue pltf. must begin & prove that deft. had not built according to the specification.—**SMITH v. DAVIES** (1836), 7 C. & P. 307, N. P.

124. ———.]—**Impeaching will.]—****BREMER v. FREEMAN**, No. 167, *post*.

125. ———.]—**Construction of deed inconsistent with *prima facie* meaning.]—**An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite & unlimited, throws upon a person alleging it not to be perpetual, the burden of proving that allegation.—**LLANELLY RY. & DOCK CO. v. LONDON & NORTH WESTERN RY. CO.** (1875), L. R. 7 H. L. 550; 45 L. J. Ch. 539; 32 L. T.

the party claiming benefit under it to support it.—**WATT v. GROVE** (1805), 2 Sosh. & Lef. 502.—**IR.**

119 xix. ———.]—Although the recital or receipt in a deed is *prima facie* evidence of the payment of the consideration, yet if the ct. comes to the conclusion that the consideration has not been paid, & directs an inquiry upon the subject, the *onus* of proving the payment lies upon the party insisting that it has been paid.—**CROLY v. O'CALLAGHAN** (1842), 5 I. Eq. 11. 32.—**IR.**

119 xx. ———.]—Pltf. before he

obtains a verdict is bound to satisfy the ct. that he is entitled to it.—**FOX v. MORRIS** (1882), 6 Ndd. L. R. 424.—**NFLD.**

119 xxi. ———.]—**BANK OF AUSTRALASIA v. NORTH GERMAN INSURANCE CO.** (1898), 17 N. Z. L. R. 387.—**N.Z.**

119 xxii. ———.]—**HAPLIN v. ARCHER** (1903), 23 N. Z. L. R. 481.—**N.Z.**

119 xxiii. ———.]—**KING v. AUCKLAND ELECTRIC TRAMWAY CO., LTD.** (1912), 31 N. Z. L. R. 924.—**N.Z.**

119 xxiv. ———.]—**FRASER v.**

575; 23 W. R. 927, H. L.; affg. (1873), 8 Ch. App. 942, L. JJ.

Annotations:—Mentd. *Levy v. Creighton* (1874), 31 L. T. 1; *Cochrane v. Exchange Telegraph Co.* (1896), 12 T. L. R. 197; *Re Lindrea, Lindrea v. Fletcher* (1913), 109 L. T. 623; *Tynemouth Corp'n. v. Newbiggin-by-the-Sea U. D. C.* (1915), 80 J. P. 195.

Verdict of jury challenged.]—*See* **CORONERS**, Vol. XIII., p. 260, No. 405.

126. ———.]—**Fraud.]—**The *onus* of proving fraud, in cases of *cessio*, rests on the person resisting the remedy.—**WIGHT v. RITCHIE** (1814), 2 Dow, 377; 3 E. R. 900, H. L.

127. ———.]—In *trover*, deft. pleaded that H. was possessed of the goods as of his own property, & that to prevent them being taken in execution he covinously pretended to sell to pltf. The replication traversed that H. did, for the purposes, etc., covinously pretend to sell the said goods:—**Held:** the replication did not admit that the goods were the property of H.; but the *onus* was on deft. of proving a fraudulent sale by H. to pltf.—**NICOLL v. BASTARD** (1835), 2 Cr. M. & R. 659; 1 Gale, 295; Tyr. & Gr. 156; 5 L. J. Ex. 7; 150 E. R. 279.

Annotations:—Mentd. *Gadsden v. Barrow* (1854), 9 Exch. 514; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197.

128. ———.]—In general the burden of proof is thrown upon the party who resists performance of an agreement, on the ground of fraud & surprise; but the rule is by no means universal. If the agreement be suspicious on the face of it, the burden of proof may be shifted on to the party seeking to enforce it (**LORD LANGDALE, M.R.**)—**WEST v. HABGOOD** (1837), 6 L. J. Ch. 369; 1 Jur. 259.

129. ———.]—Where a pltf. seeks to set aside a transaction on the ground of fraud of a particular description, the *onus probandi* is upon him, & he will be bound strictly to prove his case as it is laid in his bill. For example, if a matter necessarily rests wholly in his own mind, such as that he was imposed upon by a certain purchase, & he do not choose to pledge his oath to the truth of it, the ct. will assume that the fact could not be honestly asserted, & if deft. wholly deny the fact, & the only other witness cannot be relied upon, pltf. will fail; & if he fail the bill will be dismissed with costs, even though deft.'s conduct be not free from blame.—**MOWATT v. BLAKE** (1858), 31 L. T. O. S. 387, H. L.; *revg.* S. C. *sub nom.* **BLAKE v. MOWATT** (1856), 21 Beav. 603.

Annotations:—Mentd. *Rodger v. Comptoir D'Escompte de Paris* (1871), L. R. 3 P. C. 465; *Armstrong v. Jackson*, [1917] 2 K. B. 822.

See, generally, MISREPRESENTATION & FRAUD.

130. ———.]—**Misrepresentation.]—****MELBOURNE BANKING CORPN. v. BROUGHAM**, No. 543, *post*.

¶ *See, generally, MISREPRESENTATION & FRAUD.*

131. ———.]—**Mutual mistake.]—****MELBOURNE BANKING CORPN. v. BROUGHAM**, No. 543, *post*.

See, generally, MISTAKE.

132. ———.]—**Illegality.]—**This is a question on a proof for a small sum under a transaction alleged

BRUCE (1857), 20 Duml. (Ct. of Sess.) 115; 30 Sc. Jur. 70.—**SCOT.**

123 i. ———.]—**Though negative in form.]—**In an action of debt for tithe composition, deft. pleaded *nil debet* to a declaration containing counts in which there was no allegation that deft. was tenant from year to year, or of a lesser estate:—**Held:** the *onus probandi* of deft.'s interest lay upon deft., & proof of payment of rent by him to a third person was not sufficient evidence to show that he was tenant from year to year.—**FAIRTLOUGH v. SWINEY** (1838), 1 Jebb & S. 333.—**IR.**

to be illegal by the operation of provisions in a statute passed in 1844. The burden of establishing that illegality rests on those who assert it (*per CUR.*).—*Re CHARLES, Ex p. BARTON* (1846), 1 De G. 316; 4 Ry. & Can. Cas. 371; 7 L. T. O. S. 143; 10 Jur. 442.

See, generally, CONTRACT, Vol. XII., p. 236, Nos. 1941–1944.

133. — Gaming transaction.]—Where the defence to an action to recover money upon the sale & purchase of certain stock is one of gambling transaction, the burden of proof lay on the party setting up such a defence.—*SHAW v. BAYLEY* (1893), *Times*, Jan. 24, C. A.

See, generally, GAMING & WAGERING.

134. — Goods liable to seizure.]—*Onus probandi* of payment of duties lies on the claimer on prosecutions in the Exchequer, but in actions of trespass for taking the goods, the *onus* of proving the non-payment lies on deft.—*SALOMON v. GORDON* (1772), 2 Wm. Bl. 813; 96 E. R. 479.

Annotation:—Consd. Henshaw v. Pleasance (1777), 2 Wm. Bl. 1174.

135. — —.]—(1) Condemnation of goods by the Comrs. of Excise is not conclusive evidence to a jury in an action of trespass. (2) In such action the *onus probandi* does not lie on pltf., but on the officer.—*HENSHAW v. PLEASANCE* (1777), 2 Wm. Bl. 1174; 96 E. R. 692.

Annotations:—As to (1) *Consd. Brittain v. Kinnaird* (1819), 1 Brod. & Bing. 432. *Reid. Wood v. Chessal* (1778), 2 Wm. Bl. 1254.

136. — Claim to tithe in opposition to express endowment.]—Where a rector claims tithe in opposition to an express endowment, he must prove his case, the presumption being against him.—*DORMAN v. CURREY* (1817), Wils. Ex. 46; 4 Price, 109; 140 E. R. 410.

137. — Allegation of particular custom.]—The *onus probandi* lies on those who allege a particular custom in derogation of the ordinary maritime law. They must prove the legality & existence of the custom.—*THE HARRIET* (1841), 7 L. T. 441; *subsequent proceedings* (1842), 1 Wm. Rob. 439.

See, also, CUSTOM & USAGES, Vol. XVII., pp. 20, 36, Nos. 204, 408, 409.

138. — Insanity of party to deed.]—A party claiming under a deed is not bound to prove the sanity of the person executing it; the burden of proof lies on the other side.—*JACOBS v. RICHARDS, JACOBS v. PORTER* (1854), 18 Beav. 300; 2 Eq. Rep. 299; 23 L. J. Ch. 557; 23 L. T. O. S. 44; 18 Jur. 527; 2 W. R. 174; 52 E. R. 118; *on appeal*, 5 De G. M. & G. 55, L. J.J.

Annotations:—Mentd. Campbell v. Hooper (1855), 3 Sm. & G. 153; *Wood v. Dwarries* (1856), 11 Exch. 493.

See, generally, LUNATICS.

139. — Genuineness of attestation of deed set up.]—The *onus* of proving the genuineness of a witness to a deed in a civil suit lies on the party setting up the deed, not on the party impeaching it, as in a criminal proceeding; & it is a misdirection in a judge to tell the jury in a civil suit, that under such circumstances they must try the question as to whether the deed was forged or not, in the same manner as if deft. was on his trial for forgery.—*DOE d. DEVINE v. WILSON* (1855), 10 Moo. P. C. C. 502; 14 E. R. 581, P. C.

Annotation:—Mentd. Des Barres v. Shey (1873), 29 L. T. 592.

140. — Position of locus in quo.]—Trespass for taking heifers. Plea justifying the taking damage feasant. The question was as to the boundary of a piece of land of which pltf. was lessee:—*Held: the onus* was upon him of showing

that the *locus in quo* was within it.—*MOTT v. TURNAGE* (1850), 1 F. & F. 6, N. P.

Annotation:—Mentd. Golden v. Taylor (1860), 2 F. & F. 110.

141. — Death of person at particular time — Person presumed dead by law.]—The presumption of law that a person who has not been heard of for a period of seven years is then dead does not point to any precise moment of that period as the time of his death. The *onus* of proving his death at a particular time lies upon those who assert the fact.—*LAMBE v. ORTON* (1859), 29 L. J. Ch. 286; 1 L. T. 290; 6 Jur. N. S. 61; 8 W. R. 111.

Annotations:—Consd. Re Lowes' Trusts (1870), 23 L. T. 692; *Re Phen's Trusts* (1870), 5 Ch. App. 139. *Reid. Thomas v. Thomas* (1804), 2 Drew. & Sm. 298; *Re Benham's Trusts* (1867), L. R. 4 Eq. 416.

Presumption of death generally, *see* Part III., Sect. 6, sub-sect. 6, *post*.

142. — Agreement acted on though not executed.]—The *onus* of showing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance.—*BROGDEN v. METROPOLITAN RY. CO.* (1877), 2 App. Cas. 666, H. L.

Annotations:—Mentd. Household Fire Insee. v. Grant (1879) 4 Ex. D. 216; *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Waring & Gillow v. Thompson* (1912), 29 T. L. R. 154; *Coope v. Ridout*, [1920] 2 Ch. 411.

143. — Loss of right to maintain action.]—The *onus* of showing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right.—*MULKERN v. LORD* (1879), 4 App. Cas. 182; 48 L. J. Ch. 745; 40 L. T. 594; 43 J. P. 492; 27 W. R. 510, H. L.

Annotations:—Mentd. Hack v. London Provident Bldg. Soc. (1883), 23 Ch. D. 103; *Municipal Bldg. Soc. v. Kent* (1884), 9 App. Cas. 260; *Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. v. Martin* (1886), 17 Q. B. D. 66; *Buekie v. Lordonny* (1887), 56 L. T. 273; *Catt v. Wood*, [1908] 2 K. B. 458; *Winter v. Wilkinson*, [1915] 1 Ch. 317.

144. — Breach of condition in will.]—*Semble: The onus* of proving a breach of a condition in a will lies on the party alleging it, & the other side cannot be called on to prove a general negative.—*WILKINSON v. DYSON* (1862), 10 W. R. 681.

145. — Impeaching will.]—It lies upon the party who pleads the affirmative issues impeaching a will to begin.—*KEAYS v. ADAMS* (1879), cited in 5 P. D., p. 25.

Annotation:—Consd. Hutley v. Grimstone (1879), 5 P. D. 24.

146. — Intestacy.]—Where pltf. claimed a decree of intestacy, & the due execution of a will propounded by deft. was admitted by pltf. in their reply, the only plea against the will being that it was duly revoked by testatrix:—*Held: the onus* of proof lay on pltf., & they must begin by opening their case.—*SAQUI v. LAZARUS* (1895), 73 L. T. 191.

In action of damages.]—See Nos. 238, 240, *post*.

Foreign law differing from English law.]—See Part XI., Sect. 4, *post*.

147. On party seeking to enforce award—That direction for payment to strangers beneficial.]—A direction in an award, that one party shall pay money to a stranger, is good, if it be for the benefit of a party to the award; & the *onus* of showing that it is for his benefit is thrown on the party seeking to enforce the award.—*WOOD v. ADCOCK* (1852), 7 Exch. 468; 21 L. J. Ex. 204; 18 L. T. O. S. 332; 16 Jur. 251; 155 E. R. 1033, Ex. Ch.; *affg. S. C. sub nom. ADCOCK v. WOOD* (1851), 6 Exch. 814.

Annotations:—Mentd. Buchanan v. Kinning (1851), 20

Sect. 8.—Onus of proof and right to begin: Sub-sect. 1, A., B. & C. (a.)]

L. J. C. P. 252; *Roper v. Levy* (1851), 21 L. J. Ex. 28; *It. Laing & Todd* (1853), 13 C. B. 276; *Roberts v. Eberhardt* (1857), 27 L. J. C. P. 70.

148. On party denying—Legal presumption.]—

Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, & throws the burden of proving the negative on the party who insists on it. Therefore, where a pltf. declared that defts., who had chartered his ship, put on board a dangerous commodity, by which a loss happened, without due notice to the captain, or any other person employed in the navigation, it lay upon him to prove such negative averment.—*WILLIAMS v. EAST INDIA CO.* (1802), 3 East, 192; 102 E. R. 571.

Annotations:—*Consd. R. v. Twynning* (1819), 2 B. & Ald. 386; *Calder v. Rutherford* (1822), 3 Brod. & Bing. 302. **Refd.** *R. v. Hawkins* (1808), 10 East, 211; *R. v. Haslingfield* (1814), 2 M. & S. 558; *Pearce v. Whale* (1826), 7 Dow. & Ry. K. B. 512; *R. v. Whiston* (1836), 1 Har. & W. 696; *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90; *Brass v. Maitland* (1856), 6 E. & B. 470; *Adalo v. Lawrence & Bullen*, [1903] 1 Ch. 318. **Mentd.** *Thornton v. Lance* (1815), 4 Camp. 231; *Langridge v. Levy* (1837), 2 M. & W. 519; *Newman v. Hardwicke* (1838), 2 J. P. 328; *Keates v. Cadogan* (1851), 15 Jur. 428; *It. v. Lister* (1857), 26 L. J. M. C. 196; *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94.

149. — Assent to agreement by counsel on his behalf.]—A husband being prosecuted & found guilty at the quarter sessions, of an assault upon his wife, the ct. recommended an accommodation of the dispute & differences between them. The counsel of the parties signed a memorandum of agreement, that the husband should allow the wife an annuity of £50, & the ct., adverting to the arrangement, passed sentence upon deft., imposing only a nominal fine upon him. It was proved that deft.'s attorney stated publicly in ct., that deft. had come into the agreement, & that deft. was in ct. when the arrangement was entered into. Deft., by his answer, denied that he ever consented to it; & on his part there were depositions that to some extent supported it:—**Held:** it was not incumbent on pltf. to prove that deft. did assent to an agreement entered into by his counsel, but on deft. to disprove it.—*ELWORTHY v. BIRD* (1829), Tam. 38; 48 E. R. 16.

Annotation:—*Mentd. Swinfen v. Swinfen* (1857), 24 Beav. 549.

150. — Allegations by principal of fraud of agent.]—In a suit by principal against agent, involving charges of fraud against deft.:—**Held:** the latter lay under the burden of disproving several particulars of pltf.'s case, although the truth of those particulars was not directly proved, but rested on circumstantial evidence only.—*BARKER v. HARRISON* (1846), 2 Coll. 516; 63 E. R. 854.

151. Extent of onus—Allegation of particular custom—Legality & existence.]—*THE HARRIET*, No. 137, *ante*.

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 9 *et seq.*, 28 *et seq.*

151 i. Effect of failure to discharge onus.]—In an action for foreclosure, in which deft. set up a purchase at a tax sale prior to 1899, & a conveyance of the equity of redemption from the mtgor., but did not prove the regularity of the sale, or that taxes were in arrear:—**Held:** the onus of proof that there were taxes in

arrear for which land might rightly be sold was upon the person claiming under the sale of taxes, & had not been satisfied.—*HISLOP v. JOSS* (1901), 22 C. L. T. 144; 3 O. L. R. 281.—**CAN.**

151 ii. —.]—Where two witnesses pledge oath against oath for what they assert & the trial judge does not find

152. — Allegation of malice & fraud—Action maintainable without either.]—If a declaration discloses a state of facts upon which an action may be maintained, although there be neither malice nor fraud, pltf. is not bound to prove either, though both be alleged, & may recover upon the liability which the facts disclose, though fraud & malice be disproved.—*SWINFEN v. CHELMSFORD* (LORD) (1860), 5 H. & N. 890; 29 L. J. Ex. 382; 2 L. T. 406; 6 Jur. N. S. 1035; 8 W. R. 545; 157 E. R. 1430.

Annotations:—*Refd. Connecticut Fire Insee. v. Kavanagh*, [1892] A. C. 473; *Goldrei, Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180. **Mentd.** *Kennedy v. Broun* (1863), 13 C. B. N. S. 677; *Strauss v. Francis* (1866), L. R. 1 Q. B. 379; *Matthews v. Munster* (1887), 20 Q. B. D. 141; *Noale v. Gordon Lennox*, [1902] 1 K. B. 838; *Nocton v. Ashburton*, [1914] A. C. 932.

153. —.]—*PARFITT v. LAWLESS*, No. 57, *ante*.

154. — On appeal—Injury suffered by appellant—& right to remedy.]—It is a rule universally admitted, that when an appeal is brought from any ct., the *onus probandi* lies upon applt. to show that he has suffered an injury, & that the remedy he seeks is one that he ought to obtain (*DR. LUSHINGTON*).—*THE CUBA* (1860), 1 Lush. 14; 8 L. T. 335; 6 Jur. N. S. 152; 167 E. R. 8.

Annotations:—*Refd. Trask v. Maddox*, *The Carrier Dove* (1863), 2 Moo. P. C. C. N. S. 243. **Mentd.** *The Chetah* (1868), L. R. 2 P. C. 205; *The Glenduror* (1871), 24 L. T. 499; *The Amérique* (1874), L. R. 6 P. C. 468; *Compagnie Generale Transatlantique v. The F. T. Barry & The Auburn, Compagnie Generale Transatlantique v. The Spray, The Amérique* (1875), 23 W. R. 488.

Effect of onus on stay of cross-actions.]—*See PRACTICE.*

155. Effect of failure to discharge onus.]—If, in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of pltf. as with the denial of defts., pltf. fails, for the very simple reason that pltf. is bound to establish the affirmative of the proposition; “*Ei qui affirmat non ei qui negat incumbit probatio*” (*LORD HALSBURY, C.*).—*WAKELIN v. LONDON & SOUTH WESTERN RY. CO.* (1886), 12 App. Cas. 41; 56 L. J. Q. B. 220; 55 L. T. 709; 51 J. P. 404; 35 W. R. 141; 3 T. L. R. 233, H. L.; *affg.* (1884), 65 L. J. Q. B. 224, C. A.

Annotations:—*Consd. Mersey Docks & Harbour Board v. Procter*, [1923] A. C. 253. **Refd.** *Barker v. L. & S. W. Ry.* (1891), 8 T. L. R. 31; *Pomfret v. L. & Y. Ry.*, [1903] 2 K. B. 718; *McDonald v. S.S. Banana*, [1908] 2 K. B. 926; *Render v. S.S. Zent* (1909), 100 L. T. 639; *Marshall v. S.S. Wild Rose*, [1910] A. C. 486; *Walker v. Murrays* (1911), 4 B. W. C. 409; *McKenzie v. Chilliwack Corp.*, [1912] A. C. 888; *Marshall v. Prince*, [1914] 3 K. B. 1047; *Jefferson v. Paskell* (1915), 85 L. J. K. B. 398; *Kerr (or Lendrum) v. Ayr Steam Shipping Co.*, [1915] A. C. 217; *Craig v. Glasgow Corp.* (1919), 35 T. L. R. 214; *Janvier v. Sweeney*, [1919] 2 K. B. 316; *Smith v. G. W. Ry.*, [1921] 2 K. B. 237. **Mentd.** *Bottany v. Waine* (1885), 1 T. L. R. 588; *Brown v. G. W. Ry.* (1885), 52 L. T. 622; *Murgatroyd v. Blackburn & Over Darwen Tram Co.* (1886), 3 T. L. R. 180; *Evans v. Rhyminoy L. B.* (1887), 4 T. L. R. 72; *Griffiths v. East & West India Dock Co.* (1888), 5 T. L. R. 43; *Smith v. Baker* (1889), 5 T. L. R. 518; *Smith v. S. E. Ry.*, [1896] 1 Q. B. 178; *Moore v. Ransome's Dock Committee* (1898), 14 T. L. R. 539; *Jackson v. General Steam Fishing Co.* (1909), 101 L. T. 401; *Lewis v. Ronald* (1909), 101 L. T. 534; *Low (or Jackson) v. General Steam Fishing Co.*, [1909] A. C. 523; *Evans v. Astley*, [1911] A. C. 674; *Jones v. Canadian Pacific Ry.* (1913), 83 L. J. P. C. 13; *Latham v. Johnson*, [1913] 1 K. B. 398; *Papworth v. Battersea B. C.* (1914), 79 J. P. 105; *Cole v. De Trafford*,

one more worthy of belief than the other, the party upon whom the onus lies has failed to satisfy it.—*COWIE v. ROBINS & SON* (1916), 34 W. L. R. 245; 10 W. W. R. 287; 9 Sask. L. R. 191.—**CAN.**

155 iii. —.]—*MANS v. UNION MEAT CO.*, [1919] App. D. 268.—**S. AF.**

[1918] 2 K. B. 523; Davidson v. M'Robb (or Officer), [1918] A. C. 304.

— **Presumption against party failing.**—See Nos. 1551, 1552, *post*.

B. How Ascertained.

156. Tests—Who entitled to verdict—If no evidence given.—In *assumpsit* for unworkmanlike execution of a contract, plea, that the work was properly done, *pltf.* is entitled to begin. Supposing no evidence to be given on either side, *deft.* would be entitled to the verdict, for it is not to be assumed that the work was badly executed; therefore the *onus* lies on *pltf.*—AMOS v. HUGHES (1835), 1 Mood. & R. 464, N. P.

157. — — — — —.]—The test to determine the order of beginning at a trial is to consider which party would be entitled to the verdict supposing no evidence given on either side, as the burden of proof must lie on his adversary.—LEETE v. GRESHAM LIFE INSURANCE SOCIETY (1851), 15 Jur. 1161.

158. — — — — —.]—ABRATH v. NORTH EASTERN RY. CO., No. 227, *post*.

159. — — — — —.]—The best tests for ascertaining on whom the burden of proof lies are, to consider first which party would succeed if no evidence were given on either side; & secondly, what would be the effect of striking out of the record the allegation to be proved. The *onus* lies on whichever party would fail, if either of these steps were pursued (FARWELL, L.J.).—TALBOT v. VON BORIS, [1911] as reported in 1 K. B. 854; 80 L. J. K. B. 661; 104 L. T. 524, C. A.

160. — — — — — If particular allegation struck out.]—TALBOT v. VON BORIS, No. 159, *ante*. Compare Sub-sect. 2, *post*.

C. When Onus Shifted.

(a) In General.

161. How far capable of being shifted—As matter of law.—PICKUP v. THAMES INSURANCE CO., No. 36, *ante*.

— **Before hearing—By confession & avoidance.**—Compare Nos. 199–206, *post*.

162. — — — — — Plea of fraud by defendant—Agreement set up by plaintiff suspicious.]—WEST v. HARGOOD, No. 128, *ante*.

163. During hearing—By evidence—Legitimacy so far presumptively established as to throw on the opposing party the burden of disproving it.—MAYO (VISCOUNTESS) v. BROWN (1757), 2 Lec. 391; 161 E. R. 380.

Annotation:—*Refd.* Dyke v. Wallis (1862), 2 Sw. & Tr. 466.

PART I. SECT. 6, SUB-SECT. 1.—

C. (a).

161 i. How far capable of being shifted—As matter of law.—In an action of trespass for seizing sheep, *deft.* pleaded that the sheep were trespassing upon his land, & that he took them to the nearest accessible pound, & there duly impounded them under the statute:—*Held*: *deft.* need not prove the latter part of his plea because it was for *pltf.* to show that he had not complied with the Act.—MAIN v. ROBERTSON (1876), 2 V. L. R. 25.—AUS.

161 ii. — — — — —.]—DENISON v. FULLER (1864), 10 Gr. 498.—CAN.

161 iii. — — — — —.]—*Mere* wrongful possession is insufficient to shift the burden of proof.—HANMANTRAV v. SECRETARY OF STATE FOR INDIA (1900), 1 L. R. 25 Bom. 287.—IND.

161 iv. — — — — —.]—WILLIAMS v. DOBBIE (1884), 11 R. (Ct. of Sess.) 982.—SCOT.

161 v. — — — — —.]—To discharge an *onus* & to transfer an *onus* are not identical expressions. If at any stage of a litigation the law casts upon one of the parties the burden of establishing a certain fact or facts, as essential to success, the mere production of evidence which makes the existence of those facts probable, does not in itself shift the *onus*, though it may go a long way towards satisfying it. It frequently happens, however, that in seeking to discharge the burden of proof which the law casts upon him a party to an action produces evidence from which a *ct.* would presume the existence of the facts upon which such discharge depends in the absence of any evidence on the other side sufficient to rebut that presumption. The position thus created, however, does not amount to a shifting of the legal *onus*, but to a question of the value & effect of the evidence given by the parties respectively.—COOH v. LICHTENSTEIN, [1910]

164. — — — — —.]—Proof by one of a family, that many years before, a younger brother of the person last seized had gone abroad, & that the repute of the family was that he had died there, & that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment.

The evidence was sufficient to call upon *deft.* to give *prima facie* evidence, at least that [the younger brother] was married (LORD ELLENBOROUGH, C.J.).—DOE, LESSEE OF BANNING v. GRIFFIN (1812), 15 East, 293; 104 E. R. 855.

Annotations:—*Refd.* Jackson, Jackson v. Ward, [1907] 2 Ch. 354. *Mentd.* Greaves v. Greenwood (1876), 45 L. J. Q. B. 795.

165. — — — — — Raising presumption of law—Treasure trove.]—In 1806, in the course of ploughing a field near the shore of Lough Foyle, certain gold articles, all lying together in a space of about 9 inches, were discovered at a depth of about 18 inches beneath the surface of the field. The articles, which were probably made between A.D. 200 & A.D. 400, were of considerable value & of a miscellaneous description, including a model of a boat & a hollow collar, inside of which were concealed several plaited chains. The articles were purchased privately by the Trustees of the British Museum. On a claim by the Crown for delivery up of the articles as being treasure trove:—*Held*: (1) the true inference to be drawn from the above circumstances was that the articles were originally intentionally concealed for the purpose of security, & therefore, were, *prima facie*, treasure trove; (2) the *onus* lay upon *defts.* to adduce satisfactory evidence to displace this *prima facie* inference, & *defts.* had failed to do so.—A.-G. v. BRITISH MUSEUM TRUSTEES, [1903] 2 Ch. 598; 72 L. J. Ch. 743; 88 L. T. 858; 51 W. R. 582; 19 T. L. R. 555.

166. — — — — —.]—The party who charges another with an act, is bound in the first instance to make out something like a case, but frequently by his proving certain circumstances he may throw the burden of other proof back on the opposite party.—THE CARRON (1853), 1 Ecc. & Ad. 91; 161 E. R. 53; *sub nom.* THE PURSUIT v. THE CARROU, 7 L. T. 441.

167. — — — — —.]—The *onus probandi* lies upon a party impeaching a will to show that it ought not to be admitted to proof, but where the party impeaching the will establishes the fact that a testatrix had lost her English domicile, having gained another elsewhere, & died in the acquired domicile, the *onus probandi* is in such circumstances

App. D. 178.—S. AF.

t. **During hearing—By evidence—Prima facie evidence.**—Where *deft.* served with process bears the same name as the party obtaining the goods, it is *prima facie* evidence that he was the party chargeable.—THAYER v. VANCE (1847), 2 Thom. 269.—CAN.

a. — — — — —.]—When *pltf.* in ejectment, capable of inheriting & *prima facie* entitled to inherit, makes out a reasonable case, the *ct.* will throw upon *deft.*, especially if he be a stranger to the title, the *onus* of showing a nearer heir.—DOE d. PLACE v. SKAE (1848), 4 U. C. R. 369.—CAN.

b. — — — — —.]—In an action against the owners of a steam-boat for damage done to *pltf.*'s bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, & that the injury complained of was thus caused:—*Held*;

Sect. 6.—Onus of proof and right to begin: Sub-sect. 1, C. (a) & (b) & D.]

shifted, & it lies upon the party propounding the will to prove that the law of the acquired domicile was such as to authorise a will in the form propounded.—**BREMER v. FREEMAN** (1857), 10 Moo. P. C. C. 306; 29 L. T. O. S. 251; 5 W. R. 618; 14 E. R. 508, P. C.

Annotations:—Mentd. *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. C. 285; *Whicker v. Hume* (1858), 7 H. L. Cas. 125; *Crookenden v. Fuller* (1859), Sea. & Sm. 3; *Di Sora v. Philipps* (1863), 10 H. L. Cas. 624; *Dogliotti v. Crispin* (1866), 15 L. T. 44; *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Wilkinson v. Corfield* (1881), 6 P. D. 27; *Bloxham v. Favre* (1884), 50 L. T. 766; *Concha v. Murrieta, De Mora v. Concha* (1889), 40 Ch. D. 543; *Hanfstaengl v. Empire Palace* (No. 2), *Hanfstaengl v. Newnes* (1894), 70 L. T. 854; *Barretto v. Young*, [1900] 2 Ch. 339; *Re Martin, Loustalan v. Loustalan*, [1900] P. 211; *Pepin v. Bruyere*, [1900] 2 Ch. 504; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *Re Wernher, Wernher v. Holt*, [1913] 1 Ch. 339; *Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K. B. 111.

168. — Reshifting.]—Where a party on whom the burden of proof lies has by evidence shifted the burden, the opposite party may reshift the burden by showing by other evidence that the evidence of the other side is not trustworthy in certain particulars.—**SEDDON v. BANK OF BOLTON** (1882), 19 Ch. D. 462; 51 L. J. Ch. 542; 46 L. T. 225; 30 W. R. 362.

169. — — —.]—**ABRATH v. NORTH EASTERN RY. CO.**, No. 227, *post*.

170. As between interlocutory motion & hearing.]—The *onus* may at the hearing be thrown on a deft., which, on interlocutory motion for injunction, lies on pltf.—**WELCH v. KNOTT** (1857), 4 K. & J. 747; 4 Jur. N. S. 330; 70 E. R. 310.

Annotations:—Mentd. *Leather Cloth Co. v. American Leather Cloth Co.* (1863), 4 De G. J. & Sm. 137; *Singer Machine Manufacturers v. Wilson* (1877), 3 App. Cas. 376; *Thwaites v. McEvilly, Cantrell & Cochrane v. Murphy & Bradshaw* (1903), 20 R. P. C. 663.

Fact within knowledge of other party.]—See Sub-sect. 1, C. (b), *post*.

That holder of negotiable instrument not holder in due course.]—See **BILLS OF EXCHANGE**, Vol. VI., pp. 175 *et seq.*

That payment by bankrupt not fraudulent preference.]—See **BANKRUPTCY**, Vol. V., p. 868, No. 7237.

(b) As to Facts peculiarly within Knowledge of One Party.

171. General rule.]—There exists an exception to the general rule that a party who alleges a matter must prove it, in cases in which the subject matter of the allegation lies peculiarly within the knowledge of one of the parties (**MELLOR, J.**).—**HIBBS v. ROSS** (1866), L. R. 1 Q. B. 534; 7

sufficient *prima facie* proof of negligence, & it lay upon defts. to account for the accident.—**CATARQUI BRIDGE CO. v. HOLCOMB** (1861), 21 U. C. R. 273.—**CAN.**

o. — — —.]—**WARD v. THE SHIP YOSEMITE** (1894), 3 B. C. R. 311.—**CAN.**

— — —.]—**SOVEREIGN BANK OF CANADA v. MCINTYRE** (1910), 44 S. C. R. 157.—**CAN.**

s. — — —.]—Where a question is in issue between the exor. of the estate of a deceased person & a nephew of deceased as to whether an advance by deceased to the nephew was a loan or gift, once the exor. has proved the advance the *onus* is shifted to the nephew to show it was a gift.—**Re TAYLOR'S ESTATE**, [1923] 2 D. L. R. 847; 2 W. W. R. 180.—**CAN.**

f. — — —.]—**SHIELDS v. WILKINSON** (1887), 1 L. R. 9 All. 398.—**IND.**

g. — — —.]—**SULEIMAN KADR BAHADUR v. MEHNDI BEGUM** (1897), 1 L. R. 25 Cal. 473; L. R. 25 Ind. App. 15; 2 C. W. N. 186.—**IND.**

h. — — —.]—Where a person is domiciled in England, & where there is no evidence that he ever resided in the colony, a *prima facie* case has been made out to show that at any specified period such person was not within the colony, & the burden of proving that he was within the colony at the time specified would be shifted.—**KELLY v. BENTINCK, CRAIG v. BENTINCK** (1902), 22 N. Z. L. R. 235.—**N. Z.**

PART I. SECT. 6, SUB-SECT. 1.—C. (b).

171 i. General rule.]—When once it has been established as against a person claiming to be entitled to land by adverse possession that he went into occupation of the land as a servant,

B. & S. 655; 35 L. J. Q. B. 193; 15 L. T. 67; 30 J. P. 613; 12 Jur. N. S. 812; 14 W. R. 914; 2 Mar. L. C. 397.

Annotations:—Mentd. *The Troubadour* (1866), L. R. 1 A. & E. 302; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743.

172. — Title.]—There being a course through which title may be lawfully derived, viz. by supposing defts. to be privy to the term, their possession will be *prima facie* referred to that privy, & if it be in fact referable to some other title, it is for those within whose knowledge the matter is to prove the fact (*per CUR.*).—**MAGDALEN HOSPITAL (GOVERNORS) v. KNOTTS** (1878), 8 Ch. D. 709; 47 L. J. Ch. 726; 38 L. T. 624; 26 W. R. 640, C. A.; *affd.* (1879), 4 App. Cas. 324, H. L.

Annotations:—Refd. *Churcher v. Martin* (1889), 42 Ch. D. 312. **Mentd.** *Webster v. Southey* (1887), 36 Ch. D. 9; *Bangor (Bp.) v. Parry*, [1891] 2 Q. B. 277; *Re Devon's S. E., White v. Devon, Re Stear, Stear v. Dobell*, [1896] 2 Ch. 562; *Kingston Race Stear v. Kingston Corp.*, [1897] A. C. 509; *Mid. Ry. v. Wright* (1901), 70 L. J. Ch. 411; *Canterbury Corp. v. Cooper* (1908), 99 L. T. 612; *Rickard v. Graham*, [1910] 1 Ch. 722; *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176.

173. — Registration of policy-holder.]—A policy of insurance against accidents issued by applt. co. in the form of a coupon provided that any claim must be made within twelve months of the registration of the holder's name. H. duly filled up the form of application for registration on Dec. 25, 1905, & posted it to applt. with the required premium. On Jan. 4, 1906, he received a letter, dated the previous day, inclosing an official receipt dated Dec. 29, 1905. The co. did not keep a regular register of names, but in practice the applications were stamped, dated, & filed on being received, after which intimation was sent to the holders of coupons that they had been duly registered. The coupons were afterwards placed in bundles alphabetically, to be kept "until the liability thereon expired." H. was injured in a railway accident on Dec. 28, 1906, & died on Dec. 29, in consequence. Notice of claim was given by his widow on Jan. 2, 1907:—**Held**: the *onus* was on the co. to prove that the registration was completed before Jan. 2, & in the absence of such proof, the claim must be held to have been made in time, & the company were liable.

It [the registration] is a matter peculiarly & solely within their [defenders'] knowledge, & the burden is on them to prove this if they can (**LORD LOREBURN, C.**).—**GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPN. v. ROBERTSON**, [1909] A. C. 404; 79 L. J. P. C. 1; 25 T. L. R. 685; *sub nom.* **GENERAL ACCIDENT, FIRE & LIFE**

ballie, or caretaker, the onus lies upon him to prove when & under what circumstances his possession of the land became a possession for himself; otherwise it will be held that Stat. Limitations has never commenced to run in his favour.—**O'NEIL v. HART**, [1905] V. L. R. 107.—**AUS.**

171 ii. —.]—**BROWN v. COCKBURN** (1876), 37 U. C. R. 592.—**CAN.**

171 iii. —.]—Where there is a through booking of goods which necessitates their being carried over lines owned by different cos. a condition limiting the liability of the contracting co. to wilful misconduct of its servants on its own line is valid. Where the goods are damaged in transit the *onus* of proving that they were not damaged by the wilful misconduct of the servants of the contracting co. on its line lies on the contracting co.—**MAHONY v. WATERFORD, LIMERICK & WESTERN RY. CO.**, [1900] 2 I. R. 273.—**IR.**

ASSURANCE CO. v. HUNTER, 101 L. T. 135; 53 Sol. Jo. 649, H. L.

174. Plaintiff without means of proving defendant's allegation.]—To an action brought by the assignees of a bkpt. for a debt due to bkpt.'s estate deft. cannot set off cash notes, issued by bkpt., payable to the bearer, bearing date before his bkpcy., unless he shows further that such notes came into his hands before the bkpcy.

It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, & of which he is supposed to be cognisant: but it is said in this case that it was incumbent on the assignees to prove the time when deft. received these notes. But the assignees could have no means of knowing that fact, whereas it must have been known to deft., & as the latter relied upon it & did not prove it, the assignees were entitled to recover (ASHHURST, J.).—DICKSON v. EVANS (1794), 6 Term Rep. 57; 101 E. R. 433.

*Annotations:—*Reid, Roberts v. Bethell (1852), 12 C. B. 778. *Mentd.* Re Milan Tram. Co., *Ex p.* Theys (1884), 25 Ch. D. 587; Re Gillespie, *Ex p.* Reid (1885), 14 Q. B. D. 963; Re Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546.

175. Whether difficulty of proof by plaintiff sufficient.]—Here pltf. relies on something done or permitted by the lessee, & therefore takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within deft.'s knowledge; but that does not vary the rule of law (LORD DENMAN, C.J.).—DOE d. BRIDGER v. WHITEHEAD (1838), 8 Ad. & El. 571; 3 Nev. & P. K. B. 557; 1 Will. Woll. & H. 521; 7 L. J. Q. B. 250; 2 Jur. 493; 112 E. R. 955.

*Annotation:—*Reid, Toleman v. Portbury (1870), L. R. 5 Q. B. 288.

176. Moral impossibility of obtaining evidence—Collision.]—In a question of collision it is a rule that the *onus probandi* never be thrown upon a party where there is a moral impossibility that he can obtain the evidence required.—THE CONCORD v. THE MANCHESTER (1840), 7 L. T. 441.

See, generally, SHIPPING.

177. Operation of rule—Affidavit by plaintiff in belief in negative.]—In general, in an affidavit directed to negative a fact in the knowledge of the opposite party, the deponent need only swear to his belief of the negative; & it is for the opposite party, in answer, to swear distinctly to the affirmative.—STOKES v. GRISSELL (1854), 14 C. B. 678; 2 C. L. R. 729; 23 L. J. C. P. 141; 23 L. T. O. S. 114; 18 J. P. 378; 18 Jur. 519; 2 W. R. 466; 139 E. R. 279.

*Annotations:—*Mentd. Lake v. Butler (1855), 5 E. & B. 92; Moufflet v. Colo (1872), L. R. 8 Exch. 32.

D. In Particular Instances.

Agency—Purchase of principal's property by agent—Proof of full disclosure.]—See AGENCY, Vol. I., pp. 472, 473, Nos. 1556, 1557.

Agriculture—Claim to compensation for disturbance by demand of increased rent.]—See AGRICULTURE, Vol. II., p. 48, No. 265.

Aliens—Proof of nationality.]—See ALIENS, Vol. II., p. 197, Nos. 555, 556.

Auction—Excuse for deviation from usual practice.]—See AUCTION & AUCTIONEERS, Vol. III., p. 6, No. 33.

Bailment—Hirer's duty to take care.]—See BAILMENT, Vol. III., p. 89, Nos. 222, 223.

178. Bankruptcy—Trustee claiming assets—Goods not in apparent possession of bankrupt.]—Creditors, holding an unregistered bill of sale, took possession of goods comprised in their bill of sale under an arrangement with their debtor,

independent of the bill of sale, amounting to a fraudulent preference. The trustee in bkpcy. of the debtor claimed the goods:—*Held*: the *onus probandi* lay on the trustee, & as the goods were neither in bankrupt's possession nor in his order & disposition, the claim failed.—*Re JORDAN, Ex p. SYMONS* (1880), 14 Ch. D. 693; 43 L. T. 106; 28 W. R. 803, C. A.

—**That debtor a trader.]**—See BANKRUPTCY, Vol. IV., p. 17, No. 77.

—**Domicil of debtor.]**—See BANKRUPTCY, Vol. IV., p. 27, Nos. 211–213.

—**Notice of act of bankruptcy.]**—See BANKRUPTCY, Vol. IV., p. 329; Vol. V., pp. 926, 927, Nos. 7580–7583.

—**Intent to defeat or delay creditors.]**—See BANKRUPTCY, Vol. IV., p. 75, No. 643.

—**Proof of fraudulent preference.]**—See BANKRUPTCY, Vol. V., pp. 854, 868, Nos. 7169–7172, 7235–7237.

—**Concealment of assets.]**—See BANKRUPTCY, Vol. V., p. 1082, No. 8865.

Bills of exchange—When payment pleaded.]—See BILLS OF EXCHANGE, Vol. VI., p. 362, Nos. 2387–2389.

Receipt of notice of dishonour.]—See BILLS OF EXCHANGE, Vol. VI., pp. 250, 265, 270, Nos. 1603, 1725, 1763.

—**Application of notice of dishonour.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 271, 275, Nos. 1771, 1808.

Loss arising from want of notice of dishonour.]—See BILLS OF EXCHANGE, Vol. VI., p. 287, No. 1903.

—**Bill accepted in partnership name for private debt—Proof of authority.]**—See BILLS OF EXCHANGE, Vol. VI., p. 100, Nos. 700, 701.

—**Proof of consideration.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 172 *et seq.*

—**Fraud, duress or illegality.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 175 *et seq.*, pp. 141, 209, 474, Nos. 925, 1285, 3019.

—**Alteration.]**—See BILLS OF EXCHANGE, Vol. VI., pp. 385, 386, Nos. 2525–2533.

—**Endorsement by agent—Whether on behalf of principal.]**—See AGENCY, Vol. I., p. 313, No. 358.

Proof of foreign law.]—See BILLS OF EXCHANGE, Vol. VI., p. 436, Nos. 2810, 2811.

179. Bill of sale—Proof of misdescription of party or witness.]—Under 17 & 18 Vict. c. 36, s. 1, where the occupation of a party to, or the witness of, a bill of sale, is not stated, the *onus* of proving that such party or witness has an occupation, lies on the party seeking to impeach the bill of sale on that ground.—SUTTON v. BATH (1858), 3 H. & N. 382; 31 L. T. O. S. 186; 157 E. R. 518; *sub nom.* BATH v. SUTTON, 27 L. J. Ex. 388.

*Annotations:—*Reid, Smith v. Cheese (1875), 1 C. P. D. 60; Castle v. Downton (1879), 5 C. P. D. 56. *Mentd.* Morewood v. South Yorkshire Ry. & River Dun Co. (1858), 3 H. & N. 798.

—*See, further, BILLS OF SALE, Vol. VII., pp. 91, 98, Nos. 522, 584.*

Carriers—Liability under special contract.]—See CARRIERS, Vol. VIII., p. 15, No. 66.

Negligence in carriage of persons.]—See CARRIERS, Vol. VIII., pp. 73, 93, Nos. 492, 631–633.

—**Negligence in carriage of goods.]**—See CARRIERS, Vol. VIII., p. 65, No. 440.

—**Negligence in carriage of animals.]**—See ANIMALS, Vol. II., p. 281, No. 550.

—**Wilful misconduct.]**—See CARRIERS, Vol. VIII., p. 66, No. 448.

—**Services included in charge for carriage.]**—See CARRIERS, Vol. VIII., p. 211, No. 1343.

Sect. 6.—Onus of proof and right to begin: Sub-sect. 1, D.; sub-sect. 2, A.]

Companies—Notice that shares not fully paid.]—*See COMPANIES*, Vol. IX., p. 299, Nos. 1852, 1853.

— That minutes of meeting inaccurate.]—*See COMPANIES*, Vol. IX., pp. 581, 582, Nos. 3885–3888.

— Invalidity of amalgamation of insurance companies.]—*See COMPANIES*, Vol. X., p. 1074, No. 7512.

— That contract entered into after winding up begun beneficial.]—*See COMPANIES*, Vol. X., p. 924, No. 6337.

Compulsory purchase of land—Bona fides of opinion as to necessity for purchase.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 107, No. 39.

— Existence of minerals under land compulsorily acquired.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 126, No. 163.

— Proof of title to land as superfluous.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 283, No. 2120.

Conflict of laws—Domicil—Proof of change.]—*See CONFLICT OF LAWS*, Vol. XI., p. 335, Nos. 230–236.

Contract—Consent.]—*See CONTRACT*, Vol. XII., p. 92, No. 561.

— Readiness to fulfil contract—Contract of marriage.]—*See HUSBAND & WIFE*.

— That parties not in pari delicto.]—*See CONTRACT*, Vol. XII., p. 287, No. 2359.

— Duress.]—*See CONTRACT*, Vol. XII., p. 97, No. 598; *FRAUDULENT & VOIDABLE CONVEYANCES*; *HUSBAND & WIFE*.

— Undue influence.]—*See CONTRACT*, Vol. XII., p. 111, Nos. 696–714.

— Fraud.]—*See MISREPRESENTATION & FRAUD*.

Copyright—Proof of infringement.]—*See COPYRIGHT*, Vol. XIII., p. 194, No. 289.

Criminal law.]—*See CRIMINAL LAW*, Vol. XIV., pp. 429 *et seq.*

— Proof of insanity.]—*See CRIMINAL LAW*, Vol. XIV., pp. 59, 60, 250, Nos. 253–255, 2458.

— Voluntary confessions.]—*See CRIMINAL LAW*, Vol. XIV., pp. 410 *et seq.*

— Nationality or allegiance of accused.]—*See CRIMINAL LAW*, Vol. XV., pp. 629, 741, Nos. 6658, 8006.

— Bigamy—Subsistence of first marriage.]—*See CRIMINAL LAW*, Vol. XV., pp. 739, 740, Nos. 7990–7994.

— Belief in freedom to remarry.]—*See CRIMINAL LAW*, Vol. XV., pp. 742, 743, Nos. 8013–8019, 8027.

— That accused British subject.]—*See CRIMINAL LAW*, Vol. XV., p. 741, No. 8006.

Deeds—Construction of ambiguous words.]—*See DEEDS*, Vol. XVII., p. 289, Nos. 1011, 1012.

Easement—Restriction of *prima facie* right.]—*See EASEMENTS*, Vol. XIX., p. 78, No. 472.

— Unity of possession.]—*See EASEMENTS*, Vol. XIX., p. 130, No. 880.

Executor—Bequest to.]—*See EXECUTORS*.

— Bona fide execution of discretionary power.]—*See EXECUTORS*.

Family arrangements—Knowledge & assent of parties.]—*See FAMILY ARRANGEMENTS*.

Fishery—Right to several fishery.]—*See FISHERIES*.

Fraud.]—*See MISREPRESENTATION & FRAUD*.

Fraudulent & voidable conveyances—Proof of voluntary nature of assignment.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*.

— Undue influence.]—*See FRAUDULENT & VOIDABLE CONVEYANCES*.

Highways—Proof of dedication.]—*See HIGHWAYS*.

Husband & wife—Proof of marriage.]—*See HUSBAND & WIFE*.

— Wife's separate property.]—*See HUSBAND & WIFE*.

— Gifts between spouses.]—*See HUSBAND & WIFE*.

— Implied liability for wife's debts & expenses.]—*See HUSBAND & WIFE*.

— Nullity suits.]—*See HUSBAND & WIFE*.

— Divorce suits.]—*See HUSBAND & WIFE*.

Infant—Whether purchases necessities.]—*See INFANTS*.

Innkeepers—Proof of negligence.]—*See INNS & INNKEEPERS*.

Insanity—Proof of.]—*See CRIMINAL LAW*, Vol. XIV., pp. 59, 60, 250, Nos. 253–255, 2458; *LUNATICS*.

Insurance—Proof of loss within policy.]—*See INSURANCE*.

— Policy vitiated by misrepresentation.]—*See INSURANCE*.

— Unseaworthiness.]—*See INSURANCE*.

Intoxicating liquors—Proof of want of licence.]—*See INTOXICATING LIQUORS*.

Landlord & tenant—Validity of notice to quit.]—*See LANDLORD & TENANT*.

— Proof of breach of covenant.]—*See LANDLORD & TENANT*.

Libel & slander—Where statement privileged.]—*See LIBEL & SLANDER*.

— Where justification pleaded.]—*See LIBEL & SLANDER*.

Limitation of actions—Proof that payment made on account of barred debt.]—*See LIMITATION OF ACTIONS*.

Lunacy—Proof of insanity.]—*See LUNATICS*.

Malicious prosecution.]—*See MALICIOUS PROSECUTION*.

Market overt—Sale in.]—*See MARKETS*.

Master & servant—In workmen's compensation cases.]—*See MASTER & SERVANT*.

— Justification of dismissal.]—*See MASTER & SERVANT*.

— Scope of authority.]—*See MASTER & SERVANT*.

Misrepresentation.]—*See MISREPRESENTATION & FRAUD*.

Moneylending—Registration under Moneylenders Act, 1900 (c. 51).]—*See MONEY & MONEY-LENDING*.

Mortgage—Proof of mortgage by deposit of deeds.]—*See MORTGAGE*.

— Fraudulent sale.]—*See MORTGAGE*.

— Wilful default in letting mortgaged property.]—*See MORTGAGE*.

Negligence—Effect of maxim "*Res ipsa loquitur*."—*See CARRIERS*, Vol. VIII., pp. 91–93; *NEGLECT*.

— Proof of contributory negligence.]—*See NEGLIGENCE*.

Nuisance.]—*See NUISANCE*.

Partners—Transactions by & with.]—*See PARTNERSHIP*.

Patent—Proof of novelty.]—*See PATENTS*.

Poor Law—Settlement.]—*See POOR LAW*.

Powers—Validity of execution.]—*See POWERS*.

Rates—Alteration in value.]—*See RATES & RATING*.

Real property—Ejectment actions.]—*See LANDLORD & TENANT*; *REAL PROPERTY*.

— Existence of "*cestui que vie*."—*See REAL PROPERTY*.

Shipping—Collision actions.]—See ADMIRALTY, Vol. I., pp. 196–198, Nos. 1113, 1114, 1121–1149.

Salvage actions.]—See ADMIRALTY, Vol. I., pp. 196, 197, Nos. 1115–1120.

Marine Insurance.]—See INSURANCE.
**Unseaworthiness.]—See INSURANCE; SHIP-
PING.**

Carriage by sea.]—See SHIPPING.

**Specific performance.]—See SPECIFIC PERFORM-
ANCE.**

**Agreement suspicious on face of it.]—See
SPECIFIC PERFORMANCE.**

Title to land.]—See SALE OF LAND.

**Trade—Restraint of trade.]—See TRADE &
TRADE UNIONS.**

Trade marks—User.]—See TRADE MARKS.

Improper registration.]—See TRADE MARKS.

Trespass—Justification.]—See TRESPASS.

**Trust—Proof of fraudulent execution of.]—See
TRUSTS & TRUSTEES.**

Breach of trust.]—See TRUSTS & TRUSTEES.

**Acquiescence by cestui que trust.]—
See TRUSTS & TRUSTEES.**

**Wills—Proof of testamentary nature of docu-
ment.]—See WILLS.**

Competency of testator.]—See WILLS.

**Revocation of former testamentary instru-
ment.]—See WILLS.**

Execution of will.]—See WILLS.

Undue influence.]—See WILLS.

SUB-SECT. 2.—RIGHT TO BEGIN.

A. In General.

180. On party alleging affirmative issue.]—If there is one affirmative in any of the issues, pltf. shall first go through his evidence as to all of them, but where the affirmative through the whole lies upon deft. he shall go first through his evidence.—**TYRRELL v. HOLT & HOPELEY** (1727), 1 Barn. K. B. 12; 94 E. R. 8.
Annotation:—Mentd. *Lowe v. Jolliffe* (1762), 1 Wm. Bl. 385.

181. —.]—Pltf.'s counsel has a right to begin & state the facts, although by a rule of ct. deft. is under obligation to admit pltf.'s case. It is not like the case of an issue, proof of the affirmative of which lies on deft.—**THWAITES v. SAINSBURY** (1831), 5 C. & P. 69, N. P.

182. —.]—In *assumpsit* for work & labour deft. pleaded that the "promise was made to pltf. & J., & not to pltf. alone." Replication, that the "promise was made to pltf. alone, & not to pltf. & J.":—**Held:** on this issue pltf. ought to begin.—**DAVIES v. EVANS** (1834), 6 C. & P. 619, N. P.

183. —.]—In covenant where the affirmative of the issues is on deft. he is entitled to begin, though the damages are unascertained.—**WOOTTON v. BARTON** (1835), 1 Mood. & R. 518, N. P.

184. —.]—To a *mandamus* to a rector to restore a parish clerk, the rector returned, that the clerk was guilty of acts of intoxication, & therefore he dismissed him. The clerk brought an action for a false return, & in his declaration recited the return, & negatived the allegations contained in it. The rector, by his plea, repeated the charges contained in the return:—**Held:** deft. had the right to begin.

Deft. ought to begin. The affirmative is certainly upon him, & as the presumption is, that pltf. has not been guilty of the misconduct imputed to him until the contrary is shown, deft. ought to proceed to prove such misconduct on the

part of pltf. (**LORD DENMAN, C.J.**).—**BOWLES v. NEALE** (1835), 7 C. & P. 262, N. P.

Annotation:—Mentd. *R. v. Marshland Smeeth & Fen District Comrs.*, [1920] 1 K. B. 155.

185. —.]—Trover by the assignees of a bkpt. against the sheriff for goods. Plea, that R. sued out a writ of *fi. fa.* against bkpt., & that it was delivered to the sheriff before the bkpcy., & that the sheriff seized & sold the goods; & that no docket had been struck against bkpt., neither had the sheriff notice of any act of bkpcy. Replication, that the judgment was obtained against bkpt. by *cognovit* in an action commenced by collusion, & that the *fiat* issued within two months after the seizure. Rejoinder, that the action was commenced adversely:—**Held:** pltf. must begin.

Questions of this sort must be decided more upon what justice to the parties requires, than upon any strict rule of practice. Here, the real affirmative is the proof of collusion (**COLERIDGE, J.**).—**SCOTT v. LEWIS** (1836), 7 C. & P. 347, N. P.

186. —.]—By a private Act, the co. were empowered to make roads over the railway, & for that purpose to alter the course of, or raise any, road or way. The co. diverted a highway, & erected a bridge to carry it over the railway. The original road was forty feet wide, & the substituted one only 27, less convenient for driving sheep & cattle. The span of the bridge was 33 feet, but it was continued with wing-walls & parapets to the distance of 168 feet, & the width of the road on the bridge & between the parapets, was only sixteen feet. Defts. claimed the right to begin, contending that the substance of the issue to be tried was, whether they were warranted by the Act in the works they had made; that it was for defts. to prove they had acted in conformity with the Act; & that, consequently, the affirmative of the issue lay upon them. The Crown said that defts. had done more than they were authorised to do:—**Held:** the affirmative of the issue was on the Crown, & the Crown was entitled to begin.—**R. v. LONDON & BIRMINGHAM RY. CO.** (1839), 1 Ry. & Can. Cas. 317.

Annotations:—Mentd. *R. v. Sharpe* (1840), 3 Ry. & Can. Cas. 33, n.; *R. v. Manchester & Leeds Ry.* (1842), 3 Q. B. 528; *R. v. Rigby* (1850), 14 J. P. 384.

187. —.]—In an action of trespass to land defts. pleaded not guilty, & a right of way. Ptf. replied *de injuriâ* to the plea of the right of way; & newly assigned, that the trespasses were committed "on other & different occasions" than that in the second plea mentioned. Defts. pleaded to the new assignment a payment of money into ct., & by this plea relinquished & abandoned so much of the general issue "as traverses or denies, or can be deemed or construed to traverse or deny the trespasses newly assigned, or any part thereof." Replication to this plea, accepting the sum paid into ct., "in full satisfaction & discharge of the several trespasses above newly assigned":—**Held:** as the plea of not guilty was not entirely withdrawn, pltf. had the right to begin.—**PRICE v. SEAWARD** (1841), Car. & M. 23, N. P.

188. —.]—By a policy of insurance on life, it was stipulated to be void, if anything stated by the assured to the directors of the assurance co., previous to the execution of the policy, should be untrue. A party desiring to be assured made a statement to the directors, that he had not been afflicted with a number of specified diseases, *inter alia*, or any other disorder which tends to the shortening of life. At his death his exors. sued

Sect. 6.—Onus of proof and right to begin: Subsect. 2, A. & B.]

on the policy, & in their declaration averred the truth of the statement made by the assured. Plea, that the statement was untrue, to wit, in this, that the assured, at the time of the making thereof, was afflicted with rupture; concluding, not to the contrary, but with a verification. Pltfs. replied *de injuriâ*.—*Held*: pltfs. were entitled to begin at the trial.—*ASHBY v. BATES* (1846), 15 M. & W. 589; 4 Dow. & L. 33; 15 L. J. Ex. 349; 7 L. T. O. S. 232; 153 E. R. 984; *previous proceedings*, 6 L. T. O. S. 523, N. P.

189. —.]—*OVERBURY v. MUGGRIDGE* (1858), 1 F. & F. 137, n.

190. — *Breach of warranty.*]—*FISHER v. JOYCE* (1839), cited 9 C. & P. at p. 338; 2 Mood. & R. at p. 255, N. P.

Annotations.—*N.F.* Osborn v. Thompson (1839), 9 C. & P. 337. *Dtd.* Doe d. Worcester Schools & Almshouses Trustees v. Rowlands (1840), 9 C. & P. 734. In *Fisher v. Joyce*, where the question was, whether a horse was sound, deft. pleaded that he was sound, & I allowed him to begin; but I think I was wrong (COLERIDGE, J.).

191. —.]—In *assumpsit* on the warranty of a horse, where pltf. in his declaration averred that the horse was not sound; & deft. only pleaded that it was; upon which plea issue was joined:—*Held*: pltf. had the right to begin.—*OSBORN v. THOMPSON* (1839), 9 C. & P. 337; 2 Mood. & R. 254, N. P.

192. *S. P. ROBERTS v. HIGGS* (1840), 4 Jur. 273.

See, generally, ANIMALS, Vol. II., pp. 268 et seq.; SALE OF GOODS.

193. — *Breach of covenant to repair.*]—*DOE d. WORCESTER TRUSTEES v. ROWLANDS*, No. 239, *post*.

194. — *Allegation of fraud.*]—If a pltf. in a writ of error, to reverse an outlawry, has assigned as error, that he was beyond sea when the exigent was awarded; & deft. in error plead, that "he left the realm of his fraud & covin, & to defeat him of his just debt, & for the purpose of avoiding the outlawry"; & on this plea issue be taken; at the trial deft. in error begins, because the affirmative of the question of fraud lies on him, for the fact of pltf. in error being actually abroad is admitted on the record.—*BRYAN v. WAGSTAFF* (1825), 2 C. & P. 125; Ry. & M. 327, N. P.; *subsequent proceedings* (1826), 5 B. & C. 314.

Annotations.—*Mentd.* Vice v. Anson (1827), 3 C. & P. 19; Drummond v. Pigou (1835), 2 Scott, 228; Beauclerk v. Hook (1851), 20 L. J. Q. B. 485.

195. — *Though negative in form.*]—*SMITH v. DAVIES*, No. 123, *ante*.

196. — *Judgment impeached.*]—On an interpleader issue, where the question was whether certain goods, etc., which had been seized by the sheriff under a *fi. fa.* issued upon a judgment were the property of pltfs., as assignees of a bkpt., or of deft., the execution creditor, deft. pleaded that by virtue of the *fi. fa.* & as against pltfs. he was entitled to the proceeds of the goods, etc.:—*Held*: pltfs. were entitled to begin at the trial.—*EDWARDS v. MATTHEWS* (1847), 4 Dow. & L. 721; 16 L. J. Ex. 291; 9 L. T. O. S. 151; 11 Jur. 398.

Annotations.—*Refd.* Brandford v. Freeman (1850), 5 Exch. 734; Leete v. Gresham Life Insce. Soc. (1851), 15 Jur. 1161.

197. — *Question of substance not form.*]—In considering which party ought to begin, it is not so much the form of the issue which is to be considered as the substance & effect of it, & the judge will consider what is the substantial fact

to be made out, & on whom it lies to make it out.

In an action of covenant to repair, the breach was, that deft. did not repair, but suffered the premises to be ruinous, etc. Plea, that deft. did repair, & did not suffer the premises to become ruinous, etc.:—*Held*: on this issue pltf. must begin.—*SOWARD v. LEGGATT* (1835), 7 C. & P. 613, N. P.

Annotation.—*Mentd.* Lister v. Lane & Nesham, [1893] 2 Q. B. 212.

198. — *Question of justice to parties.*]—*SCOTT v. LEWIS*, No. 185, *ante*.

199. — *Where defendant confesses & avoids—Plea of justification.*]—In an action of assault & battery, & a plea of justification only, & issue thereon, deft.'s counsel has a right to begin, the affirmative of the issue being on him. The *onus* of proving damages does not give pltf.'s counsel a right to begin.—*BEDELL v. RUSSELL* (1825), Ry. & M. 293, N. P.

Annotation.—*Refd.* Cooper v. Wakley (1828), 3 C. & P. 474.

200. — *Plea of liberum tenementum.*]—In trespass, with plea of *liberum tenementum*, & no general issue, deft. is entitled to begin.—*PEARSON v. COLES* (1832), 1 Mood. & R. 206, N. P.

201. — *Plea of fraud.*]—In covenant to recover damages for the non-performance of an agreement under seal, if deft. plead only that the deed was obtained by fraud & covin, the affirmative of the issue being upon him, his counsel has a right to begin, although the damages are uncertain, & evidence is requisite to guide the jury in forming their estimate of them.—*REEVE v. UNDERHILL* (1834), 6 C. & P. 773; 1 Mood. & R. 440, N. P.

202. — *Plea of consent.*]—In an action of debt for a penalty of £50, for carrying pltf. to a prison under mesne process within 24 hours; deft. pleaded that it was by pltf.'s own consent. Replication, that pltf. did not consent:—*Held*: on these pleadings deft. should begin, as pltf. did not go for unliquidated damages.—*SILK v. HUMPHRY* (1835), 7 C. & P. 14, N. P.; *subsequent proceedings* (1836), 4 Ad. & El. 959.

Annotation.—*Mentd.* Gordon v. Laurie (1840), 7 L. T. O. S. 201.

203. — *Plea of set-off.*]—A deft. in *assumpsit* pleaded as to £20 payment, & as to the residue, a set-off:—*Held*: on these pleadings deft. must begin.—*COXHEAD v. HUISSH* (1835), 7 C. & P. 63, N. P.

204. — *Plea of mutual release.*]—If in an action for breach of promise of marriage deft. plead that, before any breach of the promise, the parties mutually agreed to exonerate each other from their promises, & this being denied by the replication:—*Held*: on these pleadings deft. is entitled to begin.—*STANTON v. PATON* (1843), 1 Car. & Kir. 148.

Annotation.—*Refd.* Morcer v. Whall (1845), 5 Q. B. 447.

205. — *Plea that money lost by gaming.*]—In covenant for repayment of money, the only plea being that the deed was a mtge. deed, given to secure money lost by gaming; if deft. admits the amount of the claim, he is entitled to begin, even although the claim, in a technical view, is partly for unliquidated damages.—*HILL v. FOX* (1858), 1 F. & F. 136, N. P.; *subsequent proceedings*, 31 L. T. O. S. 118; (1859), 4 H. & N. 359, Ex. Ch.

Annotations.—*Mentd.* Howkins v. Bennet (1860), 7 C. B. N. S. 507; Higginson v. Simpson (1877), 2 C. P. D. 76; Read v. Anderson (1882), 10 Q. B. D. 100; Carhill v. Carbolic Smoke Ball Co. (1892), 67 L. T. 837.

206. — Plea of inevitable accident.]—In a cause of damage debts. by their pleadings, made no charge against pltf., but only denied generally the averments in the petition, & pleaded inevitable accident:—*Held*: debts. ought to begin.—**THE THOMAS LEA** (1868), 38 L. J. Adm. 37; 20 L. T. 1017; 3 Mar. L. C. 261.

Annotation:—**Refd.** *The Abraham* (1873), 28 L. T. 775.

207. — Payment or satisfaction of bill of exchange.]—See **BILLS OF EXCHANGE**, Vol. VI., p. 362, Nos. 2387–2389.

207. On party on whom onus of proof lies—Collision of vessels.]—**THE GEORGE ARKLE** (1861), 5 L. T. 290.

208. ——*Held*: counsel for debts. had the right to begin, the *onus probandi* substantially lying upon them.—**MIDLAND RY. CO. v. GREAT WESTERN RY. CO.** (No. 2) (1876), 2 Ry. & Can. Tr. Cas. 298.

209. ——**SAQUI v. LAZARUS**, No. 146, *ante*.

210. ——A wife presented a suit for judicial separation on the ground of the husband's alleged cruelty. The husband by his answer denied the charges of cruelty, & claimed a decree of nullity on the ground of the wife's incapacity. The wife then amended her petition, & after denying the husband's allegation, sought a declaration of nullity on the ground of the husband's incapacity. At the trial:—*Held*: the burden of proof was on the wife, who had therefore the right to begin.—**L. v. L. (OTHERWISE M.)** (1908), 25 T. L. R. 43; 53 Sol. Jo 32.

211. Where both parties allege affirmative issues.]—In an action on a policy of insurance on a life debt. pleaded that the declaration contained in the policy was untrue in this, that the person was not in good health. Replication, that the declaration in the policy was true, & that the party was in good health:—*Held*: on these pleadings, pltf. was entitled to begin.—**RAWLINS v. DESBROUGH** (1837), 8 C. & P. 321; 2 Mood. & R. 70, N. P.

Annotations:—**Consd.** *Ashby v. Bates* (1846), 15 M. & W. 589. **Mentd.** *Geach v. Ingall* (1845), 14 M. & W. 95.

212. ——If in an action on a life policy debts. plead that at the time of the declaration of health & the policy the habits of the person whose life was insured were immoderate & intemperate, & that he was addicted to excessive drinking. Replication: that his habits were moderate & temperate, & not immoderate & intemperate, & that he was not addicted to excessive drinking:—*Held*: on these pleadings pltf. should begin, as there was an affirmative on both sides.—**CRAIG v. FENN** (1841), Car. & M. 43, N. P.

213. ——A declaration on promissory notes by indorsee against drawer contained counts on the notes only, without any other count, & debt. pleaded as to part of the amount, payment

of that sum while the payee was the holder of the notes, & as to the residue, a payment of a further sum into ct., & that pltf. had sustained no greater damages. Replication to the first plea, that the payment was not made while the payee was the holder of the notes; & to the second plea, that pltf. had sustained greater damages:—*Held*: if the first issue had stood alone, debt. would have been entitled to begin, but the second issue entitled pltf. to begin, although it was stated by debt.'s counsel, that, if debt. succeeded on the first issue, pltf., as matter of calculation, could not be entitled to any thing on the second issue.—**CRIPPS v. WELLS** (1843), Car. & M. 489, N. P.

Annotation:—**Apprvd. & Foll'd.** *Booth v. Millns* (1846), 15 M. & W. 669.

214. ——In an action in which there are several issues, pltf. is entitled to begin if the affirmative of any one issue is upon him.—**BOOTH v. MILLNS** (1846), 15 M. & W. 669; 4 Dow. & L. 52; 15 L. J. Ex. 354; 7 L. T. O. S. 340; 153 E. R. 1019.

Annotations:—**Refd.** *Edwards v. Matthews* (1847), 11 Jur. 398; *Clack v. Clack*, [1906] 1 K. B. 483.

215. ——**DOE d. WORCESTER TRUSTEES v. ROWLANDS**, No. 239, *post*.

Right of Crown to begin.]—See **CONSTITUTIONAL LAW**, Vol. XI., p. 528, Nos. 325–327.

216. On re-hearing.]—On re-hearing applt. is to begin.—**WILLIAMS v. WILLIAMS** (1866), 2 Ch. App. 15; 36 L. J. Ch. 200; 12 Jur. N. S. 994, L. C. & L. JJ.

217. Wrong party allowed to begin—Whether ground for new trial.]—In ejectment, the lessor of pltf. claimed as devisee under a will of J. At the trial, debts. admitted the seisin of J., & the due execution of that will, & that pltf. was *primâ facie* entitled under it, & proposed to set up a subsequent will revoking the first will. Debts. were permitted to begin:—*Held*: pltf. should have been permitted to begin.

Debts. proposed to admit a part only of pltf.'s case; & in fact, set up a case that denies that pltf. is devisee (**COLTMAN, J.**).—**DOE d. BATHER v. BRAYNE** (1848), 5 C. B. 655; 3 New Pract. Cas. 44; 17 L. J. C. P. 127; 10 L. T. O. S. 416; 136 E. R. 1035.

Annotation:—**Refd.** *Brandford v. Freeman* (1850), 5 Exch. 734.

B. How Ascertained.

218. Question for judge—Whether decision subject to review.]—The question, which party is entitled to begin on the trial of a cause, is to be determined by the judge at *Nisi Prius*, & his determination will not be reviewed by the judges in banc.—**LOPES v. ANDREWS** (1826), 5 L. J. O. S. K. B. 46.

219. ——**—**—(1) At *Nisi Prius* the test

PART I. SECT. 6, SUB-SECT. 2.—A.

208 i. On party alleging affirmative issue—Where defendant confesses & avoids—Plea of inevitable accident.]—Where the defence is inevitable accident pltf. must begin.—**THE JOHN OWEN**, 5 C. L. T. 565.—**CAN.**

206 ii. ——On the trial of an action of ejectment brought by the heir-at-law, where debt.'s counsel admits the heirship of the lessor of pltf., & that his ancestor died seised of the property sought to be recovered, but sets up a will in his debt.'s favour, debt. is entitled to begin & to have the general reply.—**DOE d. HAZEN v. JAMES CHURCH** (1879), 18 N. B. II.

208 i. On party on whom onus of proof lies.]—Onus of proving property

as stated in the pleas is on debt., & he is bound to begin.—**GRAHAM v. WETMORE** (1859), 4 All. 373.—**CAN.**

208 ii. ——Where the onus of proving a complete defence, such as "account stated" in a partnership action, is on debt. he must begin, & if pltf. does not call any evidence pltf. will still have the right to reply.—**FOOK LUNG FIRM v. LAI YUEN FIRM** (1912), 7 Hong Kong L. R. 99.—**HONG KONG.**

217 i. Wrong party allowed to begin—Whether ground for new trial.]—Where in debt on an indemnity bond debt. pleaded that if pltf. was damaged she was damaged of her own wrong, & pltf. took issue on the plea, & did not assign any breach: & at the trial, pltf. not offering any evidence to prove that

she was damaged, was nonsuited, on a motion for a new trial, on the ground that the issue was on debt., & that he should have begun:—*Held*: the nonsuit was right.—**HAMILTON v. DAVIS** (1845), 2 U. C. R. 137.—**CAN.**

217 ii. ——A new trial will not be granted for misdirection as to the right to begin, unless it appear that injustice may have been occasioned by it.—**MCDONALD v. MCHUGH** (1855), 12 U. C. R. 603.—**CAN.**

k. After report of accountant—Under remit to explicate grounds of action.]—*Qu.*: which party should open in a debate, after the report of an accountant under a remit with a view to explicate the grounds of action.—**WESTERN BANK OF SCOTLAND v. BAIRD'S TRUSTEES** (1872), 45 Sc. Jur.

Sect. 6.—Onus of proof and right to begin: Subsect. 2, B., C. & D.]

to determine which party is entitled to begin, is to consider which would get the verdict if no evidence were given on either side, as the right to begin is with his adversary.

(2) If the decision of a judge at *Nisi Prius* as to which party is entitled to begin be decidedly erroneous, the ct. in banc will review it.—**HUCKMAN v. FERNIE** (1838), 3 M. & W. 505; 1 Horn & H. 149; 7 L. J. Ex. 163; 2 Jur. 444; 150 E. R. 1245.

Annotations:—As to (1) **Appl.** *Lect. v. Gresham Life Insee. Soc.* (1851), 15 Jur. 1161. As to (2) **Folld.** *Geach v. Ingall* (1845), 14 M. & W. 95. **Expld.** *Booth v. Mills* (1846), 15 M. & W. 669; *Brandford v. Freeman* (1850), 5 Exch. 734. **Folld.** *Leete v. Gresham Life Insee. Soc.* (1851), 15 Jur. 1161. **Reid.** *Edwards v. Matthews* (1847), 16 L. J. Ex. 291; *Clack v. Clack*, (1906) 1 K. B. 483. **Generally, Mentd.** *Elkin v. Janson* (1845), 14 L. J. Ex. 201; *Wheulton v. Hardisty* (1857), 8 E. & B. 232; *Griffiths v. Fleming*, (1909) 1 K. B. 805.

220. ——[As to the right to begin in those cases which are not within the rule of the judges as to personal injuries, libel, & slander, but where the affirmative of the issue is on deft.:—**Held:** it must be left to the judge to decide in each particular case, whether a substantial question is the assessment of damages, & if it is, pltf. will be entitled to begin.—**HOGGETT v. EXLEY** (1839), 9 C. & P. 324; 2 Mood. & R. 251, N. P.

Annotation:—**Folld.** *Worcester Free School & Trinity Almshouses v. Rowlands* (1841), 6 Jur. 177.

221. Substance not form of issue material.]—**SOWARD v. LEGGATT**, No. 197, *ante*.

See, also, No. 238, *post*.

222. Tests to be applied—Who entitled to verdict—If particular allegation struck out.]—Upon the question as to who is to begin, is it not the proper test to examine whether, if the particular allegation be struck out of the plea, there will or will not be a defence to the action? It is immaterial whether the allegation be in the affirmative or negative (**ALDERSON, B.**).—**MILLS v. BARBER** (1836), 1 M. & W. 425; *Tyr. & Gr.* 835; 5 L. J. Ex. 204; 150 E. R. 500.

Annotations:—**Mentd.** *Woodgate v. Field* (1842), 2 Haro, 211; *Re Boyse, Crofton v. Crofton* (1886), 55 L. T. 391.

223. ——[If no evidence given.]—**AMOS v. HUGHES**, No. 156, *ante*.

224. ——[To a declaration on an agreement for not repairing premises in a reasonable time, deft. pleaded that he did repair within a reasonable time:—**Held:** on these pleadings, pltf. should begin; for if no evidence was offered on either side, deft. would succeed.—**BELCHER v. M'INTOSH** (1839), as reported in 8 C. & P. 720, N. P.

Annotations:—**Mentd.** *Proudfoot v. Hart* (1890), 25 Q. B. D. 42; *Calthorpe v. McOscar*, [1923] 2 K. B. 573.

225. ——[—]—**HUCKMAN v. FERNIE**, No. 219, *ante*.

226. ——[—]—**Assumpsit** on a policy of assurance on life, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the insurance co. before the execution of the policy, should be untrue. In this declaration the assured stated, that "he was at that time in good health, & not afflicted with any disorder, nor addicted to any habit tending to shorten life; that he had not at any time been afflicted with insanity, etc.; that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs; & that T. was at that time his usual medical attendant." The declaration in the cause averred the truth of this declaration

& statement of the assured. Deft. pleaded pleas, respectively alleging, (1–5) that the declaration & statement of the assured was untrue in this, that at the time of making it he had had spitting of blood, consumptive symptoms, an affection of the lungs, an affection of the liver, & a cough of an inflammatory & dangerous nature; 6thly, that at that time he was affected with a disorder tending to shorten life; 7thly, that he was not at that time in good health; & 8thly, that he had falsely averred therein that T. was his usual medical attendant. Issues were joined on these pleas:—**Held:** pltf. was entitled to begin at the trial, the issue on the seventh plea & *semble*, on the other pleas also, being upon him.

The question is, for whom would the verdict be entered upon that issue, if no evidence were given on either side. No intendment could be made that a man had had a spitting of blood, or the contrary (**ALDERSON, B.**).—**GEACH v. INGALL** (1845), 14 M. & W. 95; 15 L. J. Ex. 37; 4 L. T. O. S. 98; 9 Jur. 691; 153 E. R. 404.

Annotations:—**Folld.** *Ashby v. Bates* (1846), 15 M. & W. 589. **Mentd.** *Thorn v. Bigland* (1853), 1 W. R. 290.

227. ——[—]—Whenever litigation exists, somebody must go on with it; pltf. is the first to begin; if he does nothing, he fails; if he makes a *prima facie* case, & nothing is done to answer it, deft. fails. The test, therefore, as to the burden of proof or *onus* of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the *onus* of proof shifts, & at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, & the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of *onus* of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of *onus* of proof (**BOWEN, L.J.**).

The term "*onus* of proof" may be used in more ways than one. Sometimes when a cause is tried the jury is left to find generally for either pltf. or deft., & it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests, & when & at what period it shifts. Issues again may be left to the jury upon which they are to find generally for pltf. or deft., & they ought to be told on whom the burden of proof rests; & indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law which have to be explained to the jury (**BOWEN, L.J.**).—**ABRATH v. NORTH EASTERN RY. CO.** (1883), 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 47 J. P. 692; 32 W. R. 50; 15 Cox, C. C. 354, C. A.; on appeal (1886), 11 App. Cas. 247, H. L.

Annotations:—**Reid.** *Bradshaw v. Goodwin* (1894), 10 T. L. R. 491; *R. v. Stoddart* (1909), 73 J. P. 348. **Mentd.** *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884), 50 L. T. 274; *Harrison v. National Provincial Bank of England* (1885), 2 T. L. R. 70; *Ponfold v. Grosvenor*

Bank (1886), 2 T. L. R. 759; *Edwards v. Annett* (1887), 3 T. L. R. 671; *Lea v. Charrington* (1889), 61 L. T. 222; *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Flood v. Jackson*, [1895] 2 Q. B. 21; *Nevill v. Fine Arts & General Insee.*, [1895] 2 Q. B. 156; *Wakelin v. L. & S. W. Ry.*, [1896] 1 Q. B. 189, n.; *Comford v. Carlton Bank*, [1899] 1 Q. B. 392; *Citizens' Life Assoc. v. Brown*, [1904] A. C. 423; *Cox v. English, Scottish & Australian Bank*, [1905] A. C. 168; *Jones v. Hulton*, [1909] 2 K. B. 444; *R. v. Stoddart* (1909), 2 Cr. App. Rep. 217; *R. v. Bradshaw, etc.* (1910), 4 Cr. App. Rep. 240; *R. v. Horn* (1912), 76 J. P. 270; *Wiffen v. Bailey & Komford U. D. C.* (1914), 78 J. P. 187; *Bradshaw v. Waterlow*, [1915] 3 K. B. 527; *R. v. Immer, R. v. Davis* (1917), 118 L. T. 416; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

228. ———.] — *LEETE v. GRESHAM LIFE INSURANCE SOCIETY*, No. 157, *ante*.
Compare Sub-sect. 1, *ante*.

C. When Right Shifted.

Where defendant confesses & avoids.]—See Nos. 199–206, *ante*.

229. Plaintiff's case admitted in part.]—In ejectment, where the lessor of pltf. claims under a will, & deft. under a codicil thereto, the validity of which is the question between them, deft. on admitting the title of the lessor of pltf. under the will, has a right to begin & to have the general reply.—*DOE d. CORBETT v. CORBETT* (1813), 3 Camp. 368.

*Annotations:—***Refd.** *Doe d. Bather v. Brayne* (1848), 5 C. B. 655. **Refd.** *Doe d. Warren v. Bray* (1828), Mood. & M. 166.

230. ———.] — In ejectment where the lessor of pltf. claimed as heir of W., & deft. claimed the whole property as devisee under the will of W., & part of it also under the marriage settlement made on her marriage with W.:—**Held:** deft.'s admitting at the trial that the lessor of pltf. was the heir of W. did not entitle deft. to begin; but if deft. had claimed title under the will only, & had admitted the title of the lessor of pltf. as heir, it would have been otherwise.—*DOE d. LEWIS v. LEWIS* (1843), 1 Car. & Kir. 122; 1 L. T. O. S. 458.

231. ———.] — *DOE d. BATHER v. BRAYNE*, No. 217, *ante*.

232. Plea of justification as to part—Judgment suffered by default as to residue.]—In an action for a libel, when there is no general issue, but a justification is pleaded as to part, & judgment is suffered by default as to the residue, pltf. is entitled to begin.—*WOOD v. PRINGLE* (1833), 1 Mood. & R. 277, N. P.

233. Effect of special plea.]—To an action for breach of promise of marriage deft. did not plead the general issue, but only that pltf., after the promise, conducted herself in a lewd, unchaste, & immodest manner, etc.:—**Held:** on this state of the pleadings pltf. had the right to begin.—*HARRISON v. GOULD* (1836), 7 C. & P. 580.

D. In Particular Instances.

234. In action for damages.]—Where real damages are not the object of the action, the party on whom the affirmative issue lies is entitled to begin. *Qu.*: whether a new trial can be obtained on the ground that a party has been improperly deprived of his right to begin?—*BURRELL v. NICHOLSON* (1833), 6 C. & P. 202; 1 Mood. & R. 304, N. P.

*Annotations:—***Refd.** *Huckman v. Fernie* (1838), 3 M. & W. 505; *Aston v. Perkes* (1840), 9 C. & P. 231.

235. ———.] — **False imprisonment.]—**In an action for false imprisonment, if deft. plead as a justification that pltf. stole feathers, & that he was there-

fore imprisoned, & pltf. reply, *de injuria*, pltf. is entitled to begin, although this is no plea of the general issue, & the affirmative is on deft.—*ATRINSON v. WARNE* (1834), 6 C. & P. 687, N. P.

236. ———.] — *WOOTTON v. BARTON*, No. 183, *ante*.

237. ———.] — **Question for judge.]—***HOGGETT v. EXLEY*, No. 220, *ante*.

238. ———.] — **Amount of damages unascertained.]—**Pltf. is entitled to begin where damages of an unascertained amount are the object of the action, though the affirmative of the issues on the record be with deft.—*CARTER v. JONES* (1833), 6 C. & P. 64; 9 C. & P. 232, n.; 1 Mood. & R. 281, N. P.

*Annotations:—***Consd.** *Wootton v. Barton* (1835), 1 Mood. & R. 518. **Refd.** *Doe d. Worcester Trustees v. Rowlands* (1840), 9 C. & P. 734; *Chapman v. Emden* (1841), 9 C. & P. 712. **Mentd.** *Doe d. Duncan v. Edwards* (1839), 1 Will. Woll. & H. 566.

239. ———.] — **In actions in form *ex contractu*, pltf. is entitled to begin, if the substantial question is the assessment of damages, though the affirmative of the issues be on deft. In covenant or an indenture of lease, suggesting breaches, that deft. did not use & occupy the premises demised in a good & proper manner, & did not well & sufficiently repair the same; pleas, that deft. did use & occupy the premises in a good & proper manner, & did well & sufficiently repair the same:—**Held:** pltf. was entitled to begin.—*DOE d. WORCESTER TRUSTEES v. ROWLANDS* (1841), 9 C. & P. 734; *sub nom.* *WORCESTER FREE SCHOOL & TRINITY ALMS-HOUSES (GOVERNORS & SUPERVISORS) v. ROWLANDS*, 5 Jur. 177.**

*Annotations:—***Mentd.** *Smith v. Pent* (1853), 9 Exch. 161; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Conquest v. Ebbetts*, [1896] A. C. 490.

240. ———.] — **In all cases at *Nisi Prius* in which pltf. claims damages, the amount of which is unascertained, he has a right to begin, although the affirmative of the issue on the record rests with deft.**

In an action of covenant by an attorney's clerk for improperly dismissing him, plea, that he conspired with B., & in pursuance of that conspiracy was guilty of divers acts of misconduct, which the plea set out, which came to deft.'s knowledge, who thereupon dismissed him; replication *de injuria*:—**Held:** pltf. was entitled to begin.—*MERCER v. WHALL* (1845), 5 Q. B. 447; 1 New Pract. Cas. 246; 14 L. J. Q. B. 267; 5 L. T. O. S. 304; 9 Jur. 576; 114 E. R. 1318.

*Annotations:—***Refd.** *Cannam v. Farmer* (1849), 3 Exch. 698. **Mentd.** *Lomax v. Arding* (1855), 10 Exch. 734; *Philps v. Clift* (1859), 28 L. J. Ex. 153; *Raymond v. Minton* (1866), L. R. 1 Exch. 244.

241. ———.] — *HILL v. FOX*, No. 205, *ante*.

242. ———.] — **In an action for negligence, the only plea being accord & satisfaction:—**Held:** pltf. was entitled to begin.—***PIM v. EASTERN COUNTIES RY. CO.* (1860), 2 F. & F. 133.

Where defendant pleads fraud.]

244. ———.] — **Where damage liquidated.]—***SILK v. HUMPHREY*, No. 202, *ante*.

245. ———.] — **Trespass—Plea of justification.]—**In trespass, where there are special pleas of justification, but no plea of the general issue, deft. is entitled to begin, although the declaration alleges special damage.—*FISH v. TRAVERS* (1829), 3 C. & P. 578, N. P.

243. ———.] — **In trespass for entering the close of pltf., the plea justified in assertion of a right, & the replication traversed the right. The counsel for pltf. declining to state that he went for substantial damages, the judge decided**

Sect. 6.—Onus of proof and right to begin: Sub-sect. 2, D. Sect. 7: Sub-sect. 1.]

that the action was brought to try a right, & deft. was entitled to begin:—*Held*: the decision was right.—*CHAPMAN v. RAWSON* (1846), 8 Q. B. 673; 15 L. J. Q. B. 225; 10 Jur. 287; 115 E. R. 1026.

See, generally, TRESPASS.

247. In action on contract—Non-repair.]—

(1) If, in an action of covenant for non-repair, etc., deft. plead affirmative pleas, which are denied by the replication, deft. is entitled to begin.

(2) The new rule of practice made by the Judges as to the right to begin, does not extend to actions of contract.—*LEWIS v. WELLS* (1835), 7 C. & P. 221.

248. ———.]—SOWARD v. LEGGATT, No. 197, ante.

249. ———.]—BELCHER v. M'INTOSH, No. 224, ante.

250. ———.]—DOE d. WORCESTER TRUSTEES v. ROWLANDS, No. 239, ante.

251. ———.]—The rule of the judges as to the right to begin does not extend to actions of covenant, &, *semble*: it does not extend to any cases of contract.—*CHAPMAN v. EMDEN* (1841), 9 C. & P. 712, N. P.

——— On bill of exchange—Want of consideration.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 173, No. 1079.

Plea of discharge by payment.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 362, Nos. 2387, 2389.

Bill taken by plaintiff with notice of defect—Fraud.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 175, No. 1095.

Illegality.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 179, No. 1118.

——— Absence of consideration.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 173, 181, Nos. 1079, 1129.

& money count.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 482, No. 3057.

SECT. 7.—EVIDENCE RECEIVED IN PART ENTITLES WHOLE TO BE GIVEN.

SUB-SECT. 1.—CONNECTED MATTERS.

252. Documentary evidence—Pleading.]—The party against whom an answer in Chancery is produced in evidence may have the whole of it

read.—*BATH (EARL) v. BATHERSEA* (1694), 5 Mod. Rep. 9; 2 Bos. & P. 548, n.; Bull. N. P. 236; 12 Vin. Abr. (Evidence) 111, pl. 31; 87 E. R. 487. *Annotation:—Held. Doe d. Foster v. Derby* (1834), 1 Ad. & El. 783.

253. ——— Account—Entries both charging & discharging.]—A book in which an exor. has kept an account of receipts & payments may, if the absence of vouchers is properly explained, be admitted to discharge the exor. as well as to charge him.—*DARSTON v. OXFORD (EARL)* (1701), 1 Eq. Cas. Abr. 10; Prec. Ch. 188; 3 P. Wms. 401, n.; 21 E. R. 834; *reversd.* on other grounds, *sub nom. ORFORD (EARL) v. DASTON* (1702), COLLES, 229, H. L.

Annotations:—Mentd. Morrice v. Bank of England (1736), Cas. temp. Talb. 217; *Maltby v. Russell* (1825), 2 Sim. & St. 227; *Re Radcliffe, European Assoc. Soc. v. Radcliffe* (1878), 7 Ch. D. 733; *Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569.

254. ———.]—Book of account being read as evidence by one side by way of charge, may be read as evidence by the other side by way of discharge.—*CARTER v. COLRAIN (LORD)* (1740), Barn. Ch. 126; 27 E. R. 581, L. C.

255. ———.]—MORRIS v. BURCHELL (1840), 13 L. T. O. S. 71.

256. ——— Declarant deceased.]—Entries in the books of the deceased attorney of deft. admitted as evidence for pltf. in a bill of foreclosure, to prove that the whole mtge. money had been paid to deft., & there was no usury; such entries though not against the interest of the attorney, being found in an account in which there were entries against his interest.—*CLARK v. WILMOT* (1841), as reported in 1 Y. & C. Ch. Cas. 53; 62 E. R. 787; *on appeal, sub nom. CLARKE v. WILMOT* (1843), 1 Ph. 276, L. C.

Annotations:—Mentd. Gabriel v. Sturgis (1846), 15 L. J. Ch. 201; *Staffurth v. Pott* (1848), 2 De G. & Sm. 571.

257. ———.]—In taking accounts between a mtgor. & a deceased mtgee. of a barge, an account book kept by the latter in his own handwriting containing entries of payments made to him by mtgor. as well as disbursements made by him on account of the barge s admissible on behalf of the mtgee.'s exors. in evidence as containing entries against interest.—*HUDSON & HUMPHREY v. SWIFTSURE (OWNERS), THE SWIFTSURE* (1900), 82 L. T. 389; 16 T. L. R. 275; 9 Asp. M. L. C. 65.

258. ——— Balance of amount in favour of declarant.]—DOE d. TEYNHAM (LORD) v. TYLER, No. 738, post.

PART I. SECT. 7, SUB-SECT. 1.

252 i. Documentary evidence—Pleading.]—In an action for the recovery of land, plifs. claimed title under a deed from the exors. of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office, with the affidavit of verification attached. Plifs. sought to support their case by reference to a certain statement in deft.'s pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the exors. of S.:—*Held*: they could not take that part of the pleading which suited their purpose & reject the rest: they could not use a scrap of it to eke out the insufficiency of their own evidence.—*BARBER v. MCKAY* (1839), 17 O. R. 562.—*CAN.*

m. ——— Account—Particulars to prove payment.]—Particulars of demand served by pltf. on deft., containing an admission of payment on account, & showing a balance in favour of pltf., were put in at the trial by deft. to prove the payment. Pltf. then re-

lied upon the particulars so put in by deft. as a link in the chain of evidence, to show that he was entitled to a verdict for the balance therein mentioned:—*Held*: though the particulars rendered by pltf. & made use of by deft. were not evidence *per se* of the balance as therein stated, still the whole of the particulars ought to go to the jury as a fact in connection with other facts of the case, to assist them in forming their verdict.—*KEESER v. EMPEY* (1847), 4 U. C. R. 47.—*CAN.*

n. ——— Admissions against interest.]—In answer to an action brought by architects, claiming fees for the preparation of sketches or designs for deft., the latter, when examined as a witness, admitted that the sketches had been prepared for him by plifs., but stated that there was an understanding that they were not to be paid for unless used by him, & that they had not been used. It appeared that deft., at the time the plans were invited, had not yet purchased the land for the proposed buildings, & that he had asked for plans from several architects:—

Held: the admission of deft. could not be divided, for the purpose of obtaining a commencement of proof, there being no improbability in his statement, or indication of bad faith, or other circumstance, to bring the case within the exceptions of 60 Vict. (Q), c. 50, s. 20, amending art. 1243 of the Civil Code.—*COX v. PACAUD* (1902), Q. R. 23 S. C. 9.—*CAN.*

o. ——— Letters.]—Extracts from a letter embodied in an affidavit cannot be noticed; either the whole letter or a copy should be before the ct., or at least, it should be sworn that the letter contains nothing more relating to the action.—*VAUGHAN v. ROSS* (1851), 8 U. C. R. 506.—*CAN.*

p. ———.]—At law a party producing a letter, or other document in evidence cannot use it partially, but makes the entire evidence. When the answer of a party in another cause is resorted to as evidence, the whole of it is admissible both at law & in equity.—*BOARDMAN v. JACKSON* (1813), 2 Ball. & B. 382.—*IR.*

q. ———.]—A defender doc,

259. ————.]—*WILLIAMS v. GEAVES*, No. 739, *post*.

— **Admissions against interest.**]—*See* Nos. 274, 275, 726, *post*.

280. — **Letters—Shown to witness in cross examination.**]—On cross examination, some letters, written by a witness who was not a party in the cause, were put into her hand & she was asked to explain the meaning of certain passages therein contained & whether what she wrote in such passages was true:—*Held*: the other party was entitled to have the whole of such letters read.—*SMITH v. PRICKETT & MORRELL* (1861), 7 Jur. N. S. 610.

See, generally, Part V., Sect. 6, sub-sect. 6, *post*.

261. — **Referred to in depositions.**]—In an action brought by plffs. on the mtge. deed, plffs. gave in evidence a deposition of the deft. before magistrates on a charge against S. of forging other deeds, & which deposition was supposed to contain an admission by deft. of the genuineness of plffs.' deed. Letters written by S. to deft. were produced before the magistrates, & referred to in the depositions. In these letters, written after the payment of the £420, S. alleged that he had been unable to obtain the money, & made various excuses for the delay:—*Held*: the letters were admissible in evidence for deft.—*PAINTER v. ABIL* (1863), as reported in 33 L. J. Ex. 60; 8 L. T. 287.

Annotation:—*Mentd.* *Ellston v. Deacon* (1866), L. R. 2 C. P. 20.

262. — **Letters & answers.**]—Deft. who puts in evidence a correspondence, consisting of several letters between himself & pltf., has a right to give in evidence a letter written by him to pltf., in reply to pltf.'s last letter, which bore date on the day before deft.'s letter.—*ROE v. DAY* (1836), 7 C. & P. 705, N. P.

263. ————.]—It was proposed on the part of a pltf. to give in evidence a letter written by deft.'s attorney, which purported to be an answer to a letter written to him by pltf.'s attorneys:—

not make a letter evidence by putting it into the hands of a witness for the purpose of cross-examination. When part of a paragraph is read for pursuer, defender is entitled to insist that the whole shall be read.—*EDWARDS v. MAC INTOSH* (1823), 3 Murr. 369.—*SCOT*.

r. — **Document subject of action—Libel.**]—Pltf. wrote a book & sent a copy as published to defts. for review. In an action for libel contained in the review, the whole book was put in evidence. At the commencement of the book was a note explaining the author's qualifications upon the subject of the work & referring to favourable comments in the *Australian Journalist*: & also a preface containing extracts from letters from distinguished men, in praise of pltf.'s work:—*Held*: the whole book as published & sent to defts., including the prefatory notes, was properly admitted in evidence.—*MARKS v. SUNDAY TIMES NEWSPAPER CO.* (1915), 15 S. R. N. S. W. 490.—*AUS*.

a. — **Affidavit—Papers annexed thereto.**]—In an action of slander for charging pltf. with perjury, some of the counts stated in the indictment that the words were spoken of & concerning the pltf., & of & concerning a certain affidavit, etc.; deft. justified, setting out the affidavit, & alleging certain statements therein contained to be wilfully false. The affidavit referred to two papers which were annexed, but there was no positive proof that they were annexed when the affidavit was sworn to by pltf.:—*Held*: there was sufficient *prima facie* evidence

to let in the whole affidavit, & the admission of part to be read without the papers annexed was not correct, & the innuendoes not sufficiently proved.—*MILNER v. GILBERT* (1847), 3 Kerr, 617.—*CAN*.

t. — **Articles of partnership agreement.**]—Where, on the cross-examination of pltf., deft.'s counsel examined him as to the time he entered into a partnership, & his interest in it, pltf. was held to be entitled to go into the contents of the whole agreement, although it appeared there was written articles.—*TOZER v. HUTCHISON* (1869), 1 Han. 540.—*CAN*.

a. — **Examination of deft. before trial.**]—At the close of the defence, pltf.'s counsel without objection, put in deft.'s examination before trial. Pltf.'s counsel, in addressing the jury, read a portion thereof; & the judge, in his charge, read other portions:—*Held*: could be no objection to the judge reading such other portions, as they were properly in evidence.—*SCOUALL v. STAPLETON* (1886), 12 O. R. 200.—*CAN*.

b. — **All terms to be proved.**]—Where a party endeavours to prove by oral testimony the contents of a written document, the ct. before giving effect to such testimony should be convinced that all the terms have been proven. It is not sufficient for the party undertaking such a duty to furnish evidence of certain clauses which support his claim, but he must set out the whole document so that the ct. may be able to give effect to all its provisions, & that by testimony of the

Held: if pltf.'s counsel put in this letter of deft.'s attorney, he should also call for & put in the letter to which it was an answer, & not leave it to deft. to put in the letter of pltf.'s attorneys as his evidence.—*WALSON v. MOORE* (1845), 1 Car. & Kir. 626.

224. — **Single letter self-explanatory.**]—(1) Deft.'s son, who was under age, had lodged with pltf. for some time, during a part of which he had paid for his board, etc. He afterwards fell ill, but continued with pltf. who supplied him with necessaries. The father being applied to by pltf. for money, wrote in answer to the effect, that he could not advance any at that time, but that his son would come into possession of £80, in the following month, & that he would be able to pay what he owed pltf. himself:—*Held*: the letter was no admission of a liability in the father.

(2) A letter which fully explains itself, is admissible in evidence, without that to which it is an answer.—*MORTIMORE v. WRIGHT* (1840), 6 M. & W. 482; 9 L. J. Ex. 158; 4 Jur. 465; 151 E. R. 502.

Annotations:—As to (1) *Refd.* *Shelton v. Springett* (1851), 11 C. B. 452; *Bazeley v. Porder* (1868), L. R. 3 Q. B. 559; *Healing v. Healing* (1902), 51 W. R. 221; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90. *Generally, Mentd.* *Linegar v. Hodd* (1848), 17 L. J. C. P. 106; *Dickenson v. Wright* (1860), 5 H. & N. 401.

265. — **Letter with endorsement thereon.**]—In an action by assignee of an insolvent, a letter written by deft. was given in evidence; on the back of it something had been written by the insolvent:—*Held*: deft.'s counsel were entitled to have that read.—*DAGLEISH v. DODD* (1832), 5 C. & P. 238, N. P.

Contract contained in series of letters.]—*See* *CONTRACT*, Vol. XII., p. 79; *DEEDS*, Vol. XVII., p. 245.

266. **Verbal statements & declarations.**]—The whole of the account which a party gives of a transaction must be taken together, & his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his cotemporaneous assertion of a fact favourable to

clearer nature. The document need not be set forth in evidence in its very words, but its exact sense & effect must be shown.—*ROSS v. WILLIAMSON* (1887), 14 O. R. 184.—*CAN*.

c. — **Forged documents of title—Other unimpeachable evidence.**]—If a party put in evidence in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeachable, the ct., in rejecting the forged documents, will take the unimpeachable evidence into consideration, & if satisfied, adjudicate thereon.—*SEVVAJI VIJAYA BHAGUNADHA VAL-OJI KRISHNAN COPALDAR v. CHINNA NAYANA CHETTI* (1864), 10 Moo. Ind. App. 151.—*IND*.

d. — **Document enclosed in another—Both to be produced.**]—A party cannot use a document which was enclosed in another, without producing the latter, although no notice to produce was served.—*WRIGHT v. LEE* (1842), Arn. M. & O. 311.—*IR*.

266 i. **Verbal statements & declarations.**]—In 1875, N. purchased printing materials from C. The price, \$5,000, was paid but the deed erroneously stated it to be \$7,188.40, which was therein acknowledged. C. remained in possession & carried on the printing business in partnership with M. for several months, when they failed, appt. being assignee to their estate. In 1876, N. claimed the plant, stating they purchased in good faith & paid the agreed price, but the deed erroneously stated the price at \$7,188.40. The assignee claimed payment of \$2,188.40, balance between the consideration mentioned & \$5,000 paid,

Sect. 7.—Evidence received in part entitles whole to be given: Sub-sects. 1 & 2.]

himself; & that, not merely as evidence that he made such a counter claim, but as admissible evidence of the existence of the matter in his discharge, which he asserts.—*RANDLE v. BLACKBURN* (1813), 5 Taunt. 245; 128 E. R. 683.

Annotation:—Mentd. Harrison v. Turner (1847), 11 Jur. 817.

267. —[—] (1) The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts.

(2) The whole of what a party says at the same time, must be given in evidence, & what he says in his favour must not be taken as true, but must be left, under all circumstances, for the jury to say whether they believe it or not (*BEST, C.J.*).—*SMITH v. BLANDY* (1825), Ry. & M. 257, N. P.

268. —[—]—If the drawer of a bill for £200 not having received due notice of its dishonour, say, that he does not mean to insist upon want of notice, but add, that he is only bound to pay the whole of his statement must be taken together, & the holder in an action against him can only recover to the amount of the £70.—*FLETCHER v. FROGGATT* (1827), 2 C. & P. 569, N. P.

269. —[—]—Pltf.'s brother, who was examined on interrogatories, having been asked upon cross-examination as to some particulars of a conversation which pltf. had told him, he, pltf., had held with deft., & being asked, on re-examination, to detail the whole conversation, stated that pltf. had informed him that deft. had expressed his regret at being obliged to direct the search:—*Held*: this evidence was admissible.—*GLYNN v. HOUSTON* (1811), 2 Man. & G. 337; 4 State Tr. N. S. App. 1368; 2 Scott, N. R. 548; 5 Jur. 195; 133 E. R. 775.

Annotation:—Mentd. Scott v. Seymour (1862), 10 W. R. 739.

270. —[—] **Conversation.**—*THOMSON v. AUSTEN*, No. 534, *post*.

271. —[—]—[—]—*GLYNN v. HOUSTON*, No. 209, *ante*.

272. —[—] **Qualified admission.**—Where pltf.'s case was clearly supported by a qualified admission made by deft.:—*Held*: no misdirection that the judge did not distinctly tell the jury that the whole admission must be taken together.—*BECKHAM v.*

before delivery. The evidence for the assignee was the testimony of N. that the price, \$5,000, as agreed had been paid, corroborated by C.:—*Held*: the only evidence in support of applt.'s contention being that of resp., applt. could not divide the admission in order to avail himself of what was favourable & reject what was unfavourable.—*FULTON v. MCNAMEE* (1878), 2 S. C. R. 470.—*CAN.*

270 i. —[—] **Conversation.**—*HALIFAX BANKING Co. v. SMITH* (1890), 18 S. C. R. 710.—*CAN.*

e. —[—] **Documents subject of conversation.**—S., a gauger at S., sent defts. a certificate of quantity of molasses contained in a number of casks by them sold to the pltf.s, as ascertained by a regauging. This certificate he afterwards saw in defts.' possession, & conversed with one of them about it. The conversation between S. & defts. having been received in evidence, the certificate was offered in evidence, & received subject to objection:—*Held*: as the conversation was admissible, the certificate, concerning which they were conversing, was also admissible.—*COX v. McMANN* (1879), 19 N. B. R. 121.—*CAN.*

f. —[—] **Judicial statements.**—Where the judicial statements of a

defender were founded on, to the effect of eluding a plea of prescription, they must be taken as a whole.—*NOBLE v. SCOTT* (1843), 5 Durl. (Cl. of Sess.) 723; 15 Sc. Jur. 330.—*SCOT.*

g. —[—] **Information disclosing commission of offence.**—Where a statement has been made or information given as a whole disclosing the commission of an offence, the ct. is not justified in allowing in evidence portions of such statements or information because such portions may happen to be words not in themselves disclosing the commission of an offence.—*ROBINSON v. BENSON & SIMMONS*, [1918] W. L. D. 1.—*S. AF.*

272 i. —[—] **Qualified admissions.**—*Held*: pltf. could not give evidence of the admission made by deft. in a former suit as to the promise, without also putting in the qualification by which it was accompanied, showing that the promise was *nudum pactum*.—*STUART v. MOTT* (1893), 24 N. S. R. 526.—*CAN.*

272 ii. —[—]—[—]—*BAIKANTHANATH KAMAR v. CHANDRA MOHAN CHOWDHRY* (1868), 1 B. L. R. A. C. 133; 10 W. R. 190.—*IND.*

272 iii. —[—]—[—]—A defender admitted the debt sued for, subject to a

OSBORNE (1843), 6 Man. & G. 771; 7 Scott, N. R. 520; 2 L. T. O. S. 188; 134 E. R. 1103.

Against interest.—*See* No. 275, *post*.
273. Declarations against interest.—*PERCIVAL v. NANSON*, No. 726, *post*.

274. —[—] **Declarant deceased.**—*R. v. BIRMINGHAM OVERSEERS*, No. 705, *post*.

—[—] **Accounts.**—*See* Nos. 256–258, *ante*.

275. —[—] **Whether verbal or written.**—A verbal or written declaration against proprietary interest is evidence, not only of that fact which is against interest, but also of all other circumstances contained in it. Therefore, a verbal statement & a written entry in a book, made by a deceased person while in the undisturbed occupation of a house, that he rented it at £22 a year, & paid the rent for the same, is evidence in an issue between strangers, not only in proof of the tenancy & of the amount of rent payable for the same, but also in proof of the rent having been paid.—*R. v. EXETER GUARDIANS* (1869), 1 L. R. 4 Q. B. 341; 1 B. & S. 433; 38 L. J. M. C. 126; 20 L. T. 693; 33 J. P. 550; 17 W. R. 850.

Annotations:—Foll. Watson v. Sandford (1879), 40 L. T. 39. *Consd.* Ward v. Pitt, [1913] 2 K. B. 130; *Re Adams*, Benton v. Powell, [1922] P. 240. *Reid*, Bowley v. Atkinson (1879), 13 Ch. D. 283.

—[—] **Declarant deceased.**—*See, generally*, Part II., Sect. 5, sub-sect. 2, *post*.

Production & inspection of documents on examination of witness, *see* Part V., Sect. 6, sub-sect. 6, *post*.

SUB-SECT. 2.—DISCONNECTED MATTERS.

276. Matter disconnected inadmissible—Unless explanatory.—If pltf. read a passage from deft.'s answer as evidence of a particular fact, deft. has no right to read subsequent matter connected with it by such words as "but" & "and" unless the subsequent matter be explanatory of the passage read by pltf.—*DAVIS v. SPURLING* (1829), 1 Russ. & M. 61; Tambl. 199; 39 E. R. 25.

Annotations:—Mentd. A.-G. v. Chesterfield (1854), 18 Beav. 596; Blaggrave v. Routh (1856), 2 K. & J. 509; Gething v. Keighley (1878), 9 Ch. D. 547.

277. —[—]—Letters of the husband exhibited by the wife are evidence against him & explanations therein contained of his conduct, with respect to

counter claim or part of the record, & not connected in time or origin with the debt sued for:—*Held*: the qualification must be taken with the admission, there being no evidence of the debt except the admission.—*DONALDSON v. DONALDSON* (1852), 24 Sc. Jur. 504.—*SCOT.*

PART I. SECT. 7, SUB-SECT. 2.

276 i. Matter disconnected inadmissible—Unless explanatory.—A deft., by his answer, admitted that he was devisee as alleged in the bill, but added that his right to deal with the property had been taken away by a suit for administration in England:—*Held*: the latter statement was not an explanation of the former; & the admission as to the will might be read by pltf. as evidence without making evidence of what followed.—*STICKNEY v. TYLEE* (1867), 13 Gr. 193.—*CAN.*

277 i. —[—]—Part of a conversation had been given in evidence by a witness on direct examination:—*Held*: the other part could not be given on cross-examination, as it was not connected with what had been already proved.—*HALIFAX BANKING Co. v. SMITH* (1890), 18 S. C. R. 710.—*CAN.*

277 ii. —[—]—A witness was asked

the matter charged are to be taken into the cts. consideration, but other statements therein are not evidence for the husband, at least in debating the plea.—*NEELD v. NEELD* (1831), 4 Hag. Ecc. 263; 102 E. R. 1442.

Annotations.—*Mentd.* *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *Russell v. Russell*, [1897] A. C. 395.

278. — Though relating to subject-matter of action.—A witness, who has been cross-examined as to what pltf. said in a particular conversation, cannot, on that ground, be re-examined as to other assertions, made by pltf. in the same conversation, but not connected with the assertions to which the cross-examination related. Although the assertions, as to which it is proposed to re-examine, be connected with the subject-matter of the present suit.—*PRINCE v. SAMO* (1838), 7 Ad. & El. 627; 3 Nev. & P. K. B. 139; 1 Will. Woll. & H. 132; 7 L. J. Q. B. 123; 2 Jur. 323; 112 E. R. 606.

Annotation.—*Consd.* *Sturge v. Buchanan* (1839), 10 Ad. & El. 598.

279. ——(1) The general rule of evidence that, if one side puts in evidence a document for the purpose of proving part of it, the other side has a right to have the whole put in, does not apply to merchants' or traders' books of account containing entries of receipts & payments; therefore, if one side puts in such books of accounts to prove certain items of receipts, that does not entitle the other side to put those books in evidence to prove payments, unless the different items are so mixed up together as clearly to form one transaction.

(2) In taking accounts, entries made in the books of one of the accounting parties may be used in evidence against him. But entries in his favour may not be used by him in evidence unless directly & intimately connected with some entry which is used on the other side.

(3) Although an entry of receipt is good evidence of such receipt as against the person making it, an entry of payment is not evidence of such payment in favour of such person.—*REEVE v. WHITMORE* (1865), 2 Drew. & Sm. 446; 6 New Rep. 314; 12 L. T. 724; 11 Jur. N. S. 722; 13 W. R. 913; 62 E. R. 690.

280. Accounts—Entries on credit side not connected with entries on debit side—Not necessary for explanation.—Entries in a steward's book in his favour, not referring to or necessary to explain entries against him, will not be evidence of such facts, even though, at the end of the account, a balance is struck of all the items, which balance is against the steward.—*KNIGHT v. WATERFORD* (MARQUESS) (1841), 4 Y. & C. Ex. 283; 10 L. J. Ex. Eq. 57; 5 Jur. 818; 160 E. R. 1013; *revid.* on other grounds, *sub nom.* *WATERFORD* (MARQUIS) *v.* *KNIGHT* (1844), 11 Cl. & Fin. 653, 11 L.

Annotations.—*Apld.* *Doe d. Kinglake v. Boviss* (1849), 7 C. B. 456. *Consd.* *R. v. Exeter Grdns.* (1869), 10 B. & S. 433. *Reid.* *Whaley v. Carlisle* (1867), 15 W. R. 1183. *Mentd.* *Raine v. Cairns* (1841), 4 Ware, 327; *Nixon v. Taft Vale Ry.* (1849), 7 Hare, 136; *South Staffordshire Ry. v. Hall* (1851), 3 Mac. & G. 353; *Shepherd v. Londonderry* (1852), 16 Jur. 796.

281. — Declarant deceased.—An ancient roll, found amongst the muniments of a manor, containing the reeve's account of moneys received by him on account of the lord, followed by an account of moneys expended by him on account of the lord, was tendered as evidence of a fact noticed in one of the items of discharge for which the reeve took credit in the account. This

entry was rejected on the ground that it did not appear on the face of the account that the reeve gave credit for any sum applied to the discharge of that particular item:—*Held*: the evidence was properly rejected.—*DOE d. KINGLAKE v. BEVISS* (1849), 7 C. B. 456; 18 L. J. C. P. 128; 12 L. T. O. S. 452; 137 E. R. 181.

Annotations.—*Expld.* *Hudson & Humphrey v. Swiftsure*, (Owners), *The Swiftsure* (1900), 82 L. T. 389. *Reid.* *Whaley v. Carlisle* (1867), 15 W. R. 1183; *De la Warr v. Miles* (1881), 29 W. R. 809; *Ward v. Pitt*, [1913] 2 K. B. 130. *Mentd.* *Waterpark v. Fennell* (1859), 7 H. L. Cas. 650; *Hastings v. N. E. Ry.*, [1899] 1 Ch. 656.

282. Declarations by deceased persons in course of duty—Entries outside scope of duty excluded.—*PERCIVAL v. NANSON*, No. 726, *post*.

283. ——*TROTTER v. MACLEAN*, No. 851, *post*.

284. — Whether evidence of collateral facts—Certificate of arrest by sheriff's officer—Statement as to place of arrest.—A sheriff's officer sent a written memorandum to the sheriff's office, stating that he had arrested A. at a certain place, this return was filed at the sheriff's office, & the officer being dead, was received in evidence to prove the place of such arrest in an action between A. & a third party; the ct. granted a new trial, intimating a strong opinion that such return was not evidence of the place of arrest, but giving the party an opportunity of putting the question upon the record. *Semble*: such return was not receivable in evidence for any purpose.—*CHAMBERS v. BERNASCONI* (1831), 1 Cr. & J. 451; 1 Tyr. 335; 9 L. J. O. S. Ex. 125; 148 E. R. 1499; *subsequent proceedings* (1834), 1 Cr. M. & R. 347, Ex. Ch.

Annotations.—*Expld.* *Poole v. Dicks* (1835), 1 Bing. N. C. 649. *Distd.* *Milne v. Leisler* (1862), 7 H. & N. 786; *Lyell v. Kennedy* (1887), 50 L. T. 647. *Reid.* *Marks v. Lahee* (1837), 3 Bing. N. C. 408; *Edie v. Kingsford* (1854), 14 C. B. 759. *Mentd.* *Doe d. Welsh v. Langfield* (1847), 16 M. & W. 497.

285. ——*By the course of the office of the sheriff of M. the officer making an arrest was required to make a return in writing, signed by him, of the arrest, & of the place where the arrest took place. A writ having been delivered to W., a sheriff's officer, to arrest A., W. arrested him accordingly, & made the following return: "Nov. 9, 1825, arrested A. in South Molton Street, at the suit of W." which return was signed by the officer & sent by him to the sheriff's office on the execution of the writ, & was then filed with the writ according to the course of the office. The writ & certificate were produced by the under-sheriff at the trial in an action brought by A. against a third party:—Held: the certificate was not admissible after the death of the officer to prove the place where the arrest was made.*

An entry written by a person deceased in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, & of every circumstance therein described, which would naturally accompany the fact itself.

As all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails, pltf. in error cannot succeed; & we are all of opinion that whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.

whether he knew the fact that a vessel sent by him had been detained for want of wood, & whether M. & Co., the agents, admitted the fact in a

reference of the question to two merchants:—*Held*: only distinct admissions made by them were admissible, & to allow what was proposed would be

trying this case by another, which was quite incompetent.—*WIGHT v. LIDDEL* (1829), 5 Murr. 35.—*SCOT*.

Sect. 7.—Evidence received in part entitles whole to be given: Sub-sect. 2. Sect. 8. Part II. Sect. 1.]

Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, & even of the day when the arrest was made, both which facts it might be necessary for the officer to make known to his principal, we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done (DENMAN, C.J.).—*CHAMBERS v. BERNASCONI* (1834), 1 Cr. M. & R. 347; 4 Tyr. 531; 3 L. J. Ex. 373; 149 R. R. 1114, Ex. Ch.; *previous proceedings* (1831), 1 Cr. & J. 451.

Annotations:—Expld. Poole v. Dicaa (1835), 1 Bing. N. C. 639. *Distd.* Marks v. Lahe: (1837), 3 Bing. N. C. 408. *Consd.* Milne v. Leisler (1862), 7 H. & N. 786. *Apld.* Smith v. Blakey (1867), L. R. 2 Q. B. 326. *Distd.* Lyell v. Kennedy (1887), 56 L. T. 647. *Refd.* R. v. Dukinfield (1848), 3 New Sess. Cas. 126; R. v. Birmingham, Churchwardens & Overseers (1861), 31 L. J. M. C. 63; Sturla v. Freccia (1880), 5 App. Cas. 623; Mercer v. Denne, [1905] 2 Ch. 538; British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. *Mentd.* Re Chambers, *Ex p.* Chambers (1835), 1 Deac. 197; Gardner v. Mount (1839), 10 Ad. & El. 464; Doe v. Welsh v. Langfield (1847), 16 M. & W. 497; Edie v. Ricksford (1854), 14 C. B. 759.

286. ——— Estimate for repairs by ship's carpenter—Statements that materials not procurable at certain parts.]—In an action upon a marine policy on an issue as to total loss, it appeared that at the port where the vessel was sold, the captain had applied to the American consul & to Lloyd's agent; that the former had directed surveyors to survey the ship, & a ship's carpenter to make an estimate of the cost of repair. Upon the trial the depositions of the captain & the consul were read. They referred to the estimate of the ship's carpenter & stated that in their opinion it was a true estimate. The man who made it died before action brought: & it did not appear upon what materials his estimate had been founded. Upon the estimate was a written certificate, signed by the carpenter, that certain of the necessary materials could not be procured at that port; & also a certificate, signed by Lloyd's agent & the consul, of the competence of the carpenter:—*Held*: that document was not admissible for any purpose.—*MURRIETTA v. OLD-FIELD* (1846), 8 L. T. O. S. 273.

287. ——— Entry by mate in ship's log—Facts relating to collision.]—*THE HENRY COXON*, No. 882, *post*.

288. ——— Report of committee as to fitness for duty—Statement as to birthplace & age.]—A report of a committee appointed by a Govt. to inquire into the fitness of A. to be given the

title of Agent to the Govt., was produced as evidence. The report after stating the character of A. as to fitness, stated his birthplace & age, the facts of his life, & some of his present circumstances:—*Held*: as the only duty of the committee was to report upon the fitness of A. for the post, the document could not be received as evidence of his birthplace & age.—*STURLA v. FRECCIA* (1880), 5 App. Cas. 623; 50 L. J. Ch. 86; 43 L. T. 209; 44 J. P. 812; 29 W. R. 217, H. L.; *affg.* S. C. *sub nom.* *POLINI v. GRAY*, *STURLA v. FRECCIA* (1879), 12 Ch. D. 411, C. A.

Annotations:—Consd. Haines v. Guthrie (1884), 13 Q. B. D. 818; Bird v. Keep, [1918] 2 K. B. 692. *Refd.* Re Turner, Glenister v. Harding (1885), 29 Ch. D. 985; Re Trufort, Trafford v. Biane (1887), 36 Ch. D. 600; Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241; Mercer v. Denne, [1905] 2 Ch. 538; Amys v. Barton (1911), 5 B. W. C. C. 117; Re Djambi (Sumatra) Rubber Estates (1912), 107 L. T. 631; Heyne v. Fischel (1913), 110 L. T. 264; Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130; Collis v. Emphlett, [1918] 1 Ch. 232; Finn v. Shelton Iron, Steel & Coal Co. (1924), 131 L. T. 213.

SECT. 8.—RIGHT OF PARTY TO HAVE EVIDENCE HEARD.

289. Although judge in favour of party.]—Although a judge is in favour of a deft. or resp. without hearing his evidence, deft. or resp. is entitled to insist upon his evidence being heard; & where he has not insisted upon this right the Ct. of Appeal, before reversing the decision of the judge below, will give him an opportunity of adducing this evidence.—*Re PINCOFFS, Ex p. JACOBSON* (1882), 22 Ch. D. 312; 52 L. J. Ch. 561; 48 L. T. 197; 31 W. R. 354, C. A.

Non-reception of evidence as ground of appeal.]—See PRACTICE

290. Refusal to hear evidence by magistrate—Mandamus.]—Upon a summons, under Metropolitan Management Act, 1862 (c. 102), sect. 77, to enforce the apportionment of "paving expenses," a magistrate has power to receive evidence as to whether the actual expenditure was incurred, & incurred solely, in paving works. If the magistrate refuses to receive such evidence, he may be directed to do so by *mandamus*.—*R. v. MARSHAM*, [1892] 1 Q. B. 371; 61 L. J. M. C. 52; 65 L. T. 778; 56 J. P. 164; 40 W. R. 84; 8 T. L. R. 3; 36 Sol. Jo. 11, C. A.

Annotations:—Expld. Stroud v. Wandsworth District Board of Works, [1894] 2 Q. B. 1. *Refd.* Bower v. Calster R. D. C. (1911), 75 J. P. 186; R. v. Cheshire J.J., *Ex p.* Heaver (1912), 108 L. T. 374. *Mentd.* Davis v. Greenwich Board of Works (1895), 64 L. J. M. C. 257; Met. Dist. Ry. v. Fulham Vestry, [1895] 2 Q. B. 443; R. v. Stepney B. C. (1901), 71 L. J. K. B. 238; Ballard v. Wandsworth B. C. (1906), 95 L. T. 118; It. v. Offlow General Income Tax Comrs. (1911), 27 T. L. R. 353.

action was of an indecent character & unfit to be dealt with, & he dismissed it out of the ct. of his own motion:—*Held*: pltf. should have been allowed to prove her case in respect to those causes of action against which there was no objection.—*GUILBAULT v. BROTHIER* (1904), 10 B. C. R. 419.—**CAN.**

PART I. SECT. 8.

h. Although verdict pro confesso given.]—Deft. notified failed to attend, & a verdict *pro confesso* was taken against him, the judge declining to hear evidence in support of the plea:—*Qu.*: whether the evidence should not have been received.—*McGANN v. KEYS* (1855), 12 U. C. R. 429.—**CAN.**

k. Although not necessary.]—Although it may not be necessary to give evidence, pltf. has the right to do so.—*BENNER v. EDMONDS* (1899), 30 O. R. 676.—**CAN.**

l. Where action of indecent character.]—On the trial of an action containing three different causes of action, the judge came to the conclusion that the

Part II.—Admissibility of Evidence.

SECT. 1.—IN GENERAL.

291. Evidence to be received rather than rejected.]—My practice is, whenever I can, rather to receive evidence than to reject it, because it is less mischievous (PARK, J.).—*DAVISON v. OVEREND* (1833), 6 C. & P. 222, N. P.

292. Rules in criminal & civil cases the same.]—*R. v. CATOR*, No. 1747, *post*.

293. Must be relevant.]—A magistrate cannot be required to hear evidence which ought not to affect his determination.—*R. v. MINSHULL* (1833), 1 Nev. & M. K. B. 277; 1 Nev. & M. M. C. 74.

294. —.]—*HOLLINGHAM v. HEAD*, No. 421, *post*.

— Examination & cross-examination of witnesses.]—*Sec Part V., Sect. 6, sub-sects. 1 & 2, post*.

What evidence is relevant.]—*Sec Sect. 3, post*.

295. Unimportance immaterial.]—If evidence be admissible, the ct. cannot reject it because it appears unimportant.—*THE ACTÆON* (1853), 1 Ecc. & Ad. 176; 3 L. T. 90; 164 E. R. 102.

296. Evidence by way of explanation—Of conduct.]—*HAYSLEP v. GYMER*, No. 309, *post*.

— Evidence of intention or motive.]—*Sec Sect. 3, sub-sect. 5, A., post*.

297. Circumstantial evidence.]—In dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force

of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But, on the other hand, you may have a number of rays, each of them insufficient, but all converging & brought to bear upon the same point, &, when united, producing a body of illumination which will clear away the darkness you are endeavouring to dispel (LORD CAIRNS, C.).—*BELHAVEN & STENTON PEERAGE* (1875), 1 App. Cas. 278, II. L.

298. Illegal evidence.]—*SHAW v. ROBERTS*, No. 491, *post*.

299. Indecent evidence—Whether receivable.]—Indecency of evidence is no objection to it being received, where it is necessary to the decision of a civil or criminal right.—*DA COSTA v. JONES* (1778), 2 Cowp. 729; 98 E. R. 1331.

Annotations:—*Mantl. Roebuck v. Hamerton* (1778), 2 Cowp. 737; *Good v. Elliott* (1790), 3 Term Rep. 693; *Brown v. Leeson* (1792), 2 Hy. Bl. 43; *Micklefield v. Hopkin* (1794), 1 Anst. 133; *Gilbert v. Sykes* (1812), 16 East. 150; *Evans v. Jones* (1838), 3 J. P. 274; *Johnson v. Lausley* (1852), 12 C. B. 468; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Fitch v. Jones* (1855), 24 L. J. Q. B. 293; *Gurney v. Gurney* (1863), 1 Hem. & M. 413; *Cooke v. Cooke* (1865), 34 L. J. Ch. 459.

300. Formal tender necessary—Appeal.]—The ct. will not entertain questions as to the admissibility of evidence, unless the evidence has been formally tendered at the trial.—*CAMPBELL v. LOADER* (1865), 3 H. & C. 520; 5 New Rep. 285;

PART II. SECT. 1.

293 i. Must be relevant.]—Before A. became insane he had begun an action against B. for a sum of £971, & B. had thereupon obtained an order that A., who for many years had been B.'s solr., should deliver a bill of costs for taxation. Subsequently to A. becoming insane, on the application of B., & with the consent of counsel purporting to act on behalf of A., the order for the delivery of a bill of costs was set aside, judgment of *no. pros.* was entered in the action & a sum of money was borrowed from the bank by A.'s wife & paid by her to B. by way of compromise & full settlement of the claims of A. & B. against each other. After recovering his sanity A. informed B. & the bank that he repudiated what had been done by his wife but did not take any steps to set aside the order of the ct. made during his insanity:—*Held*: evidence tending to show that upon taxation it would have appeared that nothing was due from A. to B. was irrelevant to the inquiry whether the payment was for A.'s benefit.—*McLAUGHLIN v. CITY BANK OF SYDNEY* (1912), 14 C. L. R. 684.—**AUS.**

293 ii. —.]—In an action by husband & wife to recover damages for injuries sustained by the wife through defts.' negligence in not repairing the street, where the declaration did not contain a count by the husband for loss of his wife's services, she was asked to what she devoted the money she earned? to which she replied, that it went to her children, & the support of her family, for things for the house:—*Held*: the evidence was immaterial, & was not a ground for a new trial.—*CAMERON v. MONCTON TOWN* (1889), 20 N. B. R. 372.—**CAN.**

293 iii. —.]—If a person who is agent for both parties to an action obtains information in regard to the business in respect of which he is agent, & which has a bearing on the subject matter of the action, then it is admissible evidence, hearsay or no hearsay.—*FOOK LUNG FIRM v. LAI*

YUEN FIRM (1912), 7 Hong Kong L. R. 99.—**HONG KONG.**

296 i. Evidence by way of explanation—Of conduct.]—In an action to set aside a conveyance made by plff. in favour of deft., it was charged that the conveyance was never executed by plff., but that the alleged execution was obtained by deft.'s fraud, & that plff. signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. At the trial plff. tendered evidence as to deft. having induced him to drink to excess about the time of the transaction in question, but the trial judge ruled that this evidence could not be introduced under the general allegations contained in the statement of claim:—*Held*: the exclusion of evidence had been pushed too far, & for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties which could throw any light on conduct or motive.—*McDONALD v. JOHNSTON* (1889), 16 A. R. 430.—**CAN.**

m. — Of boundaries of land.]—*SNOWHALL v. STEWART*, Cass. Dig., 2nd ed. 570.—**CAN.**

n. Whether considered on appeal.]—A letter accepting an offer of some land unconditionally was written & sent to plffs. agent by the instructions of deft. At the trial she swore that she only authorised the writer to accept the offer conditionally. No objection was taken to the admissibility of the evidence:—*Held*: no objection could afterwards be taken to the ruling of the judge who left the question of authority to the jury.—*NEWCOMEN v. CORRIGAN* (1880), 1 N. S. W. L. R. 358.—**AUS.**

o. —.]—Where deft. at the trial, disclaiming any wish to succeed against the justice of the case, asserts to the reception of parol evidence to prove the understanding on which a note was given, he cannot be allowed afterwards to argue *in banc*, the technical objection he has waived.—

DAVIS v. MCSHERRY (1850), 7 U. C. R. 490.—**CAN.**

p. —.]—No exception having been taken to the evidence at the trial:—*Held*: it could not subsequently be urged in moving for a new trial.—*CAMPBELL v. BEAMISH* (1851), 8 U. C. R. 526.—**CAN.**

q. —.]—Where plff. was nonsuited at his own request, in consequence of certain evidence given by deft., he cannot move to set aside the nonsuit on the ground that such evidence was improperly admitted.—*HOLMES v. BILLINGS* (1861), 5 All. 232.—**CAN.**

r. —.]—In an action against deft. as drawer of a bill of exchange he pleaded accord & satisfaction, & gave evidence by it, without objection, that plff. accepted his note in "full settlement & payment" of the bill. This was denied by plff., who testified that the note was taken as collateral security for the payment of the bill. A verdict having been found for deft. on this issue:—*Held*: plff. not having objected at the trial, could not move for a new trial on the ground that the parol evidence was improperly received.—*BARBOUR v. ROBERTS* (1881), 24 N. B. R. 211.—**CAN.**

s. —.]—The finding of a fact by the lower Appellate Ct. upon evidence, a portion of which was inadmissible, is not such a finding of fact as cannot be interfered with in special appeal.—*GURU DAS DEY v. SAMBHU NATH CHUCKRABORTY* (1869), 3 B. L. R. A. C. 258.—**IND.**

t. —.]—The chairman is the sole judge of the admissibility of evidence tendered. Therefore, an appeal upon the ground that the chairman had admitted the probate of a will as evidence of a devise, was dismissed.—*FISHER'S CASE* (1861), 15 I. C. L. R. 369.—**IR.**

u. Tests to determine admissibility.]—In ejectment by T. & H. against P. & another, plffs. proved a Crown grant to W. but no devolution of any estate from W. to plffs.; acts of

Sect. 1.—In general. Sects. 2 & 3: Sub-sects. 1 & 2, A.]

34 L. J. Ex. 50; 11 L. T. 608; 29 J. P. 103; 11 Jur. N. S. 286; 13 W. R. 348; 159 E. R. 634.

Annotation:—Mentd. *Hodson v. Walker* (1872), L. R. 7 Exch. 55.

In Admiralty proceedings.]—See ADMIRALTY, Vol. I., pp. 198 *et seq.*

In criminal matters.]—See CRIMINAL LAW, Vol. XIV., pp. 366 *et seq.*

At coroner's inquests.]—See CORONERS, Vol. XIII., pp. 244, 245, Nos. 160-176.

In actions by or against limited companies.]—See COMPANIES, Vol. IX., p. 678, Nos. 4522-4526.

By what law governed.]—See CONFLICT OF LAWS, Vol. XI., pp. 488, 489.

In relation to act of bankruptcy.]—See BANKRUPTCY, Vol. IV., p. 109, Nos. 978-980.

Admissions by bankrupt.—Admissibility in other proceedings.]—See BANKRUPTCY, Vol. IV., pp. 510 *et seq.*

Of common rights.]—See COMMONS, Vol. XI., pp. 36, 37, Nos. 490-506.

Of condition of licensed premises.—On applica-

tion for renewal of license.]—See INTOXICATING LIQUORS.

Of fraudulent preference by bankrupt.]—See BANKRUPTCY, Vol. V., pp. 860, 861, 869, Nos. 7203-7205, 7238-7241.

Of usage.]—See CUSTOM & USAGES, Vol. XVII., pp. 37, 38, Nos. 418-426.

Verbal statement by auctioneer at auction.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 17, 18, Nos. 123-136.

SECT. 2.—ADMISSIBILITY OF PART MAKES WHOLE ADMISSIBLE.

See Part I., Sect. 7, ante.

SECT. 3.—FACTS WHICH MAY BE PROVED.

SUB-SECT. 1.—FACTS IN ISSUE.

301. General rule.]—In an action by an administratrix on a policy of insurance on the life [of the father] of the intestate, where the defence

seisin of *pltf.* T. & assurance from *pltf.* T. to *pltf.* H. On a rule *nisi* for non-suit:—*Held:* inconsistency not multiplicity forms the test by which *pltf.*'s several modes of proof may or may not be deemed admissible: the grant to W. was not inconsistent with the presumption of seisin arising from the evidence of T.'s possession: the rule *nisi* for a non-suit must be discharged.—*THURLOW v. PERKS* (1864), 1 W. W. & A.T.B. 142.—**AUS.**

b. Evidence of acts done after action brought not admissible.]—Pltf. In an action for trespass claimed under an authority from the owner of the *locus in quo* to go upon it & cut timber. At the trial he tendered evidence of acts done by *deft.* after action brought, & showing a persistence in his claim to the ground on which *pltf.* was working, the evidence was excluded. On a motion for a rule *nisi* to set aside a non-suit on the ground that the evidence was improperly excluded:—*Held:* the ruling was right.—*LONG v. DRINAN* (1877), *Knox*, 152.—**AUS.**

c. Contract for sale of racehorse on certain terms.—Evidence of treatment of horse while in defendant's possession rejected.]—Pltf. sued for the balance of the purchase money of a racehorse. *Deft.* pleaded that he had returned the horse to *pltf.* "in good & sound order & condition," as he was at liberty to do under the contract. At the trial the judge rejected the evidence to show the treatment of the horse while he was in the *deft.*'s possession, & evidence of the state & condition of the horse when he was first delivered to *deft.*:—*Held:* the judge was right in rejecting such evidence.—*HALL v. IVORY* (1877), *Knox*, 401.—**AUS.**

d. Action for personal injury.—Evidence as to plaintiff's dependent family.]—In an action to recover damages for personal injuries caused by *deft.*'s negligence, evidence of *pltf.* was admitted that he had a family who were dependent on him for their support.—*Held:* the evidence was rightly admitted.—*DEVIN v. CULLEY* (1882), 3 N. S. W. L. R. 322.—AUS.****

e. Material matters concealed from insurers.]—Pltf. when obtaining from *deft.* the policy now sued upon represented to them that he was then insured by other companies in respect of the same premises:—*Held:* he could be called upon to show that the former policies were good & valid insurances, & evidence was admissible to show that the former policies were void, & consequently he obtained the

present policy by means of a false statement.—*HANLEY v. PACIFIC FIRE & MARINE INSURANCE CO.* (1883), 14 N. S. W. L. R. 224; 9 N. S. W. W. N. 197.—**AUS.**

f. Evidence as to interpretation of circular admissible.]—Deft. published a circular which purported to be a correct representation & reproduction of an order of the *ct.* The jury found as facts that the same was an incorrect representation of the *ct.*'s order:—*Held:* evidence was admissible to show the meaning or interpretation of the circular.—*WHITE v. MORRIS, LITTLE & SON, LTD.* (1897), 23 V. L. R. 152.—**AUS.**

g. In indictment for nuisance.]—B. was indicted on an information for a public nuisance, & tendered evidence, which was rejected, to show that under a better system of sewages than that established by the *comt.*, the nuisance would not have arisen:—*Held:* the evidence was admissible, & there must be a new trial.—*R. v. BURFORD* (1883), 17 S. A. L. R. 65.—**AUS.**

h. In action for negligence.—Conversation between plaintiff & barmaid as to position of lavatory.]—Pltf. who had a drink at an hotel bar, asked the barmaid to direct him to the lavatory, which she did. Following her directions he went to a portion of the premises, where, looking for the lavatory, he fell down an unguarded lift well, & was injured. In an action against the hotel-keeper for negligence:—*Held:* the conversation between the barmaid & *pltf.* was admissible in evidence to prove that *pltf.* was on that part of the premises at the invitation of the proprietor.—*MOUNTNEY v. SMITH* (1904), 1 C. L. R. 146.—**AUS.**

k. Trespass.—Evidence to show leave & licence—and in support of equitable plea.]—Declaration q.c.f. for cutting & removing trees, with a count in trover & the common counts. Pleas, leave & licence; & a special equitable plea, setting up that *deft.*, being owner of the land, contracted by parol to sell it to *pltf.*, & that at the time of such contract & of the conveyance of the land to *deft.*, it was expressly agreed that *deft.* should have certain trees thereon, & be at liberty to cut & remove them, but that such reservation should not be, & it accordingly was not, inserted in the conveyance; & that *deft.* entered & cut the trees, etc., which are the trespasses, etc. *Deft.* as a witness at trial, having proved the sale of the

land, it was proposed to show by him the agreement as set up in the equitable plea:—*Held:* such evidence was improperly rejected, for it was admissible both under the equitable plea & the plea of leave & licence.—*WALTER v. DEXTER* (1876), 34 U. C. R. 426.—**CAN.**

l. Evidence as to inferiority of goods delivered.]—CHURCH v. ABELL (1877), 1 S. C. R. 442.—**CAN.**

m. Arbitration proceedings.]—Arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration.—*KRISHNA KANTA PARAMANIK v. BIDYA SUNDARI DAS* (1869), 2 B. L. R. App. 25.—**IND.**

n. —.]—ASHABAI v. ESSAJI (1913), L. L. R. 38 Bom. 60.—**IND.**

o. Questions of admissibility.—Should be decided as they arise.]—Questions as to the admissibility of evidence should be decided as they arise, & should not be reserved until judgment in the case is given.—*JAIJI RAJ v. BHUBOTARAN NUNDY* (1889), 1 L. R. 17 Cal. 173.—**IND.**

p. —.]—RAMJIBUN SEKHROWY v. OGHORE NATH CHATTERJEE (1897), 1 L. R. 25 Cal. 401; 2 C. W. N. 188.—**IND.**

q. Evidence of amount of defendant's property.]—There is one case, & one only, namely, actions for breach of promise of marriage, in which evidence of the amount of *deft.*'s property is admissible.—*WILSON v. LEONARD* (1852), 5 Ir. Jur. 101.—IR.****

r. Powers of magistrate.]—As a magistrate has power to receive evidence not strictly legal there is no reason why he should in any case base his decision as to the admissibility of evidence upon strictly legal grounds.—*PEARSON v. CLARK, Mac.* 136.—**N.Z.**

s. Improper admission.—Evidence admitted before objection.]—Where inadmissible evidence is given without objection, but the objection that such evidence is admissible is afterwards raised on further evidence of the same class being tendered, the evidence previously given without objection should be withdrawn from the jury.—*BANK OF NEW ZEALAND v. FLEMING* (1899), 18 N. Z. L. R. 1.—**N.Z.**

PART II. SECT. 3, SUB-SECT. 1.

301 I. General rule.]—When a material fact is alleged in a pleading, & the pleading of the opposite party is silent with respect thereto, the fact

PART II.—ADMISSIBILITY OF EVIDENCE.

was that the policy was void under 14 Geo. 3, c. 48, on the ground that the intestate had no interest in it:—*Held*: the evidence of a witness that previous to the insurance the intestate consulted him about effecting a policy on the intestate's [father's] life, was admissible as an act, & was not objectionable as hearsay.

Any evidence is admissible which tends to show that the father was the real insurer. The question in the cause is, whether the insurance was effected *bonâ fide* by J. [the father] for his own benefit, or, substantially, by T. [the intestate] in the name of J., but not for his benefit. Everything, therefore, is admissible which was done by T.: & words are often acts. The question is not open to the objection against hearsay. It is not hearsay. It is a question as to an act done. One asks another to attest a document, or to advance a sum of money; those are not merely words, but acts (ERLE, J.).—*SHILLING v. ACCIDENTAL DEATH INSURANCE CO.* (1858), 1 F. & F. 116; 4 Jur. N. S. 244.

302. Letters from principal to agent—Authority of agent in issue.—In an action against brokers for entering into a contract with pltf., as agents for sellers, without authority, it appeared that the broker had been at first put into communication with them as to the sale of a particular cargo of wool, & had learnt what their terms were, except as to price, which was to be afterwards agreed upon, & as to which he had been referred to their agent to complete the matter. The agent, as the broker was aware, received letters from time to time from the sellers, insisting on adherence to the terms they had required, & he was more or less aware of the effect of these letters. Ultimately, however, deft., acting as broker for both parties, concluded with the agent a contract upon different terms, which was at once repudiated by the sellers:—*Held*: the sellers' letters to their agent were admissible for pltf. to show the want of authority. — *HUGHES v. GRÆME* (1863), 3 F. & F. 885.

See, generally, AGENCY, Vol. I., pp. 386, 387. Nos. 901–905.

303. Carrying capacity of ship.—A charter-

party provided that the ship should load a cargo of creosoted sleepers & timber & therewith immediately proceed to S., the charterer to have the option of shipping 200 tons of general cargo. The charterparty contained the following words: "owners guarantee ship to carry at least about 90,000 cubic feet, or 1,500 tons dead weight." A lump sum of £1,000 was payable as freight. The ship was, in fact, able to load only 65,000 cubic feet, equivalent to 1,120 tons dead weight. of the cargo specified in the charterparty, & the master refused to receive 8,000 creosoted sleepers which had been sent alongside by the charterer. In an action brought by the charterer to recover damages against the owners:—*Held*: evidence to show that the ship would carry the named quantity of dead weight cargo mentioned in the charterparty was admissible.—*CARNEGIE v. CONNER* (1889), 24 Q. B. D. 45; 59 L. J. Q. B. 122; 61 L. T. 691; 6 T. L. R. 12; 6 Asp. M. L. C. 447.

Annotations.—*Mentd.* Miller v. Borneo (1900), 69 L. J. Q. B. 429; Millar v. S.S. Freden, [1917] 2 K. B. 657; *Re* Thomson & Brocklebank, [1918] 1 K. B. 655.

Facts of bankruptcy.—*See* BANKRUPTCY, Vol. IV., pp. 509, 510, Nos. 4608–4612.

SUB-SECT. 2.—MATTERS FORMING PART OF RES GESTA.

A. In General.

In criminal matters.—*See* CRIMINAL LAW, Vol. XIV., p. 307.

Admissions on rehearing generally, *see* Part X., *post*.

304. Declarations.—The principle of admission is that the declarations are *pars rei gestæ* (LORD DENMAN, C.J.).—*ROUGH v. GREAT WESTERN RY. CO.* (1841), 1 Q. B. 51; 2 Ry. & Can. Cas. 505; 4 Per. & Dav. 686; 113 E. R. 1049; *sub nom.* *ROACH v. GREAT WESTERN RY. CO.*, 10 L. J. Q. B. 80; 5 Jur. 821.

305. —.—An allegation in a cause of damage pleaded in general terms the history of the ship proceeded against for some days previous to the

must be considered as in issue.—*WATERLOO MUTUAL INSURANCE CO. v. ROBINSON* (1883), 4 O. R. 295.—*CAN.*

1. What may be.—Agreement.—In action for obstructing watercourse.—In an action for obstructing a watercourse an agreement between pltf. & deft., whereby the latter agreed to enlarge the watercourse, & did so, & was paid by pltf. for it, is evidence for pltf., & relevant to the matter in dispute.—*PALMER v. TURNER* (1862), 5 All. 290.—*CAN.*

a. — Under count for money had & received.—Declaration containing special counts.—Where a declaration contains special counts, with a count for money had & received, & the particulars also apply to the latter count, pltf. may give evidence under the count for money had & received, though his counsel did not claim to recover on that count in opening the case.—*CARRICK v. ATKINSON* (1863), 5 All. 515.—*CAN.*

b. — Not evidence rebutting immaterial statements.—Where evidence was offered to rebut immaterial statements, which could not affect the case:—*Held*: it was properly rejected.—*HAMILTON v. HOLDER* (1874), 2 P.ug. 222.—*CAN.*

c. — Fraud.—Where non tenet pleaded.—Pltf. has a right, under the plea of *non tenet*, to show a conveyance fraudulent.—*MCLEOD v. MCGUIRK* (1874), 2 P.ug. 238.—*CAN.*

d. — Fact affecting amount of damages.—In a civil action, any fact which tends to affect the amount of damages is relevant & admissible.—*BROWN v. HOPE* (1912), 20 W. L. R. 907; 2 O. L. R. 615.—*CAN.*

e. — Possibility of repeal of bye-law.—Set up by corporation.—If it is proper for a city corpn. to set up its bye-law, it must be equally open to claimant, if he concedes its validity, to urge that it is likely to be soon repealed, & that it is not intended to be permanent.—*Re GIBSON & TORONTO CITY* (1913), 28 O. L. R. 20; 4 O. W. N. 612; 11 D. L. R. 529.—*CAN.*

1. — Not insurance.—In action for damage to vehicle.—Deft., in an action to recover damages for injury to pltf.'s vehicle, is not entitled to have pltf. answer any question relating to insurance on his vehicle.—*MILLARD v. TORONTO RY. CO.* (1914), 31 O. L. R. 526; 6 O. W. N. 519.—*CAN.*

f. — Fact & legality of marriage.—In action for enticing away married woman.—The fact & the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman.—*It. v. NAZIR KHAN* (1913), 1 L. R. 36 All. 1.—*IND.*

h. Letters from agent.—An Irish railway co. contracted with pltf. to carry certain pigs from a station in Ireland through to London, part of the journey being performed on the L. Ry.

In an action against the Irish co. for breach of contract in failing to carry the pigs to London within a reasonable time, a letter from T., an agent of the L. Ry. Co. to pltf., was admitted in evidence, subject to defts.' objection:—*Held*: the letter was properly received.—*RUDDY v. MIDLAND GREAT WESTERN RY. CO.* (1881), 8 L. R. Ir. 224.—*IR.*

PART II. SECT. 3, SUB-SECT. 2.—A.

304 i. Declarations.—In a charge of unlawful & forcible entry into a dwelling-house, evidence was given by a witness for the prosecution that accused had made a statement to him that he, accused, had sold the land to pltf. This evidence was objected to, on the ground that such evidence was respecting a collateral matter & not relevant to the issue. The objection was overruled:—*Held*: upon such a charge evidence relating to title of the occupant was inadmissible.—*It. v. WALKER* (1906), 4 W. L. R. 288.—*CAN.*

k. Everything passing at the time of transaction.—Action for assault.—Conversion between witness & accused.—The statement proposed to be given in evidence was one made by the witness as to what she & accused said at the time the assault was alleged to have been committed:—*Held*: this was material to the matter in issue, & part of the *res gestæ*, & could be contradicted.—*R. v. TROOP* (1898), 30 N. S. R. 339.—*CAN.*

1. Whether res inter alios acta.—

Sect. 3.—Facts which may be proved: Sub-sect. 2, A. & B.]

collision, statements made by the mate & scamen of the ship proceeding with respect to the state of their vessel, etc.:—*Held*: (1) the previous history of the ship was admissible, as being usual & convenient; (2) such only of the statements as formed part of the *res gestæ* were admissible.—*THE MELONA* (1846), 10 Jur. 992.

Annotation.—As to (2) *Reid*. *The Midlothian* (1851), 15 Jur. 806.

306. ——— Circumstances of case.]—It is impossible to tie down to time the rule as to declarations: we must judge from all the circumstances of the case: we need not go the length of saying that a declaration made a month after the fact would of itself be admissible, but if, as in the present case, there are connecting circumstances, it may, even at that time form part of the *res gestæ* (*PARK, B.*).—*RAWSON v. HAIGH* (1824), 2 Bing. 99; 9 Moore, C. P. 217; 2 L. J. O. S. C. P. 130; 130 E. R. 242.

Annotations.—*Reid*. *Tidley v. Gyde* (1832), 9 Bing. 349. *Reid*. *Johnston v. Woolf* (1835), 2 Scott, 372; *Re Prescott*, 11 C. B. 930; 4 Jur. 852; *Rouch v. G. W. Ry.* (1841), 1 Q. B. 51.

307. ———] The ct. must in each case consider whether the declaration proposed to be received does or does not come within a reasonable time of the disputed act (*TINDAL, C.J.*).—*RIDLEY v. GYDE* (1832), 9 Bing. 349; 2 Moo. & S. 448; 2 L. J. C. P. 25; 131 E. R. 646.

Annotations.—*Reid*. *Johnston v. Woolf* (1835), 2 Scott, 372; *Pencock v. Harris* (1836), 5 Ad. & El. 449; *Rouch v. G. W. Ry.* (1841), 1 Q. B. 51; *Macdonnell v. Evans* (1852), 11 C. B. 930; *Re Douglas, Ex p. Snowball* (1872), 7 Ch. App. 531. *Mentd*. *Morgan v. Brundrett* (1833), 2 Nev. & M. K. B. 280.

308. ——— Action for false representation as to solvency.—Declaration by plaintiff as to reliance on representation.]—In case for a false representation of the solvency of B., whereby plffs. trusted him with goods:—*Held*: their declarations, at the time, that they trusted him in consequence of the representation were admissible in evidence for them.—*FELLOWES v. WILLIAMSON* (1829), Mood. & M. 306, N. P.

309. ——— Action of trover Declaration by plaintiff when goods handed over.]—In an action brought to recover back notes delivered to deft. by plff., plff. proved that deft., who was exor. of W., having questioned plff. as to her having possession of some property belonging to W., plff. handed the notes over to deft., stating that W. had given them to her, plff. before her death. Deft. did not deny the statement, but had no means of knowing its truth or falsehood. There was contradictory evidence as to whether deft. said that he would keep the notes, or that he would keep them to be returned to plff. on request. The notes had been seen in plff.'s possession before W.'s death. Other evidence was given, as to the

fairness of the conduct of plff. respecting W.'s property in general:—*Held*: the declaration made by plff. might go to the jury as evidence in her favour, on the ground, though very slight, of acquiescence in its truth by deft., & also as being a part of the *res gestæ* on the occasion of deft.'s obtaining the notes, & as giving a character to the whole conduct of plff.—*HAYSLEP v. GYMER* (1834), 1 Ad. & El. 162; 3 Nev. & M. K. B. 479; 3 L. J. K. B. 149; 110 E. R. 1169.

310. ——— Complaint as to disputed boundary.]—(1) Trespass for breaking & entering plff.'s garden. Deft. justified under two pleas, viz. the enjoyment as of right & without interruption of a way over the garden for twenty years & forty years respectively before the suit. At the trial it appeared that plff. was tenant to L. of the garden, & deft. was owner of premises comprising a cottage & yard, which had formerly been part of the estates of the L. family, with a privy in the yard abutting upon the garden, which privy had stood there for sixty years. J. L., who died in 1811, was owner of the garden & the premises belonging to deft., & devised certain of his estates, including those premises, to H. L. in trust to sell. H. L. sold various lots, & in 1812 W. became the purchaser of a lot which included those premises. In 1821 W. built the cottage, & on his death in 1849 the premises devolved to deft. in right of his wife, who was heiress of W. In 1823 S. became tenant of the garden, & continued so until 1857. In 1830 he walled up stones against the opening of the privy into the garden, & W. knocked them down. S. complained of that act to H. L. who went with his agent to look at the place, & met there S. & W. Declarations of W. & H. L. on that occasion were admitted in evidence after objection by plff. A low wall was accordingly built round & a loose flagstone put at the top so as to form a cesspool, & the privy was cleaned out through the garden until about 1852. Under the will of J. L. the garden came to W. L. on his attaining the age of 21 years, in 1817. After the declarations were given in evidence, it appeared that H. L. was trustee of W. L. during his minority, & subsequently by his request received his rents. In Oct. 1861, the tenant of the garden, by direction of W. L., built a wall to prevent deft. going through it. A correspondence between the attorneys for deft. & W. L. in which there was a negotiation as to a reference of the matter to arbitration, began on Dec. 28 of that year, & continued until the Feb. 13, 1862. The trespass for which the action was brought was committed on Feb. 3, 1863; & the writ issued on the following day. The judge left to the jury the question whether deft. had submitted to or acquiesced in the interruption for one year within 2 & 3 Will. 4, c. 71, s. 4, & they said that he had not, & found for him on both pleas:—*Held*: the declaration of W. was admissible as explanatory of acts about to be done

In an inquiry before a jury as to the value of land taken for railway purposes, evidence as to an offer previously made for the land by a trial person to the owner, is inadmissible, as being *res inter alios acta*.—*KILPATRICK v. BOARD OF LAND & WORKS* (1879), 5 V. L. R. 122.—*AUS.*

m. ———.]—In an action for not accepting timber according to agreement, plff. gave evidence of the purchase of timber by deft. from C. & W. about the same time:—*Held*: although deft.'s contract with C. & W. would otherwise have been irrelevant testimony, plff. had thereby made it material, & it was open to deft. to go into evidence to explain the whole of

the transaction with C. & W. without calling them as witnesses.—*CONNEL v. SMITH* (1847), 3 Kerr, 483.—*CAN.*

n. ——— Declaration by third party.]—On the trial of an action of trespass *quare clausum fregit*, it was stated that M., deft.'s brother, who owned the land which adjoined plff.'s land on the south side & continuous with deft.'s land, pointed out a tree stump as the boundary between the two tracts, & that it was marked as such by the surveyor. Deft. objected to this evidence:—*Held*: admissible as part of the *res gestæ*.—*BRIGGS v. MCBRIDE* (1879), 19 N. B. R. 202.—*CAN.*

o. ———.]—Documents which would

be admissible against persons through whom one claims cannot be objected to by him on the ground that they are *res inter alios acta*.—*HANI SRIMATI v. KHAONDRA NARAYN SINGH* (1904), 1 L. R. 31 Cal. 871; 9 C. W. N. 71; L. R. 31 Ind. App. 127.—*IND.*

p. Special contract.—Relation to part only of work.]—In *indubitatus assumpti* for building a house, plff. proved the value of the work to be £140, in answer to which it was shown that the principal part of the work was done under a special contract for £55:—*Held*: evidence of a special contract which related to part of the work only, was inadmissible in reply.—*ROBERTSON v. MILLS* (1848), 1 All. 27.—*CAN.*

by him, showing the nature of the enjoyment of the way.

(2) *Semble*: even taking H. L. as a stranger to the estate at the time of the conversation between him & S. & W., his declaration was admissible as part of the conversation.—**BENNISON v. CARTWRIGHT** (1864), 5 B. & S. 1; 3 New Rep. 506; 33 L. J. Q. B. 137; 10 L. T. 266; 28 J. P. 501; 10 Jur. N. S. 847; 12 W. R. 425; 122 E. R. 733.

Annotations.—**Mentd.** Glover v. Coleman (1874), L. R. 10 C. P. 108; Norfolk v. Arbuthnot (1880), 5 C. P. D. 390; Gardner v. Hodgson's Kingston Brewery Co., [1901] 2 Ch. 198.

What declarations are contemporaneous.—*See* Nos. 323–326, *post*.

311. Everything passing at the time of transaction—Action for false imprisonment by ship's captain—Expressions of plaintiff tending to mutiny.—**BINGHAM v. GARNAUT** (1788), Bull. N. P. 17; Roscoe's Evidence in Civil Actions 10th ed. 802.

312. Letters from agent—Forming part of contract.—Letters written by an agent in making a contract, which form part of the contract, or of the *res gestæ* are admissible in evidence against the principal.—**LANGHORN v. ALLNUTT** (1812), 4 Taunt. 511; 128 E. R. 429.

Annotations.—**Consd.** Coates v. Bainbridge (1828), 2 Moo. & P. 142. **Refd.** Reynier v. Pearson (1812), 4 Taunt. 662; Udell v. Atherton (1861), 7 H. & N. 172. **Mentd.** Kahl v. Jansen (1812), 4 Taunt. 565; Palmer v. Marshall (1832), 8 Bing. 317; Palmer v. Fenning (1833), 2 Moo. & S. 621.

—**After contract complete.**—*See* No. 852, *post*.

See, generally, AGENCY, Vol. I., pp. 605 *et seq.*

313. — Conversation of agents—Strike pickets employed by defendants.—What passes in conversation between members of pickets in the course of their employment to prevent persons entering into pltf.'s service seems to me to be all part of the *res gestæ* that is admissible in evidence against defts. (**NORTH, J.**).—**LYONS (J.) & SONS v. WILKINS** (1896), as reported in 65 L. J. Ch. 601; 74 L. T. 358; 60 J. P. 325; 12 T. L. R. 222; *on appeal*, [1896] 1 Ch. 811, C. A.

Annotations.—**Mentd.** Charnock v. Court, [1899] 2 Ch. 35; Walters v. Green, [1899] 2 Ch. 696; Quinn v. Leatham, [1901] A. C. 493; Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Ward, Lock v. Operative Printers' Assistants' Soc. (1906), 22 T. L. R. 327;

q. Action by physician.—In an action by a physician for professional services to deft.'s wife, where it was admitted by deft. that he had employed pltf. previous & up to the date of the account sued for, & that he was aware of the attendance subsequently, the oath of the physician was admissible to make proof as to the nature & duration of the services.—**BAYNES v. BRICE** (1888), M. L. R. 4 S. C. 353.—**CAN.**

r. Statement of bank president.—The statements of the president of a bank, not being *res gestæ* nor within the scope of his authority.—**Held**: not evidence against the bank.—**BLACK v. BANK OF NOVA SCOTIA** (1889), 21 N. S. R. 448.—**CAN.**

s. Conversation at time of transaction—Fraudulent conveyance—Must go to specific agreement impeached.—Pltf. sought to have declared void as against creditors a conveyance of land from a husband to his wife & a subsequent conveyance of the same land from the wife to her daughter. After the first conveyance the wife agreed to sell the land to W. & assigned this agreement to her daughter, who obtained an order nisi for foreclosure, but at the beginning & trial of the action the agreement was still in force & W. in possession. Neither the legal representatives of the wife, nor W. were made parties. In the action a witness,

who at the period of the impeached transaction had heard conversation between the husband & wife as to their manner of carrying on business & the passing of money between them, was not permitted to tell what were the arrangements which he had heard them discuss.—**Held**: the testimony was properly excluded, it not being with respect to a specific agreement, & no foundation having been laid for introducing the conversations as part of the *res gestæ*.—**BLAIR v. DICE**, [1921] 4 D. L. R. 568; 3 W. W. R. 379.—**CAN.**

PART II. SECT. 3, SUB-SECT. 2. B.

318 i. General rule.—When a witness called by pltf. to prove a payment says that he does not remember any statement made by deft. at the time, explaining the payment, it is competent for deft. to call evidence for that purpose.—**FLAGLER v. RICHARDS** (1849), 1 All. 514.—**CAN.**

318 ii.—**—**—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction, or else immediately after it, so as to in effect to form part of the transaction, but the subsequent acts & declarations of a son can be used against him & those claiming under him by the father, where there is nothing showing the

Gozney v. Bristol Trade & Provident Soc., [1909] 1 K. B. 901; **Pratt v. British Medical Assoc.**, [1919] 1 K. B. 244; **Ware & De Freville v. Motor Trade Assoc.**, [1921] 3 K. B. 40.

314. — Entry on counterfool of cheque.—In filling in the counterfoil to a cheque in his cheque book, testator wrote the word "loan":—**Held**: the evidence of the counterfoil was admissible as part of the *res gestæ*.—**Re ENGLAND, ENGLAND v. GARNETT** (1912), 134 L. T. Jo. 29.

315. Whether res inter alios acta—Entry by holder of bill at due date—Bill subsequently negotiated.—**COLLENBRIDGE v. FARQUHARSON, No. 318, post.**

316. — Payment of debt through third party.—In an action for sheep sold & delivered, deft. pleaded a payment of £175. It was proved by J. that he received a sum of £175 from deft.'s wife & gave it to pltf.:—**Held**: evidence might be given, that when deft.'s wife gave him the money, she told J. to take it to pltf. for the sheep.

The question is, not merely whether a particular sum was paid, but whether a payment was made for a particular purpose; & you cannot prove the purpose without letting in evidence of what was said when the money was handed over (**COLLENBRIDGE, J.**).—**WALTERS v. LEWIS** (1836), 7 C. & P. 314.

317. — Receipt for payment to third party.—**CARMARTHEN & CARDIGAN RY. CO. v. MANCHESTER & MILFORD RY. CO.**, No. 314, *post*.

B. Necessity for Contemporaneity.

318. General rule.—(1) A., the holder of a bill, deposited it with B. as collateral security for the balance of accounts between them; B. indorsed the bill over to C. after it became due. In an action by C. against A.:—**Held**: B.'s account book was not evidence in diminution of the balance between A. & B.

(2) *Semble*: a contemporaneous entry or declaration by B. would be admissible.—**COLLENBRIDGE v. FARQUHARSON** (1816), 1 Stark. 259, N. P. *Annotations*.—**Refd.** Burrough v. Moss (1830), 10 B. & C. 558. **Mentd.** Oulde v. Harrison (1854), 10 Exch. 572.

319. ——(1) The declarations of an insolvent made at the time of filing his schedule to

intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. **BUNSELL v. JOHNSON** (1876), 24 Gr. 202.—**CAN.**

318 iii.—**—**—Evidence was given by deft. of conversations with pltf.'s father after he had parted with his legal interest in the property in dispute:—**Held**: the evidence was inadmissible, not being part of the *res gestæ*.—**WALLACE v. LAIDLAW** (1881), 2 R. & G. 420.—**CAN.**

318 iv.—**—**—In an action brought by representatives of a girl to recover damages in respect of her death, which resulted from a fall on a stone in a highway under the control of defts.:—**Held**: the statement of deceased to her friends at the house to which she came, & assuming that the identity had been proved, her statement while lying near the stone, were not admissible in evidence as part of the *res gestæ*.—**GARNER v. TOWNSHIP OF STAMFORD** (1903), 24 C. L. T. 52; 7 O. L. R. 50; 2 O. W. R. 1167.—**CAN.**

t. Degree of contemporaneity—Description in subsequent Crown grant.—The description & boundaries in a Crown grant dated 1858 are not admissible to show what are the boundaries of adjoining land granted by the Crown in 1855.—**SMITH v. NEILD** (1889),

Secl. 3.—Facts which may be proved: Sub-sect. 2, B., C. & D. (a) & (b).]

obtain his discharge under 7 Geo. 4, c. 57, are not receivable in evidence, in order to show that a deed of assignment, executed by him some time previously was so executed with the view or intention of petitioning for his discharge.

(2) A contemporaneous declaration may be admissible as part of a transaction, but an action done cannot be varied or qualified by insulated declarations made at a later time (LORD DENMAN, C.J.).—PEACOCK v. HARRIS (1836), 5 Ad. & El. 449; 2 Har. & W. 281; 6 Nev. & M. K. B. 854; 6 L. J. K. B. 261; 111 E. R. 1236.

Annotations:—Mentd. De Jutzen v. Lloyd (1836), 5 Ad. & El. 456; Jolliffe v. Mundy (1838), 4 M. & W. 502.

320. ———. [—] Where a purchase is made by a parent in the name of a child, the contemporaneous acts & declarations of the parent are evidence to show that the child shall take as trustee only; but the subsequent acts & declarations of the parent are inadmissible for that purpose.—SIDMOUTH v. SIDMOUTH (1840), 2 Beav. 447; 9 L. J. Ch. 282; 48 E. R. 1254.

Annotations:—Refld. Gopeckrist Gosain v. Gungapersaud Gosain (1854), 6 Moo. Ind. App. 53; Williams v. Williams (1863), 32 Beav. 370; Forrest v. Forrest (1865), 34 L. J. Ch. 428. *Mentd.* Skeats v. Skeats (1842), 12 L. J. Ch. 22; Bone v. Pollard (1857), 24 Beav. 283; Hepworth v. Hepworth (1870), L. R. 11 Eq. 10.

321. ———. [—] The female plff. was a passenger in an omnibus belonging to defts., & whilst on her journey a concussion took place, which nearly upset the omnibus, & threw her from her seat & caused her serious injury. Upon her then getting out, one of the other passengers was standing outside; & upon the trial it was proposed by plffs.' counsel to ask the female plff. if anything was then said by this person about the accident, & if the omnibus conductor made any reply. This being objected to, the judge ruled that it could not be put, & as there was no other evidence of how the accident happened, plffs. were nonsuited. Had the question been put it would have been as follows: "Did anyone say anything about the accident?" To which the reply would have been "A bystander who had got out of the omnibus, said, alluding to the driver, 'By Jove, this fellow's conduct must be reported;'" whereupon the conductor said "Sir, he has been reported, for he has been off the points five or six times to-day; he is a new driver"—*Held*: the question was properly rejected, for it did not form part of the *res gesta*, nor, if it did, did it explain the actual cause of the collision.

It is really not a statement of the conduct of the driver at the time, but of his previous conduct (KELLY, C.B.)

It is said that it was part of the *res gesta*, but it was not so, the matter was all over, & the statement was not a portion of the surrounding circumstances so as to make it evidence (BRAM-

WELL, B.).—AGASSIZ v. LONDON TRAMWAY CO. (1872), 27 L. T. 492; 21 W. R. 109.

322. ———. [—] In an action for the seduction of plff.'s daughter:—*Held*: to prove that her connexion with deft., which happened but once, was against her consent, the daughter could be asked only as to circumstances occurring immediately after the event.

What occurred after any considerable lapse of time might be all acting (WILDE, C.J.).—COLYER v. MAYNE (1849), 2 Car. & Kir. 1011.

323. Degree of contemporaneity.—Two months after event.—Letter of parent disapproving of infant child's marriage.—In a suit for nullity of marriage, by licence, by reason of minority & want of consent of the father:—*Held*: a letter from the father, two months after the marriage, expressive of his anger at the marriage was admissible as part of the *res gesta*.

The letter is admissible, not as the declaration of the father simply, but as part of the *res gesta* connected with this marriage (DR. LUSHINGTON).—DUINS v. DONOVAN (OTHERWISE DUINS) (1830), 3 Hag. Ecc. 301; 162 E. R. 1165.

324. ———. Previous day.]—Two constables, who had taken plff. on a charge of disorderly conduct on a Sunday night, were taking plff. before a magistrate on the Monday, when they met the magistrate in the street, who desired them to take plff. back to the lock-up, & bring him up for examination on the Tuesday. They did so, when the magistrate fined him £1:—*Held*: under a notice of action against the magistrate for imprisoning plff. in the lock-up, plff. might give evidence of the circumstances under which he was taken into custody on the Sunday, & of what took place before the magistrate on the Tuesday; but he could not give evidence of a declaration made a month before by one of the constables.—EDWARDS v. FERRIS (1836), 7 C. & P. 542.

325. ———. Subsequent day.]—EDWARDS v. FERRIS, No. 324, *ante*.

326. ———. Directions given in accordance with contemporary promise.]—Plff., at the recommendation of B. sent goods to a dyer who was told by plff.'s son that B. would give directions about them. B. called, & gave directions, & afterwards became bkpt. In trover for these goods brought by plff. against B.'s assignees:—*Held*: the directions given by B. were admissible in evidence for the assignees.—SHARP v. NEWSHOLME (1839), 5 Bing. N. C. 713; 8 Scott, 21; 9 L. J. C. P. 211; 3 Jur. 581; 132 E. R. 1275.

— Proof of act of bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 72, 75, 77, 81, Nos. 615, 649-651, 676, 719, 720.

— In criminal matters.]—See CRIMINAL LAW, Vol. XIV., p. 397, Nos. 4172-4181.

— On sale of goods.]—See Sub-sect. 2, D. (b), *post*.

10 N. S. W. L. R. 171; 6 N. S. W. W. N. 55.—AUS.

a. ———. Few days before trial.]—On an indictment for not repairing a bridge:—*Held*: evidence of the state of the bridge a few days before the trial was admissible, not as proof of that fact, but as confirming the other witnesses, who swore to its state at the time laid in the indictment, & as showing such state by inference.—R. v. DESJARDINS CANAL CO. (1868), 27 U. C. R. 374.—CAN.

b. ———. Subsequent to assignment.]—A man by an informal instrument assigned to a trustee all his estate & effects on the condition of the trustee paying to each of the children

of the assignor \$400. Subsequently the grantor conveyed to one of his sons a house & premises valued at \$200:—*Held*: declarations of the father, made subsequently to the assignment in trust, & the conveyance to, & in the absence of the son, were inadmissible to show that the conveyance was made, & intended to be, in part satisfaction of the sum so secured to the son.—MULHOLLAND v. MERRIAM (1872), 19 Gr. 288; *affd.* (1873), 20 Gr. 152.—CAN.

c. ———. Some months after event.]—Admissions by an agent of the vendee made months after the transaction had taken place to a person who had nothing whatever to do with it, are no

part of the *res gesta* & are not admissible to establish a contract of sale of goods & their delivery.—LEBLANC v. LAPORTE, MARTIN & CO. (1911), 10 E. L. R. 261; 40 N. B. R. 468.—CAN.

d. ———. Conversations after meeting.—Whether evidence of character of meeting.]—Expressions used in conversation by persons apparently returning from a meeting, within an hour of its termination, while the crowd were dispersing, & at about a mile distance from the platform:—*Held*: inadmissible as evidence of the character & object of the meeting against persons who had attended it.—R. v. O'CONNELL (1845), 1 Cox, C. C. 403.—IR.

C. Relation to Act to be Explained.

327. Statement by one joint tortfeasor—Before joint tort committed.]—EDWARDS *v.* FERRIS, No. 324, *ante*.

328. Statements accompanying act not in issue—Letter enclosing bill for collection.]—If it could be shown that the letter was the envelope in which the note was sent [for the purpose of procuring payment] it might be read in evidence as a declaration accompanying an act (LORD ELLENBOROUGH, C.J.).—BRUCE *v.* HURLY (1815), 1 Stark. 23, N. P.

329. — Subsequent act.]—On the trial of an action for the infringement of a patent, the novelty of which was disputed, deft. gave evidence that R., then deceased, had, previous to the date of pltf.'s patent, used a process identical with pltf.'s, & had produced & sold a product exactly similar to that produced by pltf.'s patent. Pltf. called witnesses in reply, & a witness deposed that R. had, on a sale of the product subsequent to that of which deft. had given evidence & subsequent to pltf.'s patent, stated that the article was new, & that he wished it to be kept secret:—*Held*: the evidence was inadmissible.—HYDE *v.* PALMER (1803), 3 B. & S. 657; 1 New Rep. 523; 32 L. J. Q. B. 126; 7 L. T. 823; 11 W. R. 433; 122 E. R. 246.

*Annotation:—*Refd. Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130.

330. — Former acts.]—AGASSIZ *v.* LONDON TRAMWAY CO., No. 321, *ante*.

*D. In Particular Instances.**(a) Accidents and Collisions.*

331. Accident—Statement made at time of accident—& in presence of driver.]—The remarks were made at the very time the accident took place, & as they were made in the presence of the coachman, he might have corrected anything that was misstated by the policeman (TINDALL, C.J.).—WILSON *v.* BARFORD (1846), 7 L. T. O. S. 184.

332. — Statement made after accident.]—AGASSIZ *v.* LONDON TRAMWAY CO., No. 321, *ante*.

333. Collision—Previous history of ship.]—THE MELLONA, No. 305, *ante*.

334. — Statement by pilot after collision of ships.]—THE SCHWALBE (1859), Sw. 521; 106

E. R. 1244; *subsequent proceedings, sub nom.* NORTH GERMAN LLOYD S.S. CO. *v.* ELDER, THE SCHWALBE (1861), 14 Moo. P. C. 241, P. C.

(b) Sale of Goods.

See, generally, SALE OF GOODS.

335. Statements made at time of purchase.]—A conversation at the time of a purchase is admissible in evidence for deft. in an action for the price of the goods, although it may let in a set-off otherwise barred by Stat. Limitations.—MOORE *v.* STRONG (1835), 1 Bing. N. C. 441; 1 Hodg. 28; 1 Scott, 367; 4 L. J. C. P. 165; 131 E. R. 1187.

336. Letter by seller to agent at time of sale—Question whether purchaser treated as principal or agent.]—In trover for goods, the question was whether pltfs. sold the goods to A. on his own account (through whom deft. claimed) or to A. as agent for G. & Co., who, however, never authorised the purchase. At the time of the bargain A. referred pltfs. to B. for inquiry as to the responsibility of G. & Co., pltfs. alleging that the reference was required & given as to their responsibility as buyers, deft. alleging that it was merely as to their responsibility as shippers on behalf of A. Pltfs. wrote to their agent as follows: "We wish you to call & see B. & inquire as to the trustworthiness of G. & Co., & also of A. who is making a rather large purchase of goods for the above party, & who refers us to B. Write by return." An answer was received, but not in evidence:—*Held*: the letter was admissible as evidence for pltfs. on the ground that it was part of the *res gestæ*, & they were entitled to have the whole of it read & submitted to the consideration of the jury.—MILNE *v.* LEISLER (1862), 7 H. & N. 786; 31 L. J. Ex. 257; 5 L. T. 802; 8 Jur. N. S. 121; 10 W. R. 250; 158 E. R. 685.

See, also, No. 339, post.

337. Statement made by buyer at time of landing goods—As evidence of possession.]—Goods were consigned to A., deliverable in the river T. On the arrival of the vessel in the river the captain pressed A. to have them landed immediately. A. in consequence, sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, & kept until he carted them away to his customers in his own carts; but A., being then insolvent, at the same time

PART II. SECT. 3, SUB-SECT. 2.—C.

*e. Statements accompanying act not in issue—Boundary of land.]—*The declarations of a party accompanying the act of showing the point of beginning on the boundary of a grant, are inadmissible in evidence as part of the *res gestæ*, but the truth & correctness of such declarations are open to be controverted by other evidence.—DOE *d.* LONCHESTER *v.* MURRAY (1847), 3 Kerr, 335.—CAN.

*f. — By surgeon.]—*In an action against deft. for negligence as a surgeon in his treatment of pltf., whose hands & feet had been amputated in consequence of his having been frozen, it was proved by pltf. that when deft. first visited him, he said that pltf. would not lose any of his limbs:—*Held*: a statement made by deft. on the same occasion, to another person in the house where pltf. was, that he would lose his hands & feet, was evidence for deft. as part of the *res gestæ*, it appearing that his practice was always to encourage his patients, & prevent a depression of their spirits.—KEY *v.* THOMSON (1868), 1 Han. 297.—CAN.

*g. — Contents of letter.]—*Pltf. put in evidence the contents of a letter sent by him to his son enclosing

a money order, & containing instructions as to the disposition to be made of the money. The letter being lost:—*Held*: its contents were properly received in evidence as explaining the act of sending the order, the letter forming a part of the act.—CLOWSER *v.* SAMUEL (1873), 2 Pug. 58.—CAN.

*h. — Newspaper article.]—*In libel for two articles which were printed in deft.'s newspaper reflecting upon the character & conduct of pltf.:—*Held*: an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with pltf. in which he made an attack upon deft.'s newspaper by its name, & a letter signed by pltf., published in two newspapers before the second of the alleged libels, in which deft.'s newspaper & the editor thereof—not deft. himself—were referred to in abusive language, were admissible in evidence upon the part of deft., in mitigation of damages.—STIRTON *v.* GUMMET (1899), 20 C. L. T. 5; 31 O. R. 227.—CAN.

*k. Inscriptions on banners at meeting.]—*Inscriptions on banners, placards, & an arch recently erected in the vicinity of a meeting, charged as an overt act of conspiracy, may be given

in evidence, to show the nature & character of the meeting, although it does not appear by whom they were erected.—R. *v.* O'CONNELL (1844), 1 Cox, C. C. 401.—IR.

PART II. SECT. 3, SUB-SECT. 2.—D. (a).

1. Collision—Statement made after accident.]—In an action for collision:—*Held*: evidence of declarations made by the captain of deft.'s vessel, as to the cause of the accident, on the day after it had happened, were inadmissible for pltf.; but the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident.—SHAW *v.* DE SALABERRY NAVIGATION CO. OF MONTREAL (1859), 18 U. C. R. 541.—CAN.

PART II. SECT. 3, SUB-SECT. 2.—D. (b).

*m. Statements made at time of purchase.]—*In an action against the vendee of goods bought at auction for not accepting delivery thereof, evidence is admissible to show that samples were exhibited at the time of sale, & that the auctioneer declared that the sale was one by sample, although the note or memorandum of sale entered in the

Sect. 3.—Facts which may be proved: Sub-sect. 2, D. (b), (c) & (d); sub-sect. 3.]

told B. he would not meddle with the goods, that he did not intend to take them, & that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, & there stopped *in transitu* by the vendor. In trover for the goods by the assignees in bkpcy. of A. against the wharfinger:—*Held*: the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger.—**JAMES v. GRIFFIN** (1837), 2 M. & W. 623; 6 L. J. Ex. 241; 150 E. R. 906.

Annotations:—Mentd. *Dodson v. Wentworth* (1842), 4 Man. & G. 1080; *Bushel v. Wheeler* (1844), 15 Q. B. 442; *Helmecke v. Earle* (1858), 31 L. T. O. S. 357; *Bolton v. L. & Y. Ry.* (1860), L. R. 1 C. P. 431; *Fraser v. Witt* (1868), L. R. 7 Eq. 64; *Re Worsdell, Ex p. Barrow* (1877), 46 L. J. Bey. 71; *Re Cock, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 660.

338. Statement made at time of payment.—Payment through hands of third person.]—WALTERS v. LEWIS, No. 316, *ante*.

339. Statement by buyer immediately after transfer.—As evidence as to party to whom credit given.]—Indebitatus assumpsit, in £5,000 for certain £3 per cent. stock alleged to be sold, & caused to be transferred by plff. to deft., & by deft. duly accepted. Pleas non assumpsit, & that deft. did not accept the stock from plff. At the trial it appeared that P., a stockbroker, had applied to plff., a stock jobber, for the purchase of stock to the amount of £5,000 for deft. Plff., not having any stock of his own, applied to W., who agreed to transfer, & did accordingly transfer, stock standing in his name to deft. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal was disclosed; though credit is sometimes given to the principal & his cheque taken, where the broker's credit is not thought sufficient. A witness having been called to prove on the part of plff., that, immediately after the transfer had taken place, plff. requested T. to give him the cheque of his principal:—*Held*: this evidence was admissible, not as amounting to an admission, but as part of the *res gestæ*.—**MORTIMER v. McALLAN** (1840), 6 M. & W. 58; 9 L. J. Ex. 73; 4 Jur. 172; 151 E. R. 320; *subsequent proceedings*, 7 M. & W. 20; *sub nom.* **McALLAN v. MORTIMER** (1842), 9 M. & W. 636, Ex. Ch.

Annotations:—Mentd. *Thomas v. Fredricks* (1847), 10 Q. B. 775; *It. v. Mainwaring* (1856), 7 Cox, C. C. 192;

auctioneer's books is silent on the point.—**LAZARUS v. LUNING**, Mac. 64.—**N.Z.**

n. Exhibition of goods by vendor at time of purchase.]—In a written contract for the sale of goods, the goods were described by words & letters which were unintelligible to an ordinary person with an ordinary knowledge of the English language. There was no mention in the contract of any sample, but at the time the contract was made specimens of the goods were exhibited to the purchasers:—*Held*: the evidence of the exhibitions of the specimens was admissible to show the kind of things denoted by the words of description used by the parties. *Semble*: such evidence would only be admissible in a case where the specimen was fraudulently exhibited to deceive the purchaser, & the buyer had been induced to buy goods which turned out to be of greatly inferior quality & value.—SHARP v. THOMSON** (1915), 20 C. L. R. 137.—**AUS.****

PART II. SECT. 3, SUB-SECT. 2.—D. (c).

e. Property assigned to avoid exe-

cution.—In trespass for taking hay, which plff. claimed to have been delivered to him by deft. in payment of a debt:—*Held*: evidence was admissible on the part of deft., to show that the hay was delivered to plff. in order to prevent its being seized on execution against deft., & no property was intended to pass to plff.—**KNOWLES v. ADAMS** (1863), 5 All. 445.—**CAN.**

p. Execution debtor's statement as to seized property.]—Plff.'s attorney sent a *fi. fa.* to the sheriff, with a letter saying that they wished to get at two shares of certain building society stock standing in the name of B. & his wife, which, though standing in their name in a representative capacity, were nevertheless the property of the wife, & therefore of deft. In an action against the sheriff for false return of *nulla bona* to this writ:—*Held*: evidence that B. & his wife spoke of these shares as their own was inadmissible in this action against the sheriff, even as *prima facie* evidence of ownership.—ROBINSON v. GRANGE** (1869), 18 U. C. R. 260.—**CAN.****

q. Bill of exchange.—Bond fide debt due to mother of bankrupt.]—The

Grissell v. Bristowe (1868), L. R. 3 C. P. 112; *Langton v. Waite* (1868), L. R. 6 Eq. 165; *Calder v. Dobell* (1871), L. R. 6 C. P. 486; *Owner v. Beehive Spinning Co.*, [1914] 1 K. B. 105.

See, also, No. 336, *ante*.

(c) In Connection with Bankruptcy and Assignments to Creditors.

Bankruptcy.—Intention to defeat or delay creditors.]—See BANKRUPTCY, Vol. IV., pp. 72, 75, 77, 81, Nos. 615, 649–651, 675, 676, 718, 720.

340. Assignment for benefit of creditors.—Question of bona fides.—List of creditors drawn up at time of assignment.]—A trader & small farmer being embarrassed in her affairs & pressed by a creditor, assigned “all her effects, stock, books & book-debts,” for the benefit of her creditors, & at the same time dictated a list of persons who she stated to be creditors of her estate. The assignee having dealt with the property after her death, was sued by one of her creditors as *exor. de son tort*:—*Held*: the list was evidence as part of the transaction of the assignment in order to establish the *bona fides* of it, & so justify deft.'s intermeddling.—LEWIS v. ROGERS** (1831), 1 Cr. M. & R. 48; 4 Tyr. 872; 3 L. J. Ex. 326; 149 E. R. 988. **Annotation:—Mentd.** *Anderson v. Anderson*, [1895] 1 Q. B. 749.**

341. ——— Statement made in schedule of affairs.]—PEACOCK v. HARRIS, No. 319, *ante*.

342. ——— Statement of intention to make assignment.]—On the trial of an issue directed to try whether goods seized by the sheriff of H. under a *fi. fa.* against G. were the goods of plff., plff.'s counsel proposed to give evidence of a statement made by G., before the execution went in, that he, G., was indebted to plff., & was going to assign his goods to him, by way of payment:—*Held*: this evidence was not receivable.—PROSSER v. GWILLIM** (1843), 1 Car. & Kir. 95, N. P. **Annotation:—Reid.** *Coole v. Braham* (1848), 3 Exch. 183.**

(d) In Criminal Matters.

See, generally, **CRIMINAL LAW**, Vol. XIV., pp. 368 *et seq.*, 391 *et seq.*

Forgery of bill of exchange, *see* **BILLS OF EXCHANGE**, Vol. VI., p. 108, Nos. 740–745.

SUB-SECT. 3.—FACTS PROBATIVE OF MAIN FACT.

343. General rule.]—There appears to me to be an appreciable distinction between evidence

mother of a bkpt. claimed in the sequestration upon a bill of which she was the holder. The bill was drawn by her son-in-law upon & accepted by bkpt., & was endorsed blank by the drawer after the date of the sequestration. Claimant was met by the defence of no value received. The drawer admitted that in taking bkpt.'s acceptance he had acted on behalf & in the interest of claimant:—*Held*: she was entitled, as against the trustee on bkpt.'s estate, to prove, by parole evidence that the drawer, in drawing the bill, had acted as a *negotiorum gestor* or volunteer agent for her, & that the sum in the bill was truly due to her in respect of a loan granted by her to bkpt.—**CROSBIE v. BROWN** (1900), 3 F. (Ct. of Sess.) 83; 38 Sc. L. R. 88.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 3.

343 i. General rule.]—When the existence of a fact otherwise irrelevant, tends to prove the existence of another fact relevant to the case, the existence of the first fact is also relevant; & the evidence of what would otherwise be only *res inter alios acta* may be admis-

having a direct relation to the principal question in dispute & evidence relating to collateral facts, which will, if established, tend to elucidate that question. It is the right of the party tendering it to have evidence of the former kind admitted, irrespective of its amount or weight, these remaining for consideration when his case is closed; but I am not prepared to hold that he has the same absolute right when he tenders evidence of facts collateral to the main issue. In order to entitle him to give such evidence, he must, in the first instance, satisfy the ct. that the collateral fact which he proposes to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; & I am disposed to hold that he is also bound to satisfy the ct. that the evidence which he is prepared to adduce will be reasonably conclusive, & will not raise a difficult & doubtful controversy of precisely the same kind as that which the jury have to determine (LORD WATSON).—METROPOLITAN ASYLUM DISTRICT MANAGERS v. HILL (APPEAL No. 1) (1882), as reported in 47 L. T. 29; 47 J. P. 148, H. L.

Annotation:—*Consd. A.-G. v. Nottingham Corpn.*, [1904] 1 Ch. 673.

344. Mercantile facts connected with issue—Giving of receipt.—Defts. being bound to repay plffs. what plffs. paid F. for certain work, plffs. in order to prove what they had so paid, proved that having received F.'s bill for doing such work amounting to a certain sum, they sent a cheque by post to F., & F. proved that he received the cheque, & sent in return a receipt, which plffs. produced, & the judge at the trial allowed it to be put in evidence:—*Held*: the receipt was admissible as one of the facts connected with the payment, though it would not have been admissible by itself to have proved the payment.

It appears to me that these are all so many mercantile facts connected with the payment & that as such they might be given in evidence & that it was not necessary to give the contents of the receipt (KEATING, J.).—*CARMARTHEN & CARDIGAN RY. CO. v. MANCHESTER & MILFORD RY. CO.* (1873), L. R. 8 C. P. 685; 42 L. J. C. P. 262.

sible to prove it.—*BARNES v. SHARPE* (1910), 11 C. L. R. 462.—**AUS.**

343 ii. —[If it is desired to tender hearsay evidence it is necessary to prove that the same is so connected with the main facts as to form part of them.—*WILLOUGHBY-SUMNER, LTD. v. SUMNER*, [1924] 3 D. L. R. 381.—**CAN.**

r. Where ownership of land in question—Occasional acts of ownership.—[In a question of boundary between two persons claiming under a paper title, where there has been no enclosure, occasional acts, which would be merely acts of trespass if done by one not the owner, do not operate to give a statutory title; & evidence of such acts offered by deft. was in this case properly rejected.—*WASON v. DOUGLAS*, 21 C. L. T. 521.—**CAN.**

s. Policy of insurance against fire.—[A policy of insurance against fire effected by one of the parties in an election is not admissible in evidence to show an act of ownership over the premises in dispute.—*LATOUCHE v. PENNICK & SLOANE* (1865), 13 L. T. 151.—**IR.**

t. Where efficacy of treatment in question—Evidence of failure in other cases.—[In an action to recover payment for work done under a contract to render harmless the effluent from defts.' wool-scouring works. Experts gave evidence as to the efficacy of plffs.' treatment & partly based their opinions on its alleged success at other

works, where the conditions were not the same as at defts.' works:—*Held*: evidence to show the failure of the system at the other works was admissible in rebuttal of the opinions.—*NEILSON v. HAIGH (HENRY) & SON* (1916), 16 S. R. N. S. W. 396.—**AUS.**

u. Where paternity in question—Resemblance.—[Evidence of the resemblance of the child to the father, if relevant to the issue is admissible, but can only become relevant after a sufficient foundation has been laid to raise suspicion.—*DOE d. MAIR v. MAIR* (1853), 3 C. P. 36.—**CAN.**

v. ———.—[On a question of disputed paternity, evidence of personal resemblance between the child & his alleged father is admissible.—*BAGOT v. BAGOT* (1878), 1 L. R. Ir. 308.—**IR.**

w. Where honesty of claim in question—Evidence to show fraud.—[Plff. sued for the loss of his trunk, which he alleged contained several valuable papers, & among them the lease of a farm from his father to himself. Defts. resisted his claim as fraudulent, denying that they had ever received the trunk, & gave strong evidence to support their defence. They then offered to prove, as tending further to show the dishonesty of the claim, that this farm had been the subject of a suit in Chancery, in which it was decreed that plff.'s father held

345. Mere similarity alone insufficient.—[Evidence of events similar to the one under inquiry on account of their general similarity, is not admissible. You must not prove, e.g., that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion; nor that a person accused of crime is a habitual criminal (STEPHEN, J.).—*BROWN v. EASTERN & MIDLANDS RY. CO.* (1889), 22 Q. B. D. 391; 58 L. J. Q. B. 212; 60 L. T. 266; 53 J. P. 342; 5 T. L. R. 242, D. C.; on appeal, 22 Q. B. D. 393, C. A.

Annotation:—*Refd. Heath's Garage v. Hodges* (1915), 14 L. G. R. 195.

346. Relevancy on one ground sufficient—Irrelevancy on other grounds immaterial.—[It often happens, both in civil & criminal cases, that evidence is tendered on several alternative grounds, & yet it is never objected that if on any ground it is admissible that ground must not prevail because on some other ground it would be inadmissible & prejudicial (JELF, J.).—*R. v. BOND*, [1906] 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 70 J. P. 424; 54 W. R. 586; 21 Cox, C. C. 252, C. C. R.

Annotations:—*Refd. R. v. Chitson*, [1909] 2 K. B. 945; *R. v. Charlesworth* (1910), 4 Cr. App. Rep. 167; *R. v. Ellis*, [1910] 2 K. B. 746; *R. v. Stone* (1910), 6 Cr. App. Rep. 89; *R. v. Ball*, [1911] A. C. 47; *R. v. Thomson* (1912), 76 J. P. 431; *R. v. Price* (1913), 9 Cr. App. Rep. 15; *R. v. Rodley*, [1913] 3 K. B. 468; *R. v. Boyle & Merchant*, [1914] 3 K. B. 339; *R. v. Mason* (1914), 111 L. T. 336; *Perkins v. Jeffery*, [1915] 2 K. B. 702; *Thompson v. R.*, [1918] A. C. 221; *R. v. Lovegrove*, [1920] 3 K. B. 643; *R. v. Armstrong* (1922), 127 L. T. 221; *R. v. Starkie*, [1922] 2 K. B. 275.

347. Where ownership of land in question—Receipt of rent by lessor of plaintiff.—[1] In ejectment to recover garden ground, it was proved for plff. that deft. had been let into possession of the garden by M., who had paid rent to the lessor of plff. Deft.'s case was, that M. had rented a part of his garden of the lessor of plff., & that that had been given up, & that deft. had the residue of the garden, which was now in dispute, devised to him by his father's will in the year 1791. The lessor of plff. proposed to give evidence in reply, to show that, from the year 1791, the lessor of plff., &

the land only as agent for another, & should convey to him; & that plff. was aware of the fact, having been examined as a witness in the case:—*Held*: such evidence was rightly received.—*THOMAS v. GREAT WESTERN RY. CO.* (1857), 14 U. C. R. 389.—**CAN.**

a. Where particular agreement in question—Evidence of general agreement.—[Evidence of a general agreement with plffs. that all notes made by defts. should be drawn payable in a particular form, is admissible to support a plea of such an agreement as to the notes sued on.—*BANK OF MONTREAL v. REYNOLDS* (1866), 25 U. C. R. 352.—**CAN.**

b. Where scuttling of vessel in question—Evidence of receipt of money.—*Held*: proof of the receipt by prisoner of drafts for large sums of money, drawn by parties in C., from which the vessel which prisoner was charged with scuttling sailed, was properly received, & being unexplained by prisoner, they were properly left to the jury as evidence against him.—*R. v. TOWER* (1880), 20 N. B. R. 168.—**CAN.**

c. Where cause of fire in question—Circumstantial evidence.—[In an action against a railway co. for negligently causing fire by sparks from their engine, the cause of the fire may be proved by circumstantial evidence.—*GRAND TRUNK RY. CO. v. HAINVILLE*

Secl. 3.—Facts which may be proved: Sub-sects. 3

his father received rent for the piece of ground in question:—*Held*: the evidence was receivable.

(2) A deceased receiver of rents had rendered to his employer annual accounts of the rents received from property at H. The accounts were not signed by any one. One of the accounts was in the hand-writing of a deceased clerk, but on it was written, in the hand-writing of the receiver "H. rents"; another account was in the hand-writing of the son of the receiver, who proved that he made it out by the authority of his father, & that the account was rendered to the employer, as was the usual course:—*Held*: under these circumstances, both these accounts were receivable in evidence as the accounts of a deceased agent charging himself to his principal.—*DOE v. STURT v. MOBIS* (1811), Car. & M. 1, N. P.

Annotation:—As to (1) *Refd.* Shaw v. Beck (1853), 8 Exch. 392.

Evidence of ownership of land, *see, generally*, LANDLORD & TENANT; SALE OF LAND.

348. Where power of bankrupt to dispose of property in question—Conveyance to trustees for wife—Subsequent assignment by husband—Trustees not privy.—(1) Upon the question whether A. after executing a conveyance of property to trustees for the benefit of his wife, had the disposition of the property, evidence of his making an assignment of it, is not admissible against the trustees, unless they were privy to it, or unless the property was delivered & the assignment acted upon.

(2) Where the question is as to the solvency of a party at a particular time, the general result as collected from sufficient sources may be given in evidence.

(3) *Semble*: the accounts rendered by a bkpt. of his affairs to the comrs. are competent sources.—*MEYER v. SEFTON* (1817), 2 Stark. 274, N. P.

Evidence that goods in order & disposition of bankrupt, *see, generally*, BANKRUPTCY, Vol. V., pp. 750 *et seq.*

Where reasonableness of agreement in question—Evidence of usage.—*See* CUSTOM & USAGES, Vol. XVII., p. 40, No. 443.

In criminal matters.—*See* CRIMINAL LAW, Vol. XIV., pp. 358 *et seq.*

As to ratable value of property.—*See* RATES & RATING.

Presumption generally.—*See* Part III., Sect. 6, *post*.

(1898), 29 S. C. R. 201; 28 O. R. 625; *affd.* 25 A. R. 242.—**CAN.**

d. — Absence of fire before passage of train.—If a fire is discovered on land adjoining a railway a short while after a train had passed & it is proved that no fire was burning before the passing of the train, the same is *prima facie* evidence that the fire in question was caused by sparks from the train.—*R. v. CANADIAN PACIFIC RY. CO.* (1905), 7 Terr. L. R. 286; 1 W. L. R. 89.—**CAN.**

e. Where reason for indure in question—Evidence of indebtedness.—K., the maker, & F., the indorser, of a promissory note were sued upon it, & F. denied his indorsement. At the trial an indenture of conveyance of land from K. to F. was put in without objection, & K. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to show that it was given for anything but the expressed consideration of \$1,500, & it was not pretended that such con-

sideration was paid:—*Held*: it was competent for F. to show what the indenture was given for, that it was not given to secure him against such indorsement; & evidence of the existence of an indebtedness from K. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness.—*BANK OF HAMILTON v. ISAACS* (1888), 16 O. R. 450.—**CAN.**

f. Where irrigability of land in question—Evidence of irrigability of adjacent land.—The evidence of owners or occupants of adjacent lands directed to their own lands & the effect of irrigation upon them is not admissible to prove that certain other land was not irrigable.—*BABCOCK v. C. P. R.* (1916), 33 W. L. R. 941; 9 W. W. R. 1484; 9 Alta. L. R. 270.—**CAN.**

g. Where overt act in conspiracy in question—Documents printed by order of traversers.—Two documents printed by direction of one of the traversers, & one of which was signed by another of them, were admitted in evidence in support of an overt act

SUB-SECT. 4.—FACTS SHOWING IDENTITY.

A. What amounts to Proof of Identity.

349. General rule.—Identification is a question of fact to be proved, like any other conclusion of fact, either by direct or circumstantial evidence (*per* CUR.).—*ROOKER v. ROOKER* (1863), 3 Sw. & Tr. 526; 33 L. J. P. M. & A. 42; 9 Jur. N. S. 1329; 12 W. R. 807; 164 E. R. 1379.

350. Sufficiency of evidence.—There is ample evidence of identity founded upon the resemblance between the names, professions, places of abode, & ages of the parties (*ALDERSON, B.*).—*RUSSELL v. SMYTH* (1842), 9 M. & W. 810; 1 Dowl. N. S. 929; 11 L. J. Ex. 308; 152 E. R. 343.

Annotations:—*Refd.* Martin v. White, [1910] 1 K. B. 665. *Mentd.* Henderson v. Henderson (1844), 6 Q. B. 288; Sheehy v. Professional Life Assce. (1857), 2 C. B. N. S. 211; Schilbsy v. Westenholz (1870), L. R. 6 Q. B. 155; Rousillon v. Rousillon (1880), 14 Ch. D. 351; *Re* Henderson, Nouvion v. Freeman (1887), 57 L. J. Ch. 367; Emanuel v. Symon, [1908] 1 K. B. 302; Harris v. Taylor, [1915] 2 K. B. 580.

351. ——*Pltf.* was appointed engineer to a railway co. at a meeting of the provisional committee. Deft. had previously agreed to join that committee & had forwarded applications for shares, but whether before or after the meeting was uncertain. An individual answering to deft.'s name was present at the meeting & visited the office of the co.:—*Held*: there was no evidence to go to the jury of deft.'s identity with that individual.—*GILES v. CORNFOT* (1847), 2 Car. & Kir. 653, N. P.

352. — Question for judge.—A person, on being sent by deft., an indorser of a bill of exchange, to pltf., the indorsee, to inquire as to the solvency of B., a prior indorser, went to pltf.'s residence; & on the street door being opened, a person in a dressing-gown, whom he had never seen before or since, asked him what his business was:—*Held*: not sufficient evidence of identity to let in evidence of the conversation.

It is a question for the judge, & not a point for the consideration of the jury, whether the evidence of identity is sufficient in such case.—*CORFIELD v. PARSONS* (1833), 1 Cr. & M. 730; 3 Tyr. 806; 2 L. J. Ex. 262; 149 E. R. 593.

Annotation:—*Refd.* R. v. Colclough (1882), 15 Cox, C. C. 92.

353. Declaration by person interviewed—Prima facie evidence.—If a carman take goods to the house of L., not knowing him, & ask for Mr. L. of a person whom he finds in the house, & that person says, "I am Mr. L.," this is *prima facie* evidence that he was L.—*WILTON v. EDWARDS* (1831), 6 C. & P. 677, N. P.

in an indictment for conspiracy, though neither the printing nor publishing them was laid as an overt act in the indictment nor specified in the bill of particulars as intended to be relied on in evidence.—*R. v. O'CONNELL* (1844), 1 Cox, C. C. 397.—**IR.**

h. Where bargain in question—Letter dated antecedent to bargain.—In damages for breach of bargain it is competent to produce a letter dated antecedent to the bargain.—*STOTHART v. JOHNSTON'S TRUSTEES* (1821), 2 Murr. 539.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 4. —A.

k. Identity of name.—*Pltf.* described himself in the declaration "J. Kerriken, otherwise called J. Carrigan," & in support of the action produced an acknowledgment, signed by deft., of a balance due from him to J. Kerriken.—*Held*: it was necessary for pltf. to identify himself with the party mentioned in the acknowledgment & without proof that the J. Kerriken there mentioned was also called J. Carrigan, the action could not be

354. —[In an action against S. it was proved that a witness went to a tavern & asked a waiter if S. was there; & on a person coming out to the witness, the latter asked him who he was, & he said his name was S. The witness had not known deft. before, & had never seen him since:—*Held*: this was some proof that this person was S. & the conversation between the witness & this person was receivable in evidence.—*REYNOLDS v. STAINES* (1849), 2 Car. & Kir. 745, N. P.

355. Identification with person subsequently seen.—*Person in court.*—To prove that A. & B. took a distress, a witness was called, who stated that he saw two persons, whom he did not then know, take the distress, & that he had since learnt that their names were A. & B., & that he had seen A. in ct. Another witness, who knew A., proved that A. had been in ct.:—*Held*: this was evidence to go to the jury as to A., but not as to B., & as to B. the evidence was not sufficient.—*BYE v. BOWER* (1841), Car. & M. 262.

356. —[An action being brought against W. H. for negligently navigating a vessel, & the circumstances under which the collision took place having been proved, it was objected that no evidence had been given that deft. was the pilot in charge of the vessel, whereupon pltf.'s counsel called out, "Mr. H.!" upon which a person in ct. answered "here"; & said, "I am the pilot." It was proved by one of the witnesses who had gone on board the vessel at the time of the accident, that he had seen that person then acting as pilot:—*Held*: this was sufficient evidence of the identity of deft. with the pilot.—*SMITH v. HENDERSON* (1842), 9 M. & W. 798; 11 L. J. Ex. 315; 152 E. R. 338.

Annotation:—*Refd.* Sewell v. Evans, Roden v. Ryde (1843), 4 Q. B. 626.

357. Identity of name.—*Copy of bill & answer.*—Upon a plea of *plene administravit*, pltf., in order to show assets, gave in evidence a copy of a bill, & answer, purporting to be an answer by a person of the same time, & sustaining the same character as deft.:—*Held*: the copy was admissible, & on the face of it there was presumptive evidence of identity; deft. not having shown any circumstances to rebut the presumption.—*HENNEILL v. LYON* (1817), 1 B. & Ald. 182; 106 E. R. 67.

Annotations:—*Fold.* *Studdy v. Sanders* (1823), 2 Dow. & Ry. K. B. 347. *Apld.* *Dartnall v. Howard* (1824), Ry. & M. 169. *Consd.* *Rees d. Howell v. Bowen* (1825), M'Cle. & Yo. 383. *Apld.* *Tooth v. Bagwell* (1826), 2 C. & P. 271. *Refd.* *Logan v. Alder* (1832), 3 Tyr. 557, n. *Mentd.* *A-G v. Ray* (1844), 3 Hare, 335.

maintained.—*KERRICK v. COPELAND* (1847), 3 Kerr, 567.—*CAN.*

1. —[Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes, it will be presumed from the identity of the names.—*NICHOLSON v. BURKHOLDER* (1861), 21 U. C. R. 108.—*CAN.*

m. —[The patent from the Crown was to F. Weis, & the deed to L. C. was signed by F. Weist as a marksmen. There was no direct evidence of the identity of Weis & Weist. It was not shown there was any other F. Weis except the person who conveyed as F. Weist. Several uncles & other relatives were called, but no other witness was examined as to his heirship:—*Held*: the identity of Weis & Weist who made the deed to L. C. was sufficiently proved.—*WALLBRIDGE v. JONES* (1873), 33 U. C. R. 613.—*CAN.*

... —[The affidavits leading to an order for *ca. re.* must show that there is a debt due from deft. to pltf. It is not sufficient to show that there is a debt due from deft. to one who

bears the same name as pltf.—*WEHRFRITZ v. RUSSELL & SULLIVAN* (1902), 9 B. C. R. 79.—*CAN.*

o. —[The production on the trial by pltf.'s solr. of a grant from the Crown to a person of the same name as the person from whom pltf. claims the property granted as heir & devisee of the grantee, is sufficient evidence of the identity of pltf.'s predecessor in title with the grantee to sustain a verdict for pltf. in an action for the land.—*SIMPSON v. MALCOLM* (1914), 43 N. B. R. 79.—*CAN.*

p. *Identity of land.*—Pltf., by producing a Crown grant, to him, which contained a description exactly coinciding with that inserted in the writ, produced *prima facie* evidence that the land granted to him was the land described in the writ.—*NEWTON v. ILES* (1868), 7 N. S. W. S. C. R. (L.) 276.—*AUS.*

q. —*By number & concession.*—The description of a lot by metes & bounds from the Crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number &

358. —[In an action against three defts., as partners, the office copy of an answer to a bill in Chancery, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership; & to prove the identity of defts., the clerk of their solr. is a competent witness to that fact, though he knows nothing of defts. but from his intercourse with them professionally in the conduct of the suit in Chancery.—*STUDDY v. SANDERS* (1823), 2 Dow. & Ry. K. B. 347; *sub nom.* *STADDY v. SANDERS*, 1 L. J. O. S. K. B. 90.

Annotation:—*Refd.* *Greenough v. Gaskell* (1833), 1 My. & K. 98.

359. — *Schedule under Insolvent Debtors Act, 1826 (c. 57).*—*Semble*: (1) certified copies of the schedule etc. under above Act, are only evidence for the insolvent, & for his creditors, because they are the only persons entitled by the Act to claim them; (2) to make the contents of a schedule evidence against an insolvent debtor, some evidence of identity is necessary, & it will not be sufficient that the schedule purports to be the schedule of a person of the name of the insolvent.—*NICHOLLS v. DOWNES* (1830), 4 C. & P. 330; 1 Mood. & R. 13, N. P.

360. — *Apothecary's licence.*—In an action by an apothecary for medicines & attendance, pltf. proved that he had acted as such, & produced a licence from the Apothecaries Co., to a person bearing the same Christian & surname with himself, the seal of which was proved to be genuine:—*Held*: this was sufficient evidence for the jury of his being the party to whom the licence had been granted.—*SIMPSON v. DISMORE* (1842), 9 M. & W. 47; 11 L. J. Ex. 137; 5 Jur. 1012; 152 E. R. 21.

Annotation:—*Refd.* *Martin v. White*, [1910] 1 K. R. 665.

361. — *Person addressed by name exhibited.*—It is *prima facie* proof of identity if a name is written up in an auction room & the auctioneer is addressed by the bystanders by that name.—*COLLIER v. NOKES* (1849), 2 Car. & Kir. 1012; 15 L. T. O. S. 189, N. P.

362. — *Onus of proof.*—It is not necessary to prove strictly the identity of deft. with a person of the same name, concerning whom a witness gives evidence. The similarity of the names is sufficient to put deft. to the proof that he is not the person spoken of. *HAMBER v. ROBERTS* (1849), 7 C. B. 861; 18 L. J. C. P. 250; 137 E. R. 311.

concession.—*HAGARTY v. BRITTON* (1870), 30 U. C. R. 321.—*CAN.*

r. *Identity of goods.*—It appeared that the goods were seized in Oct. in the house mentioned in a mtge. which had been executed in the previous Aug., & were of the same kind & description as those set out in the mtge.:—*Held*: sufficient evidence that they were the same goods as those mortgaged.—*NATTHASSE PHAIR* (1875), 37 U. C. R. 153.—*CAN.*

s. *Identity of animals.*—On account of the difficulty of identifying herds of cows & other animals on prairie lands, sufficient evidence of ownership is given by the number or mark branded on the animals.—*GRAVELY v. SPRINGER* (1898), 3 Terr. L. R. 120.—*CAN.*

t. *Identity of performance.*—*CARTE v. DENNIS* (1901), 5 Terr. L. R. 30.—*CAN.*

u. *Identity of bonds.*—When to a sc. fa. deft. pleaded Stat. Limitations, to which pltf. replied an acknowledgment in writing, setting forth a sched. filed by deft. in the Insolvent Ct., in which he admitted himself to be

Sect. 3.—Facts which may be proved: Sub-sect. 4, A. & B.; sub-sect. 5, A. (a), (b) & (c).]

In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 358 *et seq.*

In divorce proceedings.]—See HUSBAND & WIFE.

B. Proof of Identity of Persons named in Documents.

363. Legatee—One witness sufficient.]—HUNT v. SARELL (1754), 1 Lec. 589; 161 E. R. 216.

Person executing deed.]—See Part V., Sect. 10, *post*.

364. Party named in schedule under Insolvent Debtors Act, 1828 (c. 57)—Identity with maker of schedule.]—NICHOLLS v. DOWNES, No. 359, *ante*.

365. Person named in apothecary's licence.]—SIMPSON v. DISMORE, No. 360, *ante*.

366. Plaintiff named in writ—More than one name by reputation.]—Qu.: where deft. justified under process sued out of a county ct. against pltf. whose name was E. S., & upon production of the writ it appeared to be against S. S., whether evidence was admissible, if objected to at the trial, to prove that she was as well known by the one name as the other.—SHEE v. JUPP (1832), 1 L. J. K. B. 145.

367. Person named in pleading.]—HENNELL v. LYON, No. 357, *ante*.

368. —.]—STUDDY v. SANDERS, No. 358, *ante*.

369. Parties named in marriage register—Subsequent cohabitation in witness' house—Production of copy to witness at time.]—CRIPPS v. CRIPPS (1842), 1 Notes of Cases. 530.

Parties to bill of exchange.]—See BILLS OF EXCHANGE, Vol. VI., p. 484, Nos. 3067, 3073.

Certificate of previous conviction.]—See CRIMINAL LAW, Vol. XIV., p. 500, Nos. 5501–5510.

SUB-SECT. 5.—FACTS SHOWING STATE OF MIND.

A. Intention or Motive.

(a) In General.

370. Intention a question of fact.]—A misstatement of the intention of deft. in doing a

debted to the consignee of the judgment in three bonds, but which bonds were different in amount & in date from the bond on which the judgment was entered, & deft. rejoined that there was no acknowledgment:—*Held*: parol evidence was admissible to show that one of the bonds mentioned in the sched. was identical with the bond on which judgment had been obtained.—HANAN v. POWER (1815), 8 L. L. R. 505.—**IR.**

PART II. SECT. 3, SUB-SECT. 4. B.

b. Legatee—Party exactly described in writ.]—Where there is an ambiguity as to the identity of the party to whom a testator has bequeathed a legacy, the fact that the description of one only of the claimants corresponds exactly to the description of the legatee given by testator does not *per se* conclude the question in favour of that claimant, & does not preclude inquiry into the question whether another claimant, whose description does not exactly correspond, may not be the legatee intended by testator; but there is a strong presumption in favour of the party exactly described which cannot be overcome except by cogent positive evidence.—NASMYTH'S TRUSTEES v. NATIONAL SOCIETY FOR PREVENTION OF CRUELTY TO CHILDREN, [1914] S. C. (H. L.) 76.—SCOT.****

c. Parties named in marriage register—Proof *alibi* required to identify.]—A certified copy of the

duplicate original register of a marriage is good evidence of the marriage in an action for restitution of conjugal rights, but proof *alibi* is required to identify the parties to the proceedings before the ct. as the persons named in the register.—RYKIE v. RYKIE (1868), Buch. 114.—**S. AF.**

d. Party named in miner's right.] It is not necessary that a miner's right should bear the full name of the holder. It is only a question of proof of identity between the person named in the right & claimant of the right.—HOMEWARD BOUND GOLD MINING Co. (NO LIABILITY) v. McPHERSON (1896), 17 N. S. W. Eq. 281.—**AUS.**

e. Maker of promissory note.]—In an action by the indorsee of a promissory note against the maker, the handwriting of the attesting witness to the maker's signature, together with the handwriting of the indorser, were proved, but no evidence was given to identify deft. with the person named in the note, & the judge at the trial, for want of such evidence, nonsuited pltf. On motion for a new trial:—*Held*: the evidence given at the trial was sufficient, & accordingly a new trial was granted.—McCULLOUGH v. SHELLES (1847), 3 Kerr. 391.—**CAN.**

f. Party named in writ.]—If the party who has been served with process & appeared to defend the action bears the same name as the party proved to be liable, pltf. is entitled to a verdict unless the party so served, etc., shows that he is not the proper deft.—

particular act may be a misstatement of fact, & if pltf. was misled by it, an action of deceit may be founded on it.—EDGINGTON v. FITZMAURICE (1885), 29 Ch. D. 459; 55 L. J. Ch. 650; 53 L. T. 369; 50 J. P. 52; 33 W. R. 911; 1 T. L. R. 326, C. A.

Annotations:—*Reid*, Yorkshire Insee. v. Craine, [1922] 2 A. C. 541. *Mentd.* Re London & Leeds Bank, *Ex p.* Carling, Carling v. London & Leeds Bank (1887), 56 L. J. Ch. 321; Derry v. Peek (1889), 14 App. Cas. 337; Oliver v. Bank of England, [1902] 1 Ch. 610.

Proof of mens rea.]—See CRIMINAL LAW, Vol. XIV., pp. 31 *et seq.*

Intent to deceive—Fortune telling.]—See CRIMINAL LAW, Vol. XV., p. 1075, Nos. 12,168, 12,169.

371. How proved—Conduct before & after given time.]—Acts, events & declarations subsequent to the time at which a question of domicile arises are admissible in evidence upon that question when they indicate what the intention was at the given time.

I have always understood the law to be, that in order to determine a person's intention at a given time, you may regard not only conduct & acts before & at the time, but also conduct & acts after the time, assigning to such conduct & acts their relative & proper weight & cogency (LOPES, L.J.).—*Re GROVE, VAUCHER v. TREASURY SOLICITOR* (1888), 40 Ch. D. 216; 58 L. J. Ch. 517; 59 L. T. 587; 37 W. R. 1, C. A.

(b) When not in Issue.

372. Act unlawful per se—Declaration in party's own favour.]—Where on the receipt of a notice to quit to two joint tenants, one of whom only actually occupied the land, the other said that he had nothing to do with the land:—*Held*: this statement was not admissible to show that a holding over after the expiration of the notice, was not wilful on the part of the latter.

What a man says for himself can be no evidence for him (LORD ABINGER, C.B.).—HIRST v. HORN (1840), 6 M. & W. 393; 151 E. R. 461.

Annotations:—*Mentd.* Tancred v. Christy (1843), 2 L. T. O. S. 190; Crook v. Whitbread (1919), 88 L. J. K. B. 959; Phipps (Northampton & Towseater Breweries) v. Rogers (1924), 93 L. J. K. B. 1009.

Intention immaterial to offence—Undis-

THAYER v. VANCE (1847), 2 Thom. 269. **CAN.**

—.]—In an action for malicious arrest on a *ca. sa.*, the affidavit is sufficiently proved by a copy of the original filed in the Crown office. The identity of deft. with deponent may be presumed *prima facie* from the name.—WILSON v. THORPE (1859), 18 U. C. R. 443. **CAN.**

h. Identity of business firm.]—Deft. was described in the declaration as the general partner of the firm of D. B. & Co., & evidence was given that the steamer was understood to be owned by D. B. & Co.:—*Held*: sufficient to charge deft., there being no plea in abatement.—HOWLAND v. BETHUNE (1856), 13 U. C. R. 270. **CAN.**

k. —.]—E., representing himself as acting for a firm of M., K., & Co. in Toronto, contracted with pltf. at St. J. for the sale of goods, & informed him that the firm was composed of two defts. (stating their names). Pltf. then commenced a correspondence with the firm respecting the goods, & received replies in the firm name, written on paper at the head of which was printed the firm name, & the names of two defts., as stated to pltf. by E.:—*Held*: it would be presumed that the letters sent to pltf. in answer to his letters were written by defts., & were evidence that they composed the firm of M., K., & Co.—GILBERT v. McDONALD (1889), 28 N. B. R. 102.—**CAN.**

charged bankrupt obtaining credit.]—See **BANKRUPTCY**, Vol. V., p. 1052, Nos. 8585, 8587.

— **Sale of unsound meat—Public Health Act, 1875 (c. 55).**—See **FOOD & DRUGS**.

— **Passing off.**—See **TRADE MARKS**.

— **Infringement of copyright.**—See **COPYRIGHT**, Vol. XIII., p. 205, Nos. 399–401.

— **Cruelty to animal.**—See **ANIMALS**, Vol. II., p. 285, No. 571.

— **Proof of mens rea.**—See **CRIMINAL LAW**, Vol. XIV., pp. 31 *et seq.*

373. Act lawful per se—Actuated by improper motive—Threat to distrain & sell fixtures.—A threat to distrain & sell fixtures is not actionable; & in an action commenced after seizure & before sale, evidence of what was sold after action is not admissible to show the intent with which the fixtures were said to be seized.—**BECK v. DENBIGH** (1860), 29 L. J. C. P. 273; 2 L. T. 154; 6 Jur. N. S. 998; 8 W. R. 392.

Annotation:—**Reid. Pole v. Cetcovich** (1860), 9 C. B. N. S. 430.

See, generally, **DISTRESS**, Vol. XVIII., p. 391, Nos. 1311–1313.

— **Whether cause of action.**—See **TORT**.

— **Assignment of debts for purpose of litigation.**—See **ACTION**, Vol. I., pp. 75 *et seq.*

374. — Third person refusing to trade with plaintiff.—Where special damage is alleged, that C. declined to deal with pltf. because his bill was dishonoured, the letter C. received, announcing to him the dishonour of the bill, may be read in evidence to show that he received such a letter, but is no proof of the statements contained in it.—**WHITAKER v. BANK OF ENGLAND** (1834), 6 C. & P. 700; *subsequent proceedings* (1835), 1 Cr. M. & R. 744.

Annotation:—**Mentd. Roberts v. Tucker** (1851), 15 Jur. 987.

375. — Application for mandamus.—The right conferred upon a shareholder of a statutory company by its special Act, incorporating for this purpose Companies Clauses Act, 1845 (c. 16), to have supplied to him a copy of the shareholders' address book is a private right incidental to his property & is a right for the enforcement of which an action for *mandamus* under Jud. Act, 1873 (c. 66), s. 25 (8), & Ord. 53, lies; & in such an action the ct. is not bound by the rules which govern the Ct. of K. B. in an application for the prerogative writ of *mandamus* on the ground that the motives of pltf. in asking for it were improper; & consequently any evidence as to the motives of pltf. is in such an action irrelevant & inadmissible.—**DAVIES v. GAS LIGHT & COKE CO.**, [1909] 1 Ch. 708; 78 L. J. Ch. 445; 100 L. T. 553; 25 T. L. R. 428; 53 Sol. Jo. 399; 16 Mans. 147, C. A.

(c) When in Issue.

376. In connection with what matters—Payment into court—Evidence to show *quo animo*.—Where money has been paid into ct., short of pltf.'s demand, & it is taken out of ct., it is admissible evidence to show *quo animo* it was done; & it is not to be taken as an admission that the rest of the demand was unfounded.—**HILDYARD v. BLOWERS** (1803), 5 Esp. 69, N. P.

377. — Bankruptcy—Whether purchases constitute trading.—A party engaged in the Greenland whale fishery purchases oil in three instances; it is for the jury to decide whether

these dealings constituted him a trader within the meaning of the statute [1 Jac. 1, c. 15, s. 2].

A declaration by the party of his object in buying oil is admissible evidence to prove his intention.—**GALE v. HALFKNIGHT** (1821), 3 Stark. 56, N. P.

— **Intention to defeat or delay creditors.**—See **BANKRUPTCY**, Vol. IV., pp. 72, 75, 77, 78, 80, Nos. 615, 649–651, 675, 676, 718–720.

— **Fraudulent preference—Intention to prefer.**—See **BANKRUPTCY**, Vol. IV., p. 869, No. 7239.

— **Composition with creditors—Intention of agreement.**—See **BANKRUPTCY**, Vol. V., p. 1083, No. 8870.

378. — On plea of mutual mistake.—In an action on a promissory note made by defts. as directors of an insurance co., where it was sought to make them personally liable, evidence was received, under an equitable plea of mutual mistake as to the form of the note, of the intention with which the note was given on the one side & taken on the other.—**CORTAULD v. SAUNDERS** (1867), 16 L. T. 468, N. P.; *subsequent proceedings*, *sub nom. COURTAULD v. SAUNDERS*, 16 L. T. 562.

See, generally, **MISTAKE**.

379. — Possession of house—Intention to steal fixtures—Larceny Act, 1861 (c. 96).—(1) Where a person enters into an agreement for the lease of a house with the fraudulent intention of stealing the fixtures on getting into possession, where in fact he steals the fixtures on entering into possession, he is guilty of larceny under above Act, s. 31.

(2) If the question put was a proper question to be left to the jury, the evidence given was admissible for the purpose of showing the intention with which applt. got possession of the houses (**PICKFORD, J.**).—**R. v. RICHARDS**, [1911] 1 K. B. 260; 80 L. J. K. B. 174; 104 L. T. 48; 75 J. P. 144; 22 Cox, C. C. 372; 6 Cr. App. Rep. 21, C. C. A.

— **Sale of goods—Whether property passes.**—See **SALE OF GOODS**.

380. — Refusal to deliver—On ground of alleged slander.—If A. has sold goods to B., & would not deliver them without payment, & it be alleged in a declaration for words by B. against C., that this non-delivery was special damage resulting from words spoken by C. to A., the counsel of C. may ask A. on the trial of the action for words whether he did not refuse to deliver the goods from what other persons said of B., & what those persons did say.

I think it is admissible in this way—you put it that the witness would not deliver the barley because of something deft. said. I think, to show that that was not so, the other side may ask the witness as to any other causes why he did not deliver the barley, & that he may state what those causes were (**LORD ABINGER, C.B.**).—**KING v. WATTS** (1838), 8 C. & P. 614, N. P.

Annotation:—**Mentd. Coxhead v. Richards** (1846), 2 C. B. 569.

— **Change of domicile.**—See **CONFLICT OF LAWS**, Vol. XI., pp. 317 *et seq.*

— **Merger or preservation of estate or charges.**—See **EQUITY**, Vol. XX., p. 513, Nos. 2417–2419; No. 383, *post*.

PART II. SECT. 3. SUB-SECT. 5.— A. (c).

1. False imprisonment—Facts prior to arrest.—In trespass for false imprisonment, where deft. justified under a *ca. sa.*, & pltf. replied that it

had been set aside before action brought, the judge at *nisi prius* allowed pltf. to go into evidence of facts & circumstances previous to the arrest, with a view of showing the oppressive conduct of deft. in issuing the *ca. sa.*:—**Held**: such evidence was

admissible as affecting the damages, though not the right of action.—**ROBERTSON v. MEYERS** (1850), 7 U. C. R. 423.—**CAN.**

m. Payment under compulsion—Letters threatening to enforce judgment.

Sect. 3.—Facts which may be proved: Sub-sect. 5, A. (c) & B.]

— **Libel — Publication.]** — See **LIBEL & SLANDER.**

— **Merger or preservation of terms.]** — See **LANDLORD & TENANT.**

— **In criminal proceedings.]** — See **CRIMINAL LAW, Vol. XIV., pp. 375, 376.**

— **Particular charges.]** — See **CRIMINAL LAW, Vol. XIV., pp. 377 et seq.**

— **Evidence of motive or malice.]** — See **CRIMINAL LAW, Vol. XIV., pp. 366, 367.**

381. What may be evidence — Ignorance of law.] — Though ignorance of the law will excuse no man, it may be recognised as a matter of evidence with regard to the motives on which a man acts. — **LAVER v. FIELDER** (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 305; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 245; 55 E. R. 1.

Annotations: — **Mentd.** **Keays v. Gilmoro** (1874), 22 W. R. 465; **Re Allen, Hineks v. Allen** (1880), 49 L. J. Ch. 553; **Re Fickus, Farina v. Fickus**, [1900] 1 Ch. 331.

382. — Covenant in marriage settlements — Husband's covenant to settle wife's property — Evidence of intention to bind wife.] — A covenant by the intended husband in a marriage settlement to settle property of the wife's, which he is incapable of effectually settling alone, is evidence of the intention of the parties that the wife should also be bound. — **CALDWELL v. FELLOWES** (1870), L. R. 9 Eq. 410; 39 L. J. Ch. 618; 22 L. T. 225; 18 W. R. 486.

Annotations: — **Consd.** **Re Howett, Hewett v. Hallett**, [1894] 1 Ch. 362. **Mentd.** **Cornwell v. Keith** (1876), 3 Ch. D. 767; **Baillie v. Trehan** (1881), 17 Ch. D. 388; **Burnaby v. Equitable Reversionary Interest Soc.** (1885), 28 Ch. D. 416.

383. — Correspondence between parties — Intention to preserve charge.] — After a decree in a foreclosure suit to which both the mtgor. & the first & second mtgees. were parties, pltf., first mtgee., purchased the equity of redemption from the trustee in bkpcy. of the mtgor. & by deed of assignment in consideration of £1,380, the sum due on first mtge. retained by the first mtgee. in full satisfaction of his debt & of £20 paid to the trustee, making the purchase-money £1,400, the trustee assigned the mtgd. property to the first mtgee. subject to the claim of the second mtgee. The value of the mtgd. property did not exceed £1,380. The second mtgee. contended that the effect of this purchase was to extinguish the first mtgo. debt & to let in his own charge as a first incumbrance. A correspondence took place between the solrs. of the first mtgee. & the trustee at the time of the purchase: — **Held**: the question being one of intention, a correspondence between the solrs. of the first mtgee. & the trustee in bkpcy. at the time of the purchase was admissible in evidence, on the question whether it was intended to keep the first mtgo. alive. — **ADAMS v. ANGELL** (1877), 5 Ch. D. 634; 46 L. J. Ch. 352; 30 L. T. 334, C. A.

Annotations: — **Consd.** **Thorne v. Cann**, [1895] A. C. 11. **Reid.** **Re Pride, Shackell v. Colnett**, [1891] 2 Ch. 135; **Liquidation Estates Purchase Co. v. Willoughby**, [1898] A. C. 321; **The Ripon City**, [1898] P. 78; **Ingle v. Vaughan-Jenkins** (1900), 69 L. J. Ch. 618; **Crosbie-Hill v. Sayer**, [1908] 1 Ch. 866; **Whiteley v. Delaney**, [1914] A. C. 132. **Mentd.** **Minter v. Carr**, [1894] 3 Ch. 498; **Nicholas v. Ridley**, [1904] 1 Ch. 192.

— **Similar acts — Misdescription under Merchandise Marks Act.]** — See **TRADE MARKS.**

B. Knowledge or Notice.

384. Condition precedent — Proof of fact.] — **CRAVEN v. HALLILEY** (1838), cited in 4 M. & W. p. 270; 7 L. J. Ex., p. 307; 150 E. R. 1430. *Annotation: —* **Consd.** **Thomas v. Connell** (1838), 4 M. & W. 267.

385. — —.] — A verbal statement is not receivable in evidence unless made at or about the time of an act done, & in order to explain that act; as for instance, if it is offered to explain a person's absence from home, & is made just before or just after his departure. But, on the other hand, if a fact be proved *aliunde*, it is clear that a particular person's knowledge of that fact may be proved by his declaration. Such evidence is admissible after proof of the fact to which it related (**PARKE, B.**). — **THOMAS v. CONNELL** (1838), 4 M. & W. 267; 1 Horn & H. 197; 7 L. J. Ex. 306; 150 E. R. 1429.

386. For what purposes admissible — To disprove alleged collusion between plaintiff & alleged agent.] — A blank acceptance is not in itself evidence of an authority to the party to whom it is given to borrow the amount on the credit & behalf of the acceptor, even although it is admitted on the part of the acceptor that the money to be raised on the security of the bill was to be lent to the acceptor; & however the latter may be liable on the bill at the suit of an honest holder, the question on a claim for money lent by him to the acceptor, will be, whether the money was received by any one as the authorised agent of the acceptor in that behalf. Letters from the acceptor to the drawer, the alleged agent, shown to the lender before he advanced the money, admissible in evidence on behalf of the latter, & letters from the alleged agent to the acceptor, admissible on behalf of the acceptor, to disprove the alleged agency. The case for deft. being collusion between the alleged agent & pltf., pltf. allowed to give evidence as to his not knowing the party's address, until his attorney discovered it, to subpoena her. — **KING v. FORBES (VISCOUNTESS)** (1862), 3 F. & F. 41, N. P.

387. What is evidence of notice — Whether attestation of document — Without proof of knowledge of contents.] — The having subscribed any paper-writing as a witness is not sufficient to charge the witness with notice, unless it is proved that he knew the contents. — **HARDING v. CRETHORN** (1793), 1 Esp. 56, N. P.

388. — Whether execution of deed — Without proof of knowledge of contents.] — In the absence of evidence to the contrary there is a legal presumption that a man knows the contents of a deed which he executes (**JESSEL, M.R.**). — **Re COOPER, COOPER v. VESEY** (1882), 20 Ch. D. 611; 51 L. J. Ch. 862; 47 L. T. 89; 30 W. R. 648, C. A. *Annotations: —* **Mentd.** **Manners v. Mew** (1885), 29 Ch. D. 725; **Brocklesby v. Temperance Bldg. Soc.** (1893), 2 R. 694; **Re Ingham, Jones v. Ingham**, [1893] 1 Ch. 352; **Re De Leeuw, Jakons v. Central Advance & Discount Corp'n.**, [1922] 2 Ch. 540.

Execution of deeds without being read or understood as ground of avoidances, see **DEEDS**, Vol. XVII., pp. 229 et seq.

389. — Newspaper — Advertisement.] — Evidence that an advertisement was inserted in a country newspaper circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it be shown that he took the newspaper in. —

— Issue having been joined on the question of payment under compulsion: — **Held**: letters from the attorney of the party who had obtained judg-

ment, threatening to enforce the same in case of nonpayment, was evidence of compulsion. — **STRANGE v. PHELAN** (1849), 2 Ir. Jur. 84. — **IR.**

PART II. SECT. 3, SUB-SECT. 5. — B.
n. What is evidence of notice — Of title — Conversations.] — Where a

NORWICH & LOWESTOFT NAVIGATION CO. v. THEOBALD (1828), Mood. & M. 151, N. P.

390. — **Article.**—BATES v. HEWITT (1866), 4 F. & F. 1023; 15 L. T. 366; 2 Mar. L. C. 432, N. P.; *subsequent proceedings* (1867), L. R. 2 Q. B. 595.

391. — **Whether entry in company's books—Books open to inspection of members.**—(1) Where an Act of Parliament constituting a co. a corp., required that certain notices should be given & a certain number of persons should be present at a general special meeting; & it was alleged that such notice had not been given, & such number of persons were not present at the meeting, when a bond to pltf. was executed; on a plea of *non est factum*:—**Held**: the co. might give in evidence such matters as showed a non-compliance with the provisions of the statute in that respect, although their corporate seal had been affixed to the bond by the proper officer.

(2) The co. were also, by the Act, required to keep books for the inspection of every member:—**Held**: those books were not evidence for the co. against a stranger, in order to prove, that the provisions of the Act had not been complied with in convening the meeting at which the bond was executed.—HILL v. MANCHESTER & SALFORD WATER WORKS CO. (1833), 5 B. & Ad. 866; 2 Nev. & M. K. B. 573; 3 L. J. K. B. 19; 110 E. R. 1011.

Annotations:—*Generally*, **Mentd.** *Mostayer v. Biggs* (1834), 4 Tyr. 466; *Prince of Wales Assoc. v. Harding* (1858), E. B. & E. 183; *Young v. Brompton, etc. Waterworks Co.* (1861), 1 B. & S. 675.

— **As against directors.**—*See COMPANIES*, Vol. IX., pp. 469, 470, Nos. 3069–3072.

— **Whether resolution of board of directors.**—*See COMPANIES*, Vol. IX., pp. 282, 283, Nos. 1743–1746.

— **Allotment of shares unknown to director.**—*See COMPANIES*, Vol. IX., pp. 451, 452.

392. — **Lloyd's Shipping List—As against underwriter.**—The Shipping List at Lloyd's, stating the time of a vessel's sailing, is *prima facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business.—MACKINTOSH v. MARSHALL (1843), 11 M. & W. 116; 12 L. J. Ex. 337; 6 L. T. 581; 152 E. R. 739.

Annotation:—**Mentd.** *Bates v. Hewitt* (1867), L. R. 2 Q. B. 595.

393. — **Presence of agent & traffic manager of carriers when evidence of custom given.**—In an action for money had & received to recover back charges alleged to have been improperly made on pltf., evidence was tendered at the trial, & received, to show that mercantile houses were in the habit of dispatching to the railway packed parcels; that is, parcels containing numbers of different parcels of different kinds of goods, & sent from & to different persons; that these packed parcels were so packed by these mercantile houses for the accommodation of their own customers & friends, & that these facts were well known in the trade, & inferentially to the railway co., but that a lower charge was made for them than for parcels packed in the same manner by pltf., who was a carrier, & who collected & packed parcels of the same sort in the way of his business. The agent & the traffic manager of defts. had been present as parties at a reference where acts of this sort were proved in their hearing:—**Held**: evidence of

their having been so present was properly admissible as part of the proof that defts. were informed & knew of the habits & practices of the mercantile houses & knowingly charged pltf. a higher rate than was demanded of other persons for the carriage of like packed parcels of goods carried under the like circumstances.—GREAT WESTERN RY. CO. v. SUTTON (1869), L. R. 4 H. L. 226; 38 L. J. Ex. 177; 22 L. T. 43; 33 J. P. 820; 18 W. R. 92, H. L.; *affg.* S. C. *sub nom.* SUTTON v. GREAT WESTERN RY. CO. (1865), 3 H. & C. 800, Ex. Ch.

Annotations:—**Mentd.** L. & N. W. Ry. v. Evershod (1878), 3 App. Cas. 1029; Denaby Main Colliery Co. v. M. S. & L. Ry. (1885), 11 App. Cas. 97; London Assoc. of Ship-owners & Brokers v. London & India Docks Joint Committee, [1892] 3 Ch. 242; Crossfield v. Manchester Ship Canal Co. (1903), 19 T. L. R. 398; Stone v. Mid. Ry., [1903] 1 K. B. 741; Taylor v. Met. Ry., [1906] 2 K. B. 55; Clarke v. West Ham Corp., [1909] 2 K. B. 858; Maskell v. Horner, [1915] 3 K. B. 106.

394. — **Whether evidence of usage sufficient.**—Where a custom of trade is relied upon to prevent property passing to the trustee of a bkpt. under Bkpty. Act, 1869 (c. 71), s. 15 (5), the alleged custom must be proved to have existed so long & to have been so extensively acted upon that the ordinary creditors of the bkpt. in his trade may be reasonably presumed to have known it.

The trustee under the bkpty. of an hotel-keeper claimed the furniture in the hotel as being in the order & disposition of the bkpt. as reputed owner. The furniture had been supplied shortly before the bkpty. under an agreement that it should be paid for by instalments & should remain the property of the vendors until the last instalment had been paid, & meanwhile should only be hired by the bkpt.

The vendors alleged such a notorious custom of hiring furniture as would prevent the doctrine of reputed ownership applying, & adduced the evidence of upholsterers to that effect. The witnesses were not cross-examined & no counter-evidence was adduced:—**Held**: (1) the existence of the alleged custom had not been so often proved in the Ct. of Bkpty. that the ct. ought to take judicial notice of it; (2) the evidence in this particular case was defective because it only prove the general practice of furniture dealers in supplying goods under such an agreement as the present, & did not sufficiently prove that the ordinary creditors of an hotel-keeper were likely to know it.—*Re MATTHEWS, Ex p. POWELL* (1875), 1 Ch. D. 501; 45 L. J. Bcy. 100; 34 L. T. 224; 24 W. R. 378, C. A.

Annotations:—*As to (1) Rejd.* *Re Blanshard, Ex p. Hattersley* (1878), 8 Ch. D. 601; *Crawcour v. Salter* (1881), 18 Ch. D. 30; *Moult v. Halliday* (1897), 46 W. R. 318; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

See, generally, CUSTOM & USAGES, Vol. XVII., p. 38.

395. — **Conditions incorporated in deposit note.**—Deft. was a keeper of a repository for the sale on commission of horses & carriages. Pltf. delivered to him a waggonette to be sold, & took from him a printed form which contained a receipt for the waggonette, followed by the words, "subject to the conditions as exhibited upon the premises." By one of the conditions exhibited upon the premises deft. had power to sell any property sent to their repository which remained over one month, unless all expenses were previously paid. Pltf. did not read this receipt but put it in his pocket without noticing it. Deft. having sold the waggonette in the exercise of the power of sale in the conditions, pltf. brought an action

party charged deft. with notice of his title, & evidence was adduced of several conversations in which notice was distinctly proved to have been

given to deft.:—**Held**: those conversations were admissible in evidence, although not particularly mentioned in the bill, as the fact of notice, & not

any particular conversation, was the point in issue.—*BARNHART v. PATTERSON* (1850), 1 Gr. 459.—**CAN.**

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to recover its value, & at the trial the jury, having been directed that the question was whether deft. had or had not given pltf. reasonable notice of the conditions, found a verdict for him:—*Held*: the jury had been misdirected, for the condition was not unreasonable, & having regard to the circumstances, there was nothing to take the case out of the general rule that if a document in a common form is delivered by one of two contracting parties to & accepted without objection by the other, it is binding upon him, whether he informs himself of its contents or not.—*WATKINS v. RYMILL* (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121; 48 L. T. 426; 47 J. P. 357; 31 W. R. 337.

Annotations:—*Conad. Millar v. Toulmin* (1886), 2 T. L. R. 707; *Hopewell v. Furness Ry.* (1907), 23 T. L. R. 451; *Walls v. Centaur Co.* (1921), 126 L. T. 242. *Reid. Woodgate v. G. W. Ry.* (1884), 51 L. T. 826; *De Clermont & Donner v. General Steam Navigation Co.* (1891), 7 T. L. R. 187; *Howcroft & Watkins v. Perkins* (1900), 16 T. L. R. 217; *The Stella*, [1900] P. 161; *Marriott v. Yecoward*, [1909] 2 K. B. 987; *Cooke v. Wilson* (1915), 85 L. J. K. B. 888; *L. & Y. Ry. v. Swann*, [1916] 1 K. B. 263; *Gibaud v. G. E. Ry.*, [1920] 3 K. B. 689; *Nunan v. Southern Ry.* (1923), 130 L. T. 131.

—*See, also*, *CARRIERS*, Vol. VIII., pp. 129, 130, Nos. 864–866.

Conditions incorporated in ticket.]—See CARRIERS, Vol. VIII., pp. 103 *et seq.*, 127, 128, Nos. 855–857.

396. — Label on goods sold.]—On an information before justices, under Sale of Food & Drugs Act, 1875 (c. 63), s. 6, for selling an article of food not of the nature, substance, & quality demanded, defts. relied on a written warranty from their vendor. The article demanded was blackberry jelly, & there was a label on the jar in which it was sold with the words, "Finest Quality Blackberry Jelly. Prepared from the choicest fruit of the season & fruit juice." The analyst certified that the sample contained at least 2 per cent. of apple pulp, & he stated in evidence that he believed that the sample consisted of two-thirds apple & one-third blackberry. Evidence was given for defts. that the jelly was sold as it was purchased, & that they had no reason to believe it to be otherwise than as demanded. The justices, however found that defts. were aware that the contents of the jar were not of the nature, substance, & quality demanded, & that they had reason to believe that the article was otherwise than as demanded when they sold it:—*Held*: except for the label there was no evidence of defts.' knowledge of the contents of the jar, & the label was not sufficient evidence to support the finding of the justices that defts. had reason to believe that article was otherwise than as demanded.—*BLAYDON CO-OPERATIVE SOCIETY v. YOUNG* (1916), 86 L. J. K. B. 417; 115 L. T. 827; 80 J. P. 451; 61 Sol. Jo. 57; 14 L. G. R. 1119; 25 Cox, C. C. 580, D. C.

See, generally, *SALE OF GOODS*.

397. — Condition on sold note.]—A traveller for defts. saw pltf., a builder, & showed him a specification of various kinds of timber which defts. had on offer for sale. Pltf. marked some items that he wished to buy, & the traveller said he might have them. Next day the traveller delivered to pltf. a sold note stating the transaction, but bearing in small print along one side the words: "Goods are sold subject to their being on hand & at liberty when the order reaches the head office." Pltf. denied that he ever saw this condition, & there was evidence as to the difficulty of reading it. Some of the items of timber not having been delivered, pltf. sued for damages for

breach of the oral agreement in the county ct., & defts. relied in defence on the condition, or, in the alternative, on a custom of the trade corresponding to the condition. The county ct. judge gave judgment in favour of pltf., holding, that the alleged custom was not proved, & secondly, that pltf. never saw the condition, & that an ordinary business man acting with ordinary care might be excused for not doing so:—*Held*: (1) there was evidence to support the county ct. judge's finding; (2) as the sold note contained a condition not part of the original verbal contract & not assented to by pltf., it was not a proper memorandum in writing of the agreement between the parties, pltf. was entitled to succeed on the oral contract, the defence that there was no sufficient memorandum in writing of the agreement not having been pleaded.—*ROE v. NAYLOR* (R. A.), LTD. (1918), 87 L. J. K. B. 958; 119 L. T. 359, C. A.

Annotations:—*As to* (2) *Reid. Walls v. Centaur Co.* (1921), 126 L. T. 242. *Generally, Mentd. The Luna*, [1920] P. 22; *Armour v. Walford* (London), [1921] 3 K. B. 473.

See, generally, *SALE OF GOODS*.

398. — Whether evidence of rumour.]—Evidence of the fact of a rumour is no evidence of the knowledge of a particular individual & is not within any of the exceptions to the rule which excludes the reception of hearsay evidence.—*R. v. GUNNELL* (1886), 55 L. T. 786; 51 J. P. 279; 3 T. L. R. 209; 16 Cox, C. C. 151, C. C. R.

399. — Of insanity—Conduct of party alleged to be insane.]—Upon the trial of an action for the recovery of a sum of money paid as a deposit on the purchase of an estate, upon the ground that pltf. was, at the time of the transaction a lunatic, & incapable of contracting, which deft. knew, the sole issue being whether at the time of such transaction deft. knew the fact of pltf.'s insanity:—*Held*: the conduct of pltf., upon various occasions, both before & after the date of the transaction was admissible in evidence to show that pltf.'s malady was of such a character as would make itself apparent to deft. at the time he was dealing with him.—*BEAVAN v. McDONNELL*, (1854), 10 Exch. 184; 2 C. L. R. 1292; 23 L. J. Ex. 326; 156 E. R. 407.

400. — General reputation.]—Evidence of the general reputation of the insanity of a person, in the neighbourhood in which he resided, is inadmissible to prove that a person was cognisant of that fact.—*GREENSLADE v. DARE* (1855), 20 Beav. 284; 24 L. J. Ch. 490; 1 Jur. N. S. 294; 3 W. R. 220; 52 E. R. 612.

Evidence of knowledge of dangerous propensity of animal.]—See ANIMALS, Vol. II., pp. 244 *et seq.*

Knowledge of illegal or immoral purpose of contract.]—See CONTRACT, Vol. XII., pp. 275 *et seq.*

Notice of acts of bankruptcy or of insolvency.]—See BANKRUPTCY, Vol. V., pp. 919 *et seq.*

Evidence of knowledge given in former proceedings.]—See No. 2651, post.

In criminal proceedings.]—See, generally, CRIMINAL LAW, Vol. XIV., pp. 374, 375.

— Altering forged document.]—See CRIMINAL LAW, Vol. XIV., pp. 387, 388, Nos. 4072–4093; Vol. XV., pp. 1069, 1070.

C. Fraud.

401. Declarations—Before execution of deed impeached.]—Declarations of a party to a deed previous to the execution admitted in support of the deed against imputations of fraud: declarations subsequent, impeaching the deed, were rejected.—*CONOLLY v. HOWE* (LORD) (1800), 5 Ves. 700; 31 E. R. 813, L. O.

402. — After execution of deed impeached.]—*CONOLLY v. HOWE* (LORD), No. 401, *ante*.

403. — By bankrupt—Before issuing of commission.]—Declarations made by a bkpt. before & after the issuing of a commission against him are inadmissible to show that it was founded in fraud.—*LLOYD v. HEATHCOTE* (1820), 2 Brod. & Bing. 388; 5 Moore, C. P. 129; 129 E. R. 1017.

Annotations:—Mentd. Harvey v. Ramsbottom (1822), 1 B. & C. 55; *Fisher v. Boucher* (1830), 10 B. & C. 705; *Belcher v. Gummow* (1847), 9 Q. B. 873; *Phillips v. Naylor* (1858), 3 H. & N. 14.

404. — After issuing of commission.]—*LLOYD v. HEATHCOTE*, No. 403, *ante*.

405. — Other false statements.]—In an action for false representation, other false statements than those held may be proved & considered by the jury, with reference to the question whether those laid were made fraudulently.—*HUNTINGFORD v. MASSEY* (1859), 1 F. & F. 690, N. P.

406. — By party alleged to be party to fraud.]—In an action of trover against the assignees of a bkpt., it appeared that the goods had been assigned by the bkpt. to B., who signed them to C., to whom the purchase-money was as contended, was advanced by pltf., to whom C. subsequently transferred the goods by bill of sale. In order to show that these transactions were fictitious, certain evidence was adduced [for the defence] & a question was asked, whether C. had not made a claim to these goods after the bkpy:—*Held*: the question could properly be asked, as the claim was an act done by one of the parties to the alleged fraud.—*FORD v. ELLIOTT* (1819), 4 Exch. 78; 18 L. J. Ex. 447; 154 E. R. 1132.

407. Acts—Similar fraudulent acts—Allegation of conspiracy.]—In case, for giving a false character, it is evidence against deft., that he recommended the person trusted, to another person who was called as a witness.—*BEAL v. THATCHER* (1800), 3 Esp. 194, N. P.

408. — Other fraudulent acts—Forgeries in support of false declaration.]—Where a person is indicted for having made a false declaration as to a fire having taken place at his house, evidence may be given, that, with the declaration, he sent a certificate, which stated the fire to have occurred, & that the signatures to that certificate are all forgeries, as this evidence may go to show that the declaration was wilfully false.—*R. v. BOYNES* (1843), 1 Car. & Kir. 65.

PART II. SECT. 3, SUB-SECT. 5.—C.

402 i. Declarations—After execution of deed impeached.]—Where a party laid a bill to set aside a deed on the ground of fraud:—*Held*: evidence of particular acts of fraud, although not charged in the bill, was admissible.—*WRIGHT v. HENDERSON* (1845), 1 O. S. 656.—*CAN.*

406 i. — By party alleged to be party to fraud.]—B., who was largely indebted, & had several suits pending against him, transferred all his property to pltf. & took as payment pltf.'s promissory notes payable in five years, without security. In an action brought by pltf. against a creditor of B.:—*Held*: the value of pltf.'s notes in the market, & his probable means of paying them, was relevant testimony to show that the transfer was fraudulent, & made to defraud B.'s creditors. In order to establish fraud in the transfer, declarations & admissions by B., both before & after the transfer, as to the general state of his business & the value of the property transferred, were admissible in evidence on the part of deft.—*LAWTON v. TARRATT* (1858), 4 All. 1.—*CAN.*

406 ii. —.]—*SHANNON v. GORE*

DISTRICT MUTUAL FIRE INSURANCE CO. (1875), 37 U. C. R. 330.—*CAN.*

o. Acts—Similar fraudulent acts.]—Evidence of other similar representations made by deft. to persons other than pltf. under similar circumstances & with the object of inducing those persons to act in the same way, is admissible on the question of intent, & to rebut a possible defence of accident or inadvertence. *Qu.*: whether such evidence would be admissible if counsel for deft. admits that the representations, if they were in fact made, were fraudulent & false.—*LAMB v. JOHNSON* (1914), 15 S. R. N. S. W. 65.—*AUS.*

411 i. Fraudulent intention—As evidence of deceit.]—A trader being in debt made a voluntary settlement of all his property except his stock in trade & book-debts. He afterwards paid off the existing debt by means of money advanced by the same creditor, & such further debt remained unpaid when he became insolvent. In a suit by the official & trade assignees to set aside such settlement:—*Held*: evidence was admissible of a conversation by the settlor some time prior to the settlement showing a fraudulent intent, though it was in respect of an intended

409. — Of party alleged to be party to fraud.]

—In an action upon Distress for Rent Act, 1737 (c. 19), s. 3, against a deft., for aiding & assisting a tenant in removing & concealing his cattle, to hinder the landlord from distraining, the acts & orders of the tenant are admissible evidence of his own fraud, & of knowledge on the part of deft., if by other evidence he is proved to have contributed to the facility of it; & circumstances of suspicion may be laid before the jury, to prove such a fraudulent co-operation as the legislature contemplated.—*STANLEY v. WHARTON* (1822), 10 Price, 138; 147 E. R. 268.

410. — Publication of advertisements.]—Where deft. was charged with a fraudulent design to induce pltf. to build some houses upon the credit of his son, evidence was given that deft. had represented that he & his son were entitled to receive some money from America, & that the "*Stamford Mercury*" contained an advertisement, which required them to go to a certain place to receive the legacy:—*Held*: a copy of the "*Stamford Mercury*" of a date which corresponded with the time when the representations were made, & which contained such an advertisement was receivable in evidence.—*LUCAS v. GODWIN* (1837), 3 Bing. N. C. 737; 3 Hodg. 114; 4 Scott, 502; 6 L. J. C. P. 205; 132 E. R. 595.

Annotations:—Mentd. Lamprell v. Billericay Union Grdms. (1849), 3 Exch. 283; *Dakhin v. Lee*, [1916] 1 K. B. 566.

411. Fraudulent intention—As evidence of deceit.]—It is said in this case that defts. intended to deceive, not that the goods were calculated even innocently to deceive, but that there was a fraudulent intention on the part of defts. That is a material fact which would be weighed duly & to which no doubt great weight would be attached by any ct. if it were established, because no ct. would be astute when they discovered an intention to deceive, in coming to the conclusion that a dishonest deft. had been unsuccessful in his fraudulent design. When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, but still it is a step, even though a short step. To any such charge there must be, however, two conditions. The first is that it ought to be pleaded explicitly so as to give deft. an opportunity of rebutting the accusation of intent. The second is that it must

settlement of a somewhat different character, & was not put in issue by the bill.—*GOODMAN v. BOULTON* (1868), 5 W. W. & A. B. 86.—*AUS.*

p. — Of plaintiff.]—Where the question in issue was whether pltf. had fraudulently set fire to a house in which he lived, evidence that he had given a bill of sale of his furniture, & subsequently insured it & claimed the insurance after the fire, is relevant, being an act of pltf. tending to show a motive for the destruction of the house.—*WHELAN v. WETMORE* (1857), 3 All. 482.—*CAN.*

q. — & arbitrators.]—*WIDDER v. BUFFALO & LAKE HURON RY. CO.* (1865), 24 U. C. R. 222.—*CAN.*

r. —.]—When there was much evidence of fraud, misrepresentation, & deficient value:—*Held*: such evidence was not to be regarded, unless it went also to fix the vendor with a knowledge or belief of such insufficient value, in which case it would be evidence of fraud.—*PIKE v. VIGERS* (1839), 2 Dr. & Wal. 252.—*IR.*

s. Fraud of married woman—Actual fraud.]—To charge a fund subject to a general power of appointment

Sect. 3.—Facts which may be proved: Sub-sect. 5, C., D., E. & F.; sub-sects. 6, 7 & 8, A.]

be proved by evidence (LORD LOREBURN, C.).—ASH (CLAUDIUS), SONS & CO., LTD. v. INVICTA MANUFACTURING CO., LTD. (1912), 29 R. P. C. 465, H. L.

See, generally, MISREPRESENTATION & FRAUD.

Representations made without reasonable grounds for belief.]—See MISREPRESENTATION & FRAUD.

In connection with offences under Weights & Measures Act, 1878.]—See FOOD & DRUGS.

D. Malice.

412. Assault—Evidence of former assaults.—In aggravation of damages.]—In an action for damages for an assault against several persons, evidence admitted of two previous assaults on the pursuer by one of the defenders, probably to show malice & premeditation in that particular defender.

It certainly startled an English lawyer that evidence should have been admitted at such length of the previous assaults in 1798 & 1802, to which the judgment had no relation, & at which all the parties were not present. But such evidence might have been admitted to show malice & premeditation in G., the only appt. present at the former assaults (LORD ELDON, C.).—MACDONELL v. MACDONALD (1813), 2 Dow, 66; 3 E. R. 780, H. L.

Annotation:—Mentd. Henderson & Brown v. Malcolm (1814), 2 Dow, 285.

Aggravation of damages in tort generally, *see* DAMAGES, Vol. XVII., pp. 122 *et seq.*

413. Trespass—Evidence of subsequent charge brought by one defendant.]—In an action of trespass against five for breaking into pltf.'s house, in which defts. have paid money into ct., pltf. cannot go into proof, as evidence of malice, that, nine months after the trespass, one of defts. indicted him for perjury.—NEWTON v. HOLFORD (1844), 1 Car. & Kir. 537.

In actions for libel or slanders.]—See LIBEL & SLANDER.

In actions for trade libel or slander of title.]—See TRADE & TRADE UNIONS.

In actions for malicious prosecution.]—See MALICIOUS PROSECUTION.

In proceedings for malicious damage to property.]—See CRIMINAL LAW, Vol. XV., pp. 1020 *et seq.*

E. Bona fides.

As evidence of reasonable & probable cause—As defence to action for false imprisonment.]—See TRESPASS.

—As defence to action for malicious prosecution.]—See MALICIOUS PROSECUTION.

Belief in authority to sign author's name.]—See CRIMINAL LAW, Vol. XV., pp. 1048, 1049, Nos. 11,822–11,830.

Belief in truth of libel.]—See LIBEL & SLANDER.

Belief in truth of representation.]—See COMPANIES, Vol. IX., pp. 113, 114, 124 *et seq.*, Nos. 536–544, 638–650; MISREPRESENTATION & FRAUD.

Claim by insured against insurers.]—See INSURANCE.

by a married woman, with payment of her debts, it is necessary to establish actual fraud against her.—LONDON CHARTERED BANK v. LEMPRIERE (1870), 1 V. R. 191.—AUS.

t. —.]—If a wife obtains credit as the nominal owner of a business which her husband founded, supervised, & made over to her in her name

without any consideration being paid by the wife, these circumstances are evidence of fraud in an action brought by the wife to retain the property thus fraudulently acquired against the creditors.—WEST v. AMES HOLDEN & CO. (1897), 3 Terr. L. R. 17.—CAN.

a. *Necessity for pleading.]—*In an action of ejectment deft. pleaded an

In petition for divorce or judicial separation.]—See HUSBAND & WIFE.

Of voidable conveyances.]—See FRAUDULENT & VOIDABLE CONVEYANCES.

—Bona fide transactions of bankrupt.]—See BANKRUPTCY, Vol. V., pp. 907 *et seq.*

F. Insanity.

See, generally, EXECUTORS, LUNATICS, WILLS.

SUB-SECT. G.—BODILY FEELINGS.

414. As evidenced by declarations.]—AVESON v. KINNAIRD (LORD), No. 686, *post*.

415. —Distinguished from declarations as to cause of feeling—Accident to workman.]—A workman became ill & died a week afterwards. His wife & another man swore that he told them that his illness was caused by an accident in his employment. In spite of objections the county ct. judge admitted these statements & made an award in favour of the widow. The employers appealed on the ground that there was no evidence that there had been an "accident arising out of . . . the man's employment" beyond deceased's own statements, which they contended were improperly admitted as evidence.—*Held*: statements made in the absence of his employer, by a deceased man, as to his bodily or mental feelings are admissible, but those made as to the cause of his illness are not admissible in evidence.—GILBEY v. GREAT WESTERN RY. CO. (1910), 102 L. T. 202; 3 B. W. C. C. 135, C. A.

Annotations:—Fold. Amys v. Barton, [1912] 1 K. B. 40; Sharp v. Loddington Ironstone Co. (1924), 17 B. W. C. C. 171.

416. — — — —.]—Upon a claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), it appeared that on Oct. 18 a workman employed by a farmer as engine-driver was driving the engine of his master's threshing machine while threshing wheat in a field. It was suggested that while so employed he was stung in the leg by a wasp. There was evidence that his fellow workmen had seen a few wasps close to the engine & that there were none about elsewhere. The workman did not complain of being stung at the time. On the next & the following days he complained of being drowsy & having pain in his leg, & that he was unfit for work, but he continued to work until Oct. 27, when he came home very ill. The doctor saw him on Oct. 28 & 29, & found him suffering from blood poisoning. On the latter day the workman made a statement to the doctor, in the presence of his wife, that his bad leg was caused by the sting of a wasp on Oct. 18. He died on Nov. 1. His widow claimed compensation.—*Held*: the statement of the deceased workman of the cause of his illness was not admissible.—AMYS v. BARTON, [1912] 1 K. B. 40; 81 L. J. K. B. 65; 105 L. T. 619; 28 T. L. R. 29; 5 B. W. C. C. 117, C. A.

Annotations:—Fold. Sharp v. Loddington Ironstone Co. (1924), 17 B. W. C. C. 171. *Reid.* Tucker v. Oldbury U. D. C. (1912), 106 L. T. 669; Bearo v. Garrod (1915), 113 L. T. 673.

equitable plea setting out certain deeds as the links in his title. At the trial pltf. sought to attack one of these deeds on the ground that it was without consideration & a fraud on third parties.—*Held*: pltf. should have replied, alleging the fraud, & not having so pleaded could not adduce it in evidence.—KINNEAR v. HARRISON (1870), 8 N. S. R. 78.—CAN.

417. ———.]—Deceased workman was employed as a navvy fireman by applts., & part of his duty was to clean a hurricane lamp. On Dec. 5, 1923, he started work as usual at 6.30 a.m., & according to the evidence given by M., a fellow workman, while at breakfast, at 8.30, he showed M. a finger of his right hand on which there was a nick of skin which had been cleaned, the rest of his hand being very dirty & oily. Thereupon M. went & looked at the lamp, & found that part of the glass was broken & had a sharp edge. Septic poisoning was set up, & on Dec. 7 deceased did not go to his work, & died on Dec. 22. An inquest was held on Dec. 24, at which applts. were represented by a solr. Statutory notice of the accident was not given until after the death of deceased. At the hearing of the application by the widow for compensation, a doctor, called on her behalf, said on cross-examination, "I asked deceased how he got cut, he told me he had cut himself on his bicycle lamp." The county ct. judge held that this statement was inadmissible, & that the fair inference from the evidence was that the cut on the finger was caused by the broken hurricane lamp which deceased was cleaning, & that the accident arose out of, & in the course of, the employment. Further, he held that no prejudice had been caused to the employers by want of notice, & that there was reasonable cause for its absence, & he made an award:—*Held*: (1) the evidence of the doctor, elicited on cross-examination, which related to the cause of the accident, was inadmissible; (2) there was sufficient evidence to justify the finding that appt. had discharged the *onus* of showing that the employers had not been prejudiced by want of notice.—*SHARP v. LODDINGTON IRONSTONE CO., LTD.* (1924), 17 B. W. C. C. 171, C. A.

See, generally, MASTER & SERVANT.

SUB-SECT. 7.—PERSONAL CHARACTERISTICS AND HABITS.

418. Resemblance to parent.]—*SLINGSBY v. A.-G.* (1916), 33 T. L. R. 120, H. L.

Annotations:—*Mentd.* *A.-G. v. Cory*, *Kennard v. Cory* (1919), 88 L. J. Ch. 410; *Rutter v. Rutter*, [1921] P. 136; *La Compania Maritima v. Royal Exchange Assce. Corp'n.* (1923), 92 L. J. K. B. 546.

419. ———.]—Evidence of facial resemblance between petitioner & a child, whose paternity is in dispute, is admissible, but should be given little, if any, weight.—*RUSSELL v. RUSSELL & MAYER* (1923), 129 L. T. 151; 39 T. L. R. 287; *on appeal*, [1924] P. 1, C. A.; [1924] A. C. 687, H. L.

Annotations:—*Mentd.* *Andrews v. Andrews & Chalmers* (1924), 40 T. L. R. 873; *Brown v. Leech* (1924), 88 J. P. 208; *Farman v. Farman* (1924), 40 T. L. R. 823.

420. Habit of teasing horses—Probable cause of death by kick of horse.]—Deceased workman, who was employed as a stable boy by resps., was found in their stable in a dying condition suffering from a kick behind the ear from one of their horses. There was no direct evidence as to how the accident happened. There was evidence that when the boy was found he was clutching in his hand a halter; that at the time when the accident happened the boy had nothing to do with the halter & had nothing to do in the stable; & that the horse was a quiet horse. There was evidence that the foreman of the resps.' yard had some

time previously had occasion to speak to the boy about litting the horses with a halter & teasing them. The county ct. judge held that the boy must have done something to the horse, which was a quiet one, to make it kick out, & that at the time of the accident the boy's duties in the stable were over, & accordingly that the accident did not arise out of his employment:—*Held*: evidence as to the previous habits of the boy with regard to hitting & teasing the horses was admissible.

Wherever an inquiry has to be made into the cause of death of a person, & there being no direct evidence, recourse must be had to circumstantial evidence any evidence as to the habits & ordinary doings of deceased which may contribute to the circumstances by throwing light upon the probable cause of death is admissible, even in the case of a prosecution for murder (*PHILLIMORE, L.J.*).—*JOY v. PHILLIPS, MILLS & Co., LTD.*, [1916] 1 K. B. 849; 85 L. J. K. B. 770; 114 L. T. 577; 9 B. W. C. C. 242, C. A.

In criminal proceedings—Character of accused.]—See CRIMINAL LAW, Vol. XIV., pp. 361 *et seq.*

—Habitual criminal.]—See CRIMINAL LAW, Vol. XIV., pp. 481 *et seq.*

SUB-SECT. 8.—SIMILAR FACTS.

A. To prove Occurrence or Existence of Main Fact.

421. General rule.]—(1) The rule as to confining the evidence to that which is relevant & pertinent to the issue, is one of great importance, not only as regards the particular case, but also with reference to saving the time of the ct., & preventing the minds of the jury from being drawn away from the real point they have to decide (*WILLES, J.*).

(2) Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another & different occasion? To admit such speculative evidence would be fraught with great danger. Where, indeed, the question is one of guilty knowledge, as in the case of a charge of uttering base coin or forged notes, such evidence is received as tending to establish a necessary ingredient in the crime. But I am not aware of any other instance. If such evidence was held admissible, it would be difficult to say that deft. might not in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that pltf. had dealt with other persons upon a certain credit; or, in an action for an assault, that pltf. might not give evidence of former assaults committed by deft. upon other persons or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual, & therefore that it was highly probable that the particular charge of assault was well founded. The extent to which this sort of thing might be carried is inconceivable. The only ground upon which it could at all be suggested that such an inquiry could be permitted on cross-examination, would be, that it was a means of testing the credit of the witness or the accuracy of his memory. But I doubt even that (*WILLES, J.*).—*HOLLINGHAM v. HEAD* (1858), 4 C. B. N. S. 388; 27 L. J. C. P. 241; 4 Jur. N. S.

PART II. SECT. 3, SUB-SECT. 7.

b. Assault — Quarrelsome disposition of party.]—In an action for damages for assault, it is incompetent

to prove defender notoriously quarrelsome.—*HADDADWAY v. GODDARD* (1816), 1 Murr. 148.—*SCOT.*

c. ———.]—It is competent

in an action of damages for assault to ask if pursuer is quarrelsome.—*BANNERMAN v. FENWICKS* (1817), 1 Murr. 252.—*SCOT.*

Sect. 3.—Facts which may be proved: Sub-sect. 8, A. & B.]

379; 6 W. R. 442; 140 E. R. 1135; *sub nom.* HOTHINGHAM v. HEAD, 31 L. T. O. S. 85.

Annotations:—As to (2) *Refd.* Baillie v. Jay (1859), 7 W. R. 283; Rew v. Hutchins (1861), 10 C. B. N. S. 829; Howard v. Sheward (1866), L. R. 2 C. P. 148.

422. Ownership of, or rights over land—Acts of ownership or rights exercised over part—Waste of manor.]—Acts exercised in assertion of right upon one part of a waste, are admissible in evidence against occupiers of another part of the same waste.—BRYAN d. CHILD v. WINWOOD (1808), 1 Taunt. 208; 127 E. R. 812.

Annotations:—*Mentd.* Andrews v. Hales (1853), 2 E. & B. 349; Whitmore v. Humphries (1871), L. R. 7 C. P. 1; A.-G. v. Tomline (1877), 5 Ch. D. 750; A.-G. v. Tomline (1880), 15 Ch. D. 150.

423. ———.]—Where, on trespass for pulling down a wall, the issue was, whether certain common land was the soil & freehold of the lord of the manor, on which *ptff.* was entitled to a right of common, or the soil & freehold of the *ptff.*:—*Held*: leases of minerals, etc., granted by the lord to other persons in other parts of the unclosed waste land were not receivable in evidence, unless it was first shown that the *locus in quo* formed part of one entire waste, to which those leases were applicable.—TYRWITT v. WYNNE (1819), 2 B. & Ald. 554; 100 E. R. 468.

Annotations:—*Consd.* Hollis v. Goldfinch (1823), 1 B. & C. 205. *Refd.* Crease v. Barrett (1835), 1 Cr. M. & R. 919; Doe d. Welsh v. Langfield (1847), 16 M. & W. 497.

424. ———. Roadside waste.]—Upon a question whether a piece of waste land, lying between a highway & *ptff.*'s inclosed land, belonged to *ptff.* or to the lord of the manor:—*Held*: grants by the lord of other slips of waste land on either side of the same road abutting on the inclosed lands of the lord himself & of other persons, were admissible for the purpose of showing that the *locus in quo* was part of the waste of the manor, without showing continuity.—DENDY v. SIMPSON (1856), 18 C. B. 831; 27 L. T. O. S. 288; 139 E. R. 1599; *sub nom.* SIMPSON v. DENDY. 2 Jur. N. S. 642, Ex. Ch.; *subsequent proceedings* *sub nom.* SIMPSON v. DENDY (1860), 8 C. B. N. S. 433; *sub nom.* DENDY v. SIMPSON (1861), 7 Jur. N. S. 1058, Ex. Ch.

—————.].—*See, also*, BOUNDARIES, Vol. VII., p. 322, Nos. 419–422.

—————. Bed or banks of watercourse.]—*See* WATERS & WATERCOURSES.

—————. Mine.]—*See* MINES.

—————. Right of fishery.]—*See* FISHERIES.

425. ———. Acts of ownership exercised over adjoining land.]—Generally speaking, acts of ownership submitted to by the holder of one portion of land, cannot be any evidence that the person exercising them has any right to the adjoining land (BEST, J.).—HOLLIS v. GOLDFINCH (1823), 1 B. & C. 205; 1 L. J. O. S. K. B. 91; 107 E. R. 76.

Annotations:—*Refd.* River Lee Navigation Conservators v. Buxton (1881), 6 App. Cas. 685. *Mentd.* Portmore v. Bunn (1823), 1 B. & C. 694; Rochdale Canal Co. v. King (1849), 18 L. J. Q. B. 223; Badger v. South Yorkshire Ry. & River Dun Co. (1859), 1 E. & E. 359.

426. Whether charges excessive—Previous charges.]—If, in an action for work & labour, surveyors be called for *deft.* to prove that, in the

year 1831, they surveyed the work, & that, in their judgment, the charges were £100 too much:—*Held*: a letter from *deft.*'s attorney stating that the work had been surveyed in 1829, & the charges were considered to be £60 too much, is not admissible as evidence in reply.—KNAPP v. HASKALL (1831), 4 C. & P. 590, N. P.

427. Parish in which land situated—Evidence of other detached portions of parishes in district.]—Evidence, that within a particular district, farms belonging in fact to one parish are frequently surrounded by another, goes no way in point of proof that the particular farm in question was so situated; such evidence was therefore held to be properly rejected as being perfectly nugatory.—MARGETTS v. MORLEY (1832), 1 L. J. K. B. 112.

428. Right to certain tithes—Receipt of other tithes.]—Evidence of continued perception of tithe of corn by a lay impropriator, is alone sufficient *prima facie* evidence of his right to the tithe of hay; so as to call upon the occupier to show that the right is in some other person.—DREVER v. DOWNES (1832), 1 L. J. K. B. 208.

See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 476 *et seq.*

429. Authority of agent or servant—Authority on previous occasion.]—To trespass for taking *ptff.*'s horse, *deft.* pleaded, first, not guilty; & secondly, that the horse was damage feasant on his land. The horse was proved to have been wrongfully distrained by the servant of *deft.* on the highway, & not on his land:—*Held*: no *prima facie* case was made out that *deft.* had authorised the distress in question, by proof of his having on other occasions authorised his servant to distrain cattle damage feasant on his land.—LYONS v. MARTIN (1838), 8 Ad. & El. 512; 3 Nev. & P. K. B. 509; 1 Will. Woll. & H. 500; 7 L. J. Q. B. 214; 112 E. R. 932.

Annotations:—*Refd.* The Druid (1842), 1 Wm. Rob. 391; Bayley v. M. S. & L. Ity. (1872), L. R. 7 C. P. 415. *Mentd.* Llinpas v. London General Omnibus Co. (1862), 1 H. & C. 526; Dyer v. Munday (1895), 64 L. J. Q. B. 448.

430. ———. Former acts on behalf of same principal.]—A warrant of distress was produced by *ptff.*, purporting to be issued by the solrs. of the landlords of certain property, the writing being in the hand of a junior partner of the firm. The solrs. had, on previous occasions, issued distress warrants in respect of other property of the landlords:—*Held*: not to be sufficient evidence of an authority by the landlords to distrain.—JONES v. BUCKLEY (1838), 2 Jur. 204.

431. ———. Former recognition of authority.]—The fact that *deft.* admitted a former bill does not prove that he authorised the drawer to accept bills in his name, unless the former bill was accepted by his hand, & even so, a single instance would be no evidence of a general authority.—PHILPOT v. STOCK (1860), 2 F. & F. 180, N. P.

See, generally, AGENCY, Vol. I., p. 384; MASTER & SERVANT.

432. Knowledge of principal of frauds of agent—Similar frauds.]—In an action against a co. to recover a sum of money obtained by them from *ptff.* through a fraud of *deft.*'s agent committed with their knowledge & for their benefit, evidence of similar frauds committed on persons other than

PART II. SECT. 3, SUB-SECT. 8.—A.

431. I. Authority of agent or servant—Former recognition of authority.]—BARRETT v. IRVINE, [1907] 2 L. R. 462.—IR.

d. Existence of nuisance—Evidence of nuisance caused elsewhere.]—In an action for a nuisance, evidence

was given by expert witnesses on *ptff.*'s behalf from which an inference could be drawn by the jury that the same was caused by *defts.* allowing a liquid to flow from their gasworks into a stream:—*Held*: evidence tendered by *defts.* to show that a similar nuisance arose in similar places in the district where no gas-

works existed was wrongly rejected; but evidence as to the effect of pouring similar liquid, after treatment into another stream, was rightly rejected.—BODE v. WOLLONGONG GAS-LIGHT CO. LTD. (1910), 10 S. R. N. W. 566; 27 N. S. W. W. N. 155.—AUS.

e. ———.]—In an action on

ptf. by the same agent, in the same manner, with the knowledge & for the benefit of defts., is admissible on behalf of ptf.—**BLAKE v. ALBION LIFE ASSURANCE SOCIETY** (1878), 4 C. P. D. 94; 48 L. J. Q. B. 169; 40 L. T. 211; 27 W. R. 321; 14 Cox. C. C. 246.

Annotations.—**Consd. R. v. Ollis**, [1900] 2 Q. B. 758; **R. v. Bond**, [1906] 2 K. B. 389.

433. Allegation of felony by carrier's servant—Similar attempts at felony.—To a declaration on the case against a common carrier for the loss of a box containing £1,500 defts. pleaded the Carriers' Act, & ptf. replied felony by A., a servant of the carriers:—**Held**: it was not competent to the carriers, they being a railway co., & their defence being that the felony had been committed by a passenger breaking through the panel of the carriage, to give evidence that on former occasions their carriages were observed to have borne marks of similar attempts from the passengers' compartment.—**BALDOCK v. GREAT WESTERN RY. CO.** (1849), 15 L. T. O. S. 370, N. P.

434. Liability for work & labour—Orders given for similar work.—On the trial of an action by ptf. against deft. for work done & materials supplied to certain houses on the orders of a third person, deft. denying that he is the owner of the houses or the real principal, evidence is admissible that other persons had received orders from deft. to do work at the same houses, without showing that ptf. knew of these orders at the time he did his work.—**WOODWARD v. BUCHANAN** (1870), L. R. 5 Q. B. 285; 39 L. J. Q. B. 71; 22 L. T. 123.

Existence of custom.—*See, generally, CUSTOM & USAGES*, Vol. XVII., p. 19, Nos. 199, 200.

Of the manor.—*See COPYHOLDS*, Vol. XIII., p. 29, Nos. 258-266.

Application to particular tenement.—*See COPYHOLDS*, Vol. XIII., p. 30, No. 267.

Existence of usage.—*See CUSTOM & USAGES*, Vol. XVII., p. 37, Nos. 422-425.

435. Existence of nuisance—Acknowledgment of nuisance caused elsewhere.—A bond given by deft. acknowledging himself to be guilty of a nuisance, is good evidence on the trial of an indictment for a nuisance, in carrying on the same business in another place.—**R. v. NEVILLE** (1791), Peake, 125, N. P.

Annotation.—**N.F. R. v. Fairie** (1857), 8 E. & B. 486.

436. Previous conviction of nuisance at same place.—On an indictment for a nuisance in carrying on an offensive trade, a conviction of deft. before justices for an offence against 16 & 17 Vict. c. 128, s. 1, committed at the same place &

in the course of the same trade, but anterior to the period comprised in the indictment, was received in evidence:—**Held**: (1) it was improperly received, the offence of which deft. was convicted not necessarily being a nuisance; (2) even if it had been a conviction for an offence precisely similar to that charged against deft., except that it was anterior in time, it would not have been admissible.—**R. v. FAIRIE** (1857), 8 E. & B. 486; 30 L. T. O. S. 131; 4 Jur. N. S. 300; 6 W. R. 56; 8 Cox. C. C. 66; 120 E. R. 181.

See, generally, NUISANCE.

On highway.—*See HIGHWAYS.*

Terms of contract—Contract of tenancy.—*See LANDLORD & TENANT.*

For sale of goods.—*See SALE OF GOODS.*

For education of child.—*See EDUCATION*, Vol. XIX., pp. 611, 612, Nos. 363, 375.

Infringement of patent.—*See PATENTS.*

Quality of goods supplied.—*See, generally, SALE OF GOODS.*

To tied house.—*See LANDLORD & TENANT.*

Justification of libel & slander—Or rebuttal of justification.—*See LIBEL & SLANDER.*

Proof of negligence.—*See NEGLIGENCE.*

Whether road highway—Conviction of adjoining parish for non-repair.—*See HIGHWAYS.*

In divorce proceedings.—*See HUSBAND & WIFE.*

Tolls.—*See HIGHWAYS; MARKETS.*

Forgery of bill of exchange.—*See BILLS OF EXCHANGE*, Vol. VI., p. 108, Nos. 740-745.

In criminal proceedings.—*See, generally, CRIMINAL LAW*, Vol. XIV., pp. 368 *et seq.*

Whether death of patient homicide—Evidence of skill of doctor.—*See CRIMINAL LAW*, Vol. XV., p. 802, Nos. 8691, 8692.

Murder.—*See CRIMINAL LAW*, Vol. XIV., pp. 377 *et seq.*

Treason.—*See CRIMINAL LAW*, Vol. XV., pp. 630, 631, Nos. 6676-6708.

Larceny of gas.—*See CRIMINAL LAW*, Vol. XV., p. 911, No. 10,025.

Uttering forged document.—*See CRIMINAL LAW*, Vol. XIV., p. 391, No. 4126; Vol. XV., pp. 1069, 1070, Nos. 12,102-12,113.

B. To prove Identity.

In criminal proceedings.—*See CRIMINAL LAW*, Vol. XIV., p. 377, Nos. 3974-3978.

Authorship of libel.—*See CRIMINAL LAW*, Vol. XIV., p. 390, No. 4111.

Evidence of identity generally.—*See Sub-sect. 4, ante.*

ULTICAN v. MOFFATT (1859), 4 All. 298

—CAN.

m. Prior & subsequent facts distinguished.—In an action against a bank for negligence in cashing a cheque, evidence of the subsequent cashing of similar cheques, adduced for the purpose of showing negligence, was excluded. Evidence of prior cashing of similar cheques was admitted.—**R. v. ROYAL BANK OF CANADA** (1920), 1 W. W. R. 198; 50 D. L. R. 293; 30 Man. L. R. 104.—CAN.

n. Principle of admission.—At the hearing of a charge against a person of obstructing a highway on a certain specified occasion, evidence that the person charged was in the habit of obstructing the highway on other occasions is admissible not for the purpose of proving other offences of the same nature as that charged, but for the purpose of showing the nature of the user of the highway by the person charged with the offence.—**ADAMS v. HORAN** (1906), 26 N. Z. L. R. 169.—N.Z.

the case for a nuisance in erecting a steam mill on land adjacent to ptf.'s dwelling house, the evidence of persons living in other adjoining premises as to the injurious effect of the steam mill upon them is admissible, in order to show by necessary inference the damage done to ptf. by the erection.—**BARLOW v. KINNAR** (1843), 2 Kerr. 94.—CAN.

f. —.—Evidence of the injurious effects of mining coal on other lands in the neighbourhood of ptf.'s, is properly received.—**McMAHON v. BERTON** (1851), 2 All. 321.—CAN.

g. Terms of contract—For work.—Deft. agreed with ptf. to sink an artesian well. After sinking a certain distance he met with an impediment, & refused to proceed further.—**Qu.**: whether evidence as to how contracts for artesian wells were usually made in the neighbourhood should have been received.—**BARRIE GAS CO. v. SULLIVAN** (1880), 5 A. R. 110.—CAN.

h. In criminal proceedings—Rape.—In an action of damages for

rape pursuer, besides making averments of rape, stated that defender was of a brutal & licentious disposition, & had on two specified occasions attempted to ravish two other women:—**Held**: the latter averments were irrelevant, & fell to be deleted from the record.—**A. v. B.** (1895), 22 R. (Ct. of Sess.) 402; 32 Sc. L. R. 297; 2 S. L. T. 515.—SCOT.

k. Construction of Crown grant—Other Crown grants.—In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises, as, *e.g.*, what is to be considered the bank of a river, other grants from the Crown are admissible to assist in the construction.—**CLARK v. BONNYCASTLE** (1834), 3 O. S. 528.—CAN.

l. In trover—Evidence of other acts of conversion.—In trover for several articles, ptf. may give evidence of acts of conversion on several days, though there is but one count in the declaration alleging one conversion.—

Sec. 3.—Facts which may be proved: Sub-sect. 8, C. (a), (b), (c), (d) & (e); sub-sect. 9, A. & B.]

C. To prove State of Mind.

(a) *Intention or Motive.*

437. Unlawful assembly—Justification in civil action for assault.]—On behalf of defts., to show the object & character of the meeting & the justification for defts.' conduct, evidence was admitted as follows: (a) evidence of drilling in the night time near Manchester shortly before the meeting & evidence of conversations between persons when drilling or proceeding to drill, as to the objects of the drilling, & evidence that such drilling had excited general apprehensions of danger to the peace; (b) evidence of statements made by persons on their way to or at the meeting, tending to show the objects of the meeting; (c) evidence of resolutions passed at the meeting held in London on the preceding July 21, of which Hunt, who presided at the Manchester meeting, had been chairman, such evidence being tendered to show the objects of an alleged general conspiracy by Hunt & others in pursuance of which both the meetings were alleged to have been held; (d) statements by witnesses who were in or near Manchester at the time of the meeting to the effect that they had felt alarm, & that other persons had expressed to them alarm; (e) evidence by the magistrates, by whose orders defts. had acted, of statements made by inhabitants of Manchester expressing fear for the safety of the town; (f) evidence that the constables refused to execute warrants for the apprehension of Hunt & others present at the meeting, & evidence of the constable's statements of the grounds of their refusal.—**REDFORD v. BIRLEY** (1822), 1 State Tr. N. S. 1071; 3 Stark. 76.

Annotations:—**Reid**, R. v. O'Connell (1844), 2 L. T. O. S.

PART II. SECT. 3, SUB-SECT. 8.—

C. (a).

o. In criminal proceedings.]—On the trial of a prisoner charged with a criminal act, evidence of the commission by him of other acts of a like character, is receivable to show intent.—**R. v. McBRIDEN** (1897), 29 N. S. R. 327.—**CAN.**

p. — Fraudulent conversion.]—Accused received from L. two cheques to be paid to a co. on account of shares therein which L. desired to purchase. Accused deposited the cheques in a bank to his own credit, subsequently using most of the proceeds, & never remitted the moneys to the co. He was charged with fraudulent conversion under Criminal Code, s. 355 (1). He was convicted & the conviction sustained on appeal. The question on appeal was whether accused was prejudiced at the trial by misdirection or nondirection to the jury or wrongful admission of evidence. As to admission of evidence as to retention by accused of moneys received from other appts. for shares.—**Held**: properly admitted as evidence of similar acts to show accused's state of mind, brought out in his cross-examination.—**R. v. THOMPSON**, [1923] 1 W. W. R. 1138; 39 Can. Crim. Cas. 395; 16 Sask. L. R. 288.—**CAN.**

q. In action for fraudulent conveyance—To rebut fraud.]—Where the conveyance of the son was attacked as well on the ground of fraud as want of consideration, & evidence has been given of other conveyance made by the father at the same time to this & other of his children, the effect of which would be to defeat creditors.—**Semble**: evidence of the circumstances under which these other deeds were given, in order to rebut the inference of fraud, is relevant.—**DOE d. BARLOW v. HAT-**

FIELD (1843), 2 Kerr. 122.—**CAN.**

r. To rebut fraud.]—Def., for the purpose of supporting his plea of fraud & showing his bona fides, had offered, in evidence, a transaction between himself & pltf. similar to the one in issue, but which had occurred about a year previously.—**Held**: such evidence was admissible, as showing grounds for the removal of deft.'s suspicions, & as a fact from which a reasonable inference might be drawn by the jury, bearing upon the question in issue.—**NOVA SCOTIA BANK v. ROBINSON** (1896), (1878-1908), 1 Cout. Dig. 556.—**CAN.**

s. Debt.]—The former conduct of deft. in respect to the same debt is a fact or circumstance to be taken into consideration on the question of intent.—**HEAM v. BEATTY** (1901), 21 C. L. T. 518; 2 O. L. R. 362.—**CAN.**

t. Assault.]—In an action of damages for assault in 1805.—**Held**: the evidence of assault by defender on pursuer in 1798 & 1802, might be given to show malice & premeditation.—**MACDONELL v. MACDONALD** (1813), 2 Dow, 66.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 8.—

C. (c).

438 i. Systematic fraud—Evidence of other persons defrauded.]—An action was brought for certain false & fraudulent representations by which pltf. were induced to enter into a contract. Evidence that deft. had made other false statements with reference to the subject matter of the contract was tendered to show that the misrepresentations for which the action was brought were made with a fraudulent intent.—**Held**: the evidence ought to be received.—**LEE v. CASTNER** (1882), 3 N. S. W. L. R. 460.—**AUS.**

461. Mentd. R. v. Williams & Vernon (1818), 6 State Tr. N. S. 775

—**J.—See, generally, CRIMINAL LAW**, Vol. XV., pp. 642 *et seq.*

In criminal proceedings.]—See, generally, CRIMINAL LAW, Vol. XIV., pp. 366 *et seq.*

Demanding with menaces.]—See CRIMINAL LAW, Vol. XIV., p. 384, Nos. 4044-4049; Vol. XV., p. 949, Nos. 10,507-10,509.

Intent to commit rape—Assault.]—See CRIMINAL LAW, Vol. XIV., p. 380, Nos. 4005, 4006.

Burglary.]—See CRIMINAL LAW, Vol. XIV., p. 384, No. 4051.

Procuring abortion.]—See CRIMINAL LAW, Vol. XV., pp. 379, 380.

Libel.]—See LIBEL & SLANDER.

Embezzlement.]—See CRIMINAL LAW, Vol. XIV., p. 383, No. 4039.

(b) *Knowledge or Notice.*

Forgery—Uttering other forged documents.]—See CRIMINAL LAW, Vol. XIV., pp. 387, 388, Nos. 4072-4080.

Coinage offences.]—See CRIMINAL LAW, Vol. XIV., p. 388, Nos. 4096-4100.

False pretences—Obtaining property.]—See CRIMINAL LAW, Vol. XIV., pp. 384, 386, Nos. 4052-4066.

Obtaining credit.]—See CRIMINAL LAW, Vol. XIV., pp. 386, 387, Nos. 4067-4069.

Receiving stolen property.]—See CRIMINAL LAW, Vol. XIV., pp. 382, 383, Nos. 4024, 4038.

(c) *System.*

438. Systematic fraud—Evidence of other persons.]—Where the defence to an action on a contract is that deft. was induced to sign the contract by the fraudulent representation of pltf., & pltf.

438 ii. ———.]—Evidence of other similar representations made by the deft. to persons other than pltf. under similar circumstances & with the object of inducing those persons to act in the same way, is admissible on the question of intent, & to rebut a possible defence of accident or inadvertence.—**LAMB v. JOHNSON** (1914), 13 S. R. N. S. W. 65.—**AUS.**

438 iii. ———.]—In an action to set aside a bill of sale of a mineral claim on the ground that it was a forgery by one of defts., evidence was given by pltf. & his witnesses as to matters which, whether material or not, were intended to make the judge give a roader credit to pltf.'s case. For the defence witnesses were allowed to give evidence showing that pltf. & his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury & conspiracy & tending to show that a like fraudulent scheme was being attempted in this case, & the result was that the judge was so influenced by this evidence that he gave judgment for defts.—**Held**: the said evidence on behalf of defts. was properly admitted.—**D'AVIGNON v. JONES** (1902), 9 B. C. R. 359.—**CAN.**

438 iv. ———.]—To an action on a written agreement signed by deft., for the purchase of a quantity of goods, deft. pleaded that pltf.'s usual course of business was to induce persons to sign contracts of sale on the false representation that said contracts were merely contracts constituting such persons agents of pltf. for the sale of the goods; that deft.'s signature to the contract sued on was obtained by such false & fraudulent representations; that, relying on such representations, defts. signed the contract without reading it, & that as soon as

was practising a systematic fraud, evidence is admissible of persons having been deceived in a similar manner.—*BARNES v. MERRITT & Co.* (1899), 15 T. L. R. 419, C. A.

439. Systematic negligence—Insanitary mode of conducting business—Evidence of other persons affected.]—Pltf. in an action of negligence alleged that he had contracted an infectious disease through the negligence of deft., a barber, in using razors & other appliances in a dirty & insanitary condition. In support of his case he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the deft.'s shop:—*Held*: as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by deft. the evidence of these witnesses was admissible.—*HALES v. KERR*, [1908] 2 K. B. 601; 77 L. J. K. B. 870; 99 L. T. 364; 24 T. L. R. 779, D. C.

440. Course of business.]—It is not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, & put down upon a table for the purpose of being carried from thence to the post office, & that by the course of business in the counting-house, all letters deposited on this table are carried to the post office by a porter.—*HETHERINGTON v. KEMP* (1815), 4 Camp. 193, N. P.

Annotations:—*Distd.* *Skilbeck v. Garbett* (1845), 7 Q. B. 846. *Reid.* *Hawkes v. Salter* (1828), 4 Bing. 715.

In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 374, 377 et seq.

(d) To rebut Defence of Accident or Mistake.

In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 376, 378, No. 3984.

Damage to property.]—See CRIMINAL LAW, Vol. XIV., p. 389.

he discovered the fraud he repudiated the contract. A motion was made at chambers to set aside the defence on the ground, mainly, that evidence could not be given, as pleaded, of transactions of pltf. with other parties:—*Held*: the evidence could be given.—*KIDD v. HENDERSON* (1889), 22 N. S. R. 138.—*CAN.*

438 v. —.—.]—In an action by vendor for specific performance of sale of land, where deft. set up defence that the contract was induced by misrepresentation, there being conflicting evidence of pltf. & deft., evidence was given of alleged similar misrepresentations by pltf. to prospective purchasers in other cases, intended as corroborative, & received subject to objection:—*Held*: it was wrongly admitted.—*BOYD v. LARSON*, [1919] 1 W. W. R. 808; 58 S. C. R. 275; 46 D. L. R. 126.—*CAN.*

438 vi. —.—.]—An action was brought by a life insurance co. claiming to have a policy set aside on the ground of fraud. There was no argument in the statement of claim that the alleged fraud was part of a fraudulent system, nor any allegation that deft. had been a party to any similar acts of fraud. At the trial it was proposed, without previous notice to deft., to adduce evidence connected with the effecting of other policies by deft. under similar fraudulent circumstances as evidence of a system of fraud:—*Held*: the evidence of the similar frauds would be admissible if the substance of the allegation that the fraud was part of a system were stated in the statement of claim.—*EDINBURGH LIFE ASSURANCE Co. v. Y.*, [1911] 1 I. R. 306.—*IR.*

438 vii. —.—.]—J.—S., as agent for A. Co., induced K. to purchase certain *even* in M. for more than double their value by means of false & fraudulent representations as to their situation, quality, development, value & costs:—

Infringement of patent.]—See PATENTS.
Passing off.]—See TRADE MARKS.

(e) Insanity.

See, generally, LUNATICS.

SUB-SECT. 9.—CHARACTER.

A. In General.

441. Competency of witness.]—It is not essential that witnesses who state that they would not believe another person on his oath, should have ever heard such person give evidence upon oath; as the real question is, whether the witnesses have such a knowledge of the person's character & conduct, as enables them conscientiously to say that it is impossible to place any reliance on any statement that such person may make.—*R. v. BISPHAM* (1830), 4 C. & P. 392.

B. Where General Character not in Issue.

442. General rule.]—Character of deft. cannot be gone into in a civil action.—*ANON.* (1773), *Lofft*, 321; 98 E. R. 673.

443. — Penal action.]—I cannot admit this evidence [as to character] in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this: that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not (*EYRE, C.B.*).—*A.-G. v. BOWMAN* (1791), 2 Bos. & P. 532, n.; 126 E. R. 1423.

COMRS. (1902), 35 N. S. R. 405.—*CAN.*

e. Systematic corruption—Isolated act not sufficient.]—The petition against the return of a member for the House of Commons at the general election in 1904 contained allegations of corrupt acts by resp. at the election of 1900, which were struck out on preliminary objections. On the trial of the petition evidence of payments by resp. of accounts in connection with the former election was offered to prove agency & a system & was admitted on the first ground. A question as to the amount of one account so paid was objected to & rejected:—*Held*: the question was not admissible as proof of a system, which could not be established by evidence of an isolated corrupt act.—*COWIE v. FIELDING, SHELburne & QUEEN'S ELECTION CASE* (1906), 37 S. C. R. 604.—*CAN.*

d. Systematic immorality—Principle of admission.]—In an action for a libel that pltf. was at the time of the publication of the libel "leading a life of open & flagrant immorality," to which deft. had pleaded pleas of justification setting forth particulars of pltf.'s alleged conduct during the period to which the libel related:—*Held*: evidence was admissible to prove similar acts of immorality committed by pltf. before & after the period referred to, on the principle of the maxim "*Ex antecedentibus et consequentibus fit optima interpretatio*."—*EYES v. HENDERSON*, 1 J. R. 127.—*N.Z.*

PART II. SECT. 3, SUB-SECT. 9.—A.

e. Conduct & habits of defendant.]—In an action by a master against an apprentice for wrongfully deserting the master's service, the pursuer is not entitled to lead evidence as to defender's conduct & habits.—*GUNN v. GOODALL* (1835), 13 Sh. (Ct. of Sess.) 1142; 10 Fac. Coll. 111.—*SCOT.*

Held: evidence of similar misrepresentation made by S. to another person was admissible to show S.'s intention in making them.—*KINGSLEY v. AFRICAN LAND CORPN., LTD.* (1914), T. P. D. 666.—*S. AF.*

438 viii. —.—.]—Deft. resisted a claim for specific performance of an alleged agreement for exchange of lands, on the ground that he had been induced to sign the agreement by the fraudulent representation of the agent for both parties that under a certain clause in the agreement he would not be bound unless he confirmed the agreement within seven days. Deft.'s counsel, when cross-examining the agent, claimed the right to prove that the same agent a few days later induced another person to sign an agreement for an exchange containing a similar clause by the same misrepresentation:—*Held*: the evidence ought not to be admitted.—*McINTOSH v. PARK*, [1917] N. Z. L. R. 598.—*N.Z.*

a. — Evidence of same person defrauded on other occasions.]—Where a party claimed damages from another on the ground of having fraudulently executed a mercantile order, knowing it to have been intended for pursuer:—*Held*: he was not entitled to lay before the jury evidence that similar offences had formerly been committed by the same defender against him, to establish that the order in question had been fraudulently executed.—*DICKSON v. DICKSON & Co.* (1830), 8 Sh. (Ct. of Sess.) 933; 5 Murr. 223.—*SCOT.*

b. Systematic negligence.]—In an action for wrongful dismissal where previous acts of irregularity, misconduct or negligence have been condoned, evidence of such acts may, nevertheless, be given to show that the act which led directly to the dismissal was not a solitary instance, but that the employee had been habitually guilty.—*COOK v. HALIFAX SCHOOL*

Sect. 3.—Facts which may be proved: Sub-sect. 9, B., C., D., E. & F. Sect. 4: Sub-sect. 1, A.]

444. To rebut allegation of fraud.]—In an ejectment by an heir-at-law to set aside a will for fraud & imposition committed by deft., he shall not be permitted to call witnesses to prove his general good character.—*GOODRIGHT v. HICKS* (1789), Bull. N. P. 296.

445. To establish fact of theft.]—*HURST v. EVANS*, No. 2, *ante*.

To show reasonable & probable cause—Malicious prosecution.]—*See MALICIOUS PROSECUTION.*

On allegation of cruelty—In divorce proceedings.]—*See HUSBAND & WIFE.*

C. Where Character is Issue.

In action for libel or slander—Where general character in issue.]—*See LIBEL & SLANDER.*

—To support plea of justification.]—*See LIBEL & SLANDER.*

Character of licensee of licensed premises.]—*See INTOXICATING LIQUORS.*

D. As affecting Damages.

Libel & slander.]—*See LIBEL & SLANDER.*

Breach of promise.]—*See HUSBAND & WIFE.*

Seduction.]—*See MASTER & SERVANT.*

Adultery.]—*See HUSBAND & WIFE.*

E. Of Witness to Document.

446. Deceased witness to will.]—Where one of the attesting witnesses to a will is dead, witnesses may be called to his character.—*PROVIS v. REED* (1829), 5 Bing. 435; 3 Moo. & P. 4; 7 L. J. O. S. C. P. 163; 130 E. R. 1129.

Credit of witness generally.]—*See Part V., Sect. 8, post.*

Attesting witnesses generally.]—*See Part V., post.*

F. In Criminal Proceedings.

Generally.]—*See CRIMINAL LAW, Vol. XIV., pp. 361 et seq.*

Cross examination as to character.]—*See CRIMINAL LAW, Vol. XIV., pp. 445 et seq.*

Habitual criminals.]—*See CRIMINAL LAW, Vol. XIV., pp. 481 et seq.*

SECT. 4.—HEARSAY.

SUB-SECT. 1.—STATEMENTS OR DECLARATIONS BY LIVING THIRD PERSONS.

A. In General.

447. General rule.]—Upon the trial of an ejectment respecting Blackacre, between A. & B. in which it was necessary for A. to prove that he was

the legitimate son of J., A. after proving by other evidence that J. was his reputed father, offered to give in evidence a deposition made by J. in a cause in Chancery, instituted by A. against C. in order to perpetuate testimony to the alleged fact disputed by C. that he was the legitimate son of J., in which character he claimed an estate in remainder in Whiteacre, which was also claimed in remainder by C. B., deft. in the ejectment, did not claim Blackacre under either A. or C., pltf. & deft. in the Chancery suit:—*Held*: according to law, the deposition of J. could not be received upon the trial of such ejectment against B. as evidence of declarations of J. the alleged father, in matter of pedigree.

The grounds on which it appears to me that the deposition is not receivable in evidence as the declaration of the witness are these: because it was made *post litem motam*, after a controversy raised upon this very point: because J., the witness who made it was brought forward to speak to the point by a person who had a direct interest in establishing it: because the deposition is upon interrogatories formally put to J. by an interested party; & because B., against whom it is proposed that the deposition should be read, had no opportunity of putting any questions on his own behalf (*BAYLEY, J.*).

By the general rule of law nothing that is said by any person can be used as evidence between contending parties unless it is delivered upon oath in the presence of those parties. In England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. To the general rule with us, there are two exceptions: first, on the trial of rights of common & other rights claimed by prescription; & secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, & to have stood quite disinterested, are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; & to supply the deficiency, the law received the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted: but here, as the reputation must proceed on particular facts, such as marriages,

PART II. SECT. 3, SUB-SECT. 9.—B.

To rebut allegation of fraud.]—It was proposed to give evidence of the good character of defender to meet the charge of fraud made against him:—*Held*: evidence of the character of defender cannot be given in a civil action.—*CLARK v. SPENCE* (1825), 3 Murr. 450.—*SCOT.*

445 i. To establish fact of theft.]—In an action for slander imputing theft, deft. having pleaded & endeavoured to support pleas of justification:—*Held*: evidence of the pltf.'s general bad character for honesty was properly rejected. *Semble*: it would have been inadmissible even without the justification; but if "not guilty" only be pleaded, deft. may show, solely in mitigation of damages, & to rebut the

presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that deft. had been guilty of the specific offence charged.—*EDGAR v. NEWELL* (1865), 24 U. C. R. 215.—*CAN.*

PART II. SECT. 4, SUB-SECT. 1.—A.

447 i. General rule.]—Hearsay evidence is not admissible on cross-examination, & if admitted, a new trial will be granted.—*WILLIAMS v. SPOWERS* (1882), 8 V. L. R. 82.—*AUS.*

447 ii. —.]—On a motion for a new trial, an affidavit stating that one of the jurymen had informed deponent that the verdict was decided by lot, will not be received.—*HODGSON v. CARR* (1847), 3 Kerr, 499.—*CAN.*

447 iii. —.]—In an action against

a sheriff for the sale of goods, without paying rent:—*Held*: the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was not evidence in the cause.—*GALBRAITH v. FORTUNE* (1860), 10 C. P. 109.—*CAN.*

447 iv. —.]—The chief clerk of the parts department of a motor car co. was presented by pltf. as a witness to give evidence from his records for the purpose of identifying a motor car as one that was alleged to have been stolen. The records were memoranda made by the co.'s employees & inspectors in the course of their duties & filed in the chief clerk's department. The co. had a rule of secrecy as to the identity of their inspectors, & these inspectors were not known to the

births, & the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood; & family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; & to admit them, would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon. I never heard the contrary contended either as counsel or judge. I think the rule is equally applicable to questions of pedigree (LORD MANSFIELD, C.J.).—BERKELEY PEERAGE CASE (1811), 4 Camp. 401, H. L.

Annotations:—Consd. *Belfast v. Chichester & A.-G.* (1820), 2 Jac. & W. 439; *Gee v. Ward* (1857), 7 E. & B. 509. **Refd.** *Gordon v. Gordon* (1821), 3 Swa. 400; *Moseley v. Davies* (1822), 11 Price, 162; *Davies v. Morgan* (1831), 1 Cr. & J. 587; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *Walker v. Beauchamp* (1834), 6 C. & P. 552; *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170. **Mentd.** *Roscommon's Claim* (1828), 6 Cl. & Fin. 97; *Meath v. Winchester* (1836), 10 Bli. 330; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812.

448. —.]—The admission of hearsay evidence upon all occasions, whether in matters of public or private rights, is somewhat of an anomaly, & forms an exception to the general rules of evidence (LORD ELLENBOROUGH, C.J.).—*WEEKS v. SPARKE* (1813), 1 M. & S. 679; 105 E. R. 253.

Annotations:—Consd. *Thomas v. Jenkins* (1837), 6 Ad. & El. 525; *Prichard v. Powell* (1845), 10 Q. B. 589; *Dunraven v. Llewellyn* (1850), 15 Q. B. 791. **Refd.** *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119; *Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Williams v. Morgan* (1850), 15 Q. B. 782.

449. —.]—In general, declarations made by living persons, not parties to an action, though against their own interest, are not admissible as evidence in that action.

Where, therefore, to impeach the consideration for a promissory note, deft. attempted to give evidence of declarations made by the person on whose account that note had been given to pltf., which person was no party to the action:—**Held:** such evidence was clearly inadmissible.

P. himself might have been called as a witness, & it is not competent to give evidence of his declarations not upon oath (*per Cur.*).—*HEALY v. JACOBS* (1827), 5 L. J. O. S. K. B. 180.

450. —.]—Where the examination on which an order of removal is founded consists altogether of inadmissible evidence, *e.g.*, hearsay evidence,

the order is bad.—*R. v. ECCLESALL BIERLOW (INHABITANTS)* (1841), 11 Ad. & El. 607; 1 Gal. & Dav. 160; 10 L. J. M. C. 90; 5 J. P. 595; 5 Jur. 460; 113 E. R. 544.

Annotations:—Consd. *R. v. Lydeard St. Lawrence* (1841), 10 L. J. M. C. 147; *R. v. Rishworth* (1842), 2 Q. B. 476. **Mentd.** *R. v. West Riding JJ.* (1842), 2 Q. B. 705.

451. —.]—Declarations made by a party in possession of an estate, in his answer to a bill in Chancery, are admissible in evidence against him, & persons deriving from him; but declarations by him of what he heard another person state, not adding that he believed the statement, are not admissible to cut down or defeat his estate.—*ROE d. TRIMLESTOWN (LORD) v. KEMMIS* (1843), 9 Cl. & Fin. 749; 8 E. R. 601, H. L.

Annotations:—Consd. *Boileau v. Rutlin* (1848), 2 Exch. 665. **Refd.** *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130. **Mentd.** *Atkinson v. Pocock* (1848), 12 Jur. 60; *Andrew v. Motley* (1862), 12 C. B. N. S. 514.

452. —.]—*LAXFORD v. GROOMBRIDGE* (1843), 1 L. T. O. S. 56.

453. —.]—*STONE v. STONE* (1845), 4 Notes of Cases, 274.

454. Evidence taken on oath before justices.—*Qu.*: whether evidence of declarations of a pauper, dead or insane, relative to his settlement, be admissible.

It is a general rule that such evidence [hearsay] is not admissible except in some few particular cases where the exception, for aught we know, is as ancient as the rule. . . . Is the evidence better upon the ground that it was upon oath administered by two justices? Evidence, though upon oath to affect an absent person, is incompetent, because he cannot cross-examine (GROSE, J.).—*R. v. ERISWELL (INHABITANTS)* (1790), 3 Term Rep. 707; 100 E. R. 815.

Annotations:—Consd. *R. v. Ferry Frystone* (1801), 2 East, 54; *Haines v. Guthrie* (1884), 13 Q. B. D. 818. **Refd.** *Johnson v. Lawson* (1824), 2 Bing. 86; *Wright v. Doe d. Tatham* (1837), 7 Ad. & El. 313; *Fligg v. Wedderburne* (1841), 11 L. J. Q. B. 45. **Mentd.** *Smith v. Edgo* (1796), 6 Term Rep. 562; *R. v. Hill* (1851), 2 Den. 254; *Bird v. Keep*, [1918] 2 K. B. 692.

455. Affidavit made on information.—The ct. will not receive the affidavit of a person who was informed by a jurymen of misconduct on the part of the jury, as evidence of such misconduct.—*DAVIS v. ROPER* (1855), 4 W. R. 9.

456. Declaration made in absence of party sought to be affected.—(1) If in an action for breach of promise of marriage, the defence set up is, that deft. was induced to make the promise through misrepresentations made to him; & it is proved that pltf. knew that her father wrote letters to deft., in which he made statements

witness. The co. refused to disclose their names. The inspectors & employees were not presented as witnesses at trial, & it was not shown that they were dead:—**Held:** the evidence was not admissible, being contrary to the well-recognised rule against the admission of hearsay evidence when persons capable of giving direct evidence were still alive.—*NATIONAL FIRE INSURANCE CO. v. ROGERS*, [1924] 2 D. L. R. 403; 2 W. W. R. 186.—**CAN.**

447 v. —.]—A witness cannot be cross-examined as to conversations with another witness, who was not asked anything concerning these conversations; & the former witness will not be recalled, unless by consent, to be examined on those conversations, in order to lay a foundation for the cross-examination of the second witness concerning them.—*MAGRATH v. BROWNE* (1841), Arm. M. & O. 133.—**IR.**

447 vi. —.]—In an action for obstruction of light to the windows of a

hotel, the summons & plaint containing no allegation of special damage, witnesses were produced, who deposed that guests coming to the hotel had refused to take the rooms which were alleged to be darkened, & had stated the darkness of the rooms as a ground for their refusal:—**Held:** this evidence of the statements made by the guests was not admissible.—*GRESHAM HOTEL CO. v. MANNING* (1867), 1 R. 1 C. L. 125.—**IR.**

456 i. Declaration made in absence of party sought to be affected.—A conversation between M. & J. was given in evidence, which showed that they had arranged that a lease should be taken up in V.'s name for all the parties. There was no evidence that this conversation had been communicated to V., or that he had acted upon it, but there was evidence that after the lease had been taken up, J. took an active part in the working of the mine:—**Held:** the conversation was not admissible as against V. to prove that

the lease was partnership property.—*ACKERMAN v. ACKERMAN* (1901), 1 S. R. N. S. W. 210.—**AUS.**

456 ii. —.]—In an action of ejectment, where deft. sets up title by possession, claiming through a third party, declarations of the latter in support of his title are not admissible.—*DOE d. WEMORE v. BELL* (1890), 30 N. B. R. 83.—**CAN.**

456 iii. —.]—In an action for the price of cattle sold, services performed & money paid on deft.'s behalf by pltf. under agreements with defts. it was sought to admit evidence that pltf. had on several occasions when purchasing cattle stated he was doing so on behalf of defts. & also evidence of persons who stated that they had had sales with pltf. & that he, pltf., had stated when making the purchases he was doing so on deft.'s behalf:—**Held:** this evidence was inadmissible to prove that pltf. had deft.'s authority to make the purchase.—*PINKI v. WESTERN*

Sect. 4.—Hearsay: Sub-sect. 1, A., B. & C.]

respecting her; such letters are evidence for deft., although there is no proof that pltf. had read them, or was acquainted with their exact contents; but pltf. would not be considered answerable for the particular expressions contained in them.

(2) But a verbal representation made by pltf.'s father, she not being present, to a third person, who communicated it to deft., is not evidence.—*FOOTE v. HAYNE* (1824), 1 C. & P. 545; *Ry. & M.* 165, N. P.

Annotations:—Generally. *Mentd.* *Young v. Hutchinson* (1843), 1 L. T. O. S. 59; *Kinning v. Buchanan* (1850), 15 L. T. O. S. 305.

457. —.—[What is said by a third party at the time of the signing of a promissory note, as to the consideration for which it is given is not evidence against the payee, if he was not present.

I am asked to receive evidence of a conversation between deft. & a third person, pltf. not being present. I am clearly of opinion that I cannot, & ought not to do so (*GARROW, B.*).—*HEALEY v. JACOBS* (1827), 2 C. & P. 616; *subsequent proceedings*, 5 L. J. O. S. K. B. 180.

458. —.—[*ETTY v. JACKSON* (1837), 1 Jur. 83, N. P.

459. —.—[Evidence tendered by a co-respondent of declarations by the wife to a third person, when the husband was not present, with regard to the conduct of the husband during cohabitation, is not admissible.—*PLUMER v. PLUMER & BYGRAVE* (1860), *Sea. & Sm.* 147; 4 Sw. & Tr. 257; 20 L. J. P. M. & A. 63.

Annotation:—Mentd. *Seddon v. Seddon & Doyle* (1860), 30 L. J. P. M. & A. 12.

460. —.—[Fact of statement distinguished from statement.]—Where one of the parties to a suit for nullity of marriage has made a statement

marital relations, that party may be asked whether he or she spoke to that person of the fact of his or her spouse's objection to marital intercourse.—

O'H. v. O'H. (1916), 115 L. T. 791; 33 T. L. R. 51; 61 Sol. Jo. 100.

461. Declarations as to place of birth.]—A pauper's statement of what he has heard & believes as to the place of his birth is within the rule excluding hearsay evidence, & insufficient to support an order for his removal.—*R. v. LYDEARD ST. LAWRENCE (INHABITANTS)* (1841), 11 Ad. & El. 616; 1 Gal. & Dav. 191; 10 L. J. M. C. 147; 6 Jur. 32; 113 E. R. 547.

Annotations:—Consd. *R. v. Rishworth* (1842), 2 Q. B. 476. *Mentd.* *R. v. West Riding JJ.* (1842), 2 Q. B. 705.

462. —.—[The following evidence of a pauper, "I was born illegitimate at S.," being necessarily hearsay evidence, is insufficient to sustain an order of removal.—*R. v. RISHWORTH (INHABITANTS)* (1842), 2 Q. B. 476; 1 Gal. & Dav. 597; 11 L. J. M. C. 34; 6 J. P. 73; 6 Jur. 279; 114 E. R. 187.

Annotation:—Mentd. *R. v. West Riding JJ.* (1842), 2 Q. B. 705.

463. Declarations of spectators of picture—Identity of alleged subject.]—*DU BOST v. BERESFORD* (1810), 2 Camp. 511.

Annotations:—Mentd. *Dobree v. Napier* (1836), 3 Scott, 201; *Austria (Emperor) v. Day & Kossuth* (1861), 3 De G. F. & J. 217; *Mulkern v. Warn* (1872), L. R. 13 Eq. 619; *Prudential Life Insce. Assocn. v. Knott* (1873), 23 W. R. 249.

See, generally, LIBEL & SLANDER.

464. Declaration by person since become lunatic—Entry not in course of duty—Entry by solicitor's clerk in diary.]—An entry in the diary of a solr.'s clerk, who had become lunatic, not allowed to be read in evidence of a matter concerning which it was not the duty of the clerk to have made such entry.—*COLEMAN v. MELLERSH* (1850), 2 Mac. & G. 309; 17 L. T. O. S. 45; 42 E. R. 119.

Annotations:—Mentd. *Blaggrave v. Routh* (1856), 2 K. & J. 509; *Morgan v. Higgins* (1859), 1 Giff. 270; *Gething v. Keighley* (1878), 9 Ch. D. 547; *Watson v. Rodwell* (1878), 7 Ch. D. 625; *Ward v. Sharp* (1884), 53 L. J. Ch. 313; *Re Webb, Lambert v. Still*, [1894] 1 Ch. 73.

PACKING CO. (1905), 2 W. L. R. 336.—**CAN.**

456 iv. —.—[*ROMANJEE COWASJEE v. CHIEF COURT OF LOWER BURMA (CHIEF JUDGE & JUDGES OF)* (1906), L. R. 34 Ind. App. 55; 1 L. R. 34 Calo. 129.—**IND.**

456 v. —.—[In an action for false imprisonment & malicious prosecution deft.'s counsel proposed to prove a statement respecting the subject-matter of the criminal charge, made by a third person, in the presence of deft. before the institution of criminal proceedings. The judge rejected the evidence upon the ground that it was hearsay merely, & that pltf. was not present at the time.—*Held*: the evidence was receivable on the first count, which was for false imprisonment, in mitigation of damages, & on the second, which was for malicious prosecution, in support of the plea to rebut malice.—*SULLIVAN v. TAINE*, Mac. 533.—**N.Z.**

456 vi. —.—[An action of damages for slander was brought against a girl on the ground that she had falsely accused the pursuer of having had connection with her. At the time of the alleged connection she was under sixteen, & a criminal charge against the pursuer had been lodged with the police with regard to his conduct towards her. In the slander action she pleaded *veritas*, & led at the trial. She adduced a witness, who deposed that a police inspector, when interrogating him, had not asked him the names of people who had seen pursuer & defender together, & that he had not declined to give such information. The police inspector, giving evidence

for the pursuer, deposed that he had asked that witness the names of any people who had seen the parties walking together, & was then asked, "What did he answer?" The question was objected to, & the objection was sustained. The pursuer excepted.—*Held*: under Evidence (Scotland) Act, 1852, s. 3, the question & the evidence it was intended to elicit were competent.—*GILMOUR v. HANSEN*, [1920] S. C. 598.—**SCOT.**

456 vii. —.—[*LIVINGSTONE v. STRACHAN, CREMER & JONES*, [1923] S. C. 794.—**SCOT.**

456 viii. —.—[In an action by E. against S. for the purchase-price of sheep alleged to have been sold by E. to B., the issue was whether B. was the agent of S. to purchase, or whether he bought for himself & employed S. to resell. During a considerable period B. had bought stock from various persons, including pltf., & had delivered the stock to S., who resold it. A witness called by deft., who had negotiated with S. for the purchase of certain cattle, was asked whether S. in the absence of E. had told him the price at which B. had authorised him to sell.—*Held*: the question was not admissible.—*ERASMUS v. SIFFMAN* (1909), T. S. 1026.—**S. AF.**

1. Statutory declaration before justices.]—Under the heading of "Scott Act inspector accused of bribery" deft. co. printed in their newspaper an item to the effect that M. had made a declaration before a Justice of the peace accusing pltf. of attempted bribery, & stating that in the declaration referred to it was alleged that pltf.

on two different occasions promised that he would not prosecute M. if the latter would give him a certain sum of money, which M. refused to do. At the trial the statutory declaration referred to was tendered in evidence, on behalf of deft., as evidence of *bona fides*, & was rejected by the trial judge.—*Held*: the evidence was rightly rejected.—*MCDONALD v. SYDNEY POST PUBLISHING CO.* (1906), 39 N. S. R. 81; 1 E. L. R. 61.—**CAN.**

g. Declaration as to birth.]—An issue had been directed to inquire whether a child was born alive or not. At the trial evidence was received of declarations made by certain members of the family shortly after the death of the child.—*Held*: the evidence was properly received.—*ITKILLY v. FITZGERALD* (1843), 6 E. R. 335.—**IR.**

h. Declaration as to death.]—The ct. refused evidence of the day on which, as the witness heard, A.'s death took place, or of the family reputation of the day of his death.—*Doe d. ARNOLD v. AULDJO* (1848), 5 U. C. R. 171.—**CAN.**

k. Declarations of surveyor.]—On the trial of an indictment for obstructing a street, C., a surveyor, stated, subject to objection, that he measured certain distances from a post which he said was pointed out to him by B. as the Genser line, & that he ran a course from that, & tested his line from four points given him by B. & found them correct, & also stated what the result of that measurement would be in regard to deft.'s house. B. was not called.—*Held*: the evidence was im-

465. Declaration of prior holder of bill of exchange.—In an action by the indorsee of a bill against the acceptor, the defence was, that the bill was a forgery; deft. had represented it to be so to certain bankers, who were applied to to discount it for a prior holder; the bankers wrote a letter, stating what deft. had said, & minutely entering into the circumstances; this letter was received in evidence preliminarily to the observation which was made upon it by the holder:—*Held*: the declaration of any prior holder of the bill was admissible against pltf.—*MIERS v. BOWLER* (1838), 2 Jur. 95.

Entries by deceased persons in course of duty, see Sect. 5, sub-sect. 3, *post*.

In collision actions.—See ADMIRALTY, Vol. I., pp. 199, 200, Nos. 1167–1169, 1181.

In election petitions.—See ELECTIONS, Vol. XX., pp. 39, 43, 168, Nos. 240, 263, 1415, 1416.

B. Exceptions to General Rule.

Witness no longer producible.—See Nos. 1055–1060, *post*.

466. Evidence of deceased persons—As to public rights—Claimed by prescription.—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

See, generally, Sect. 5, sub-sect. 4, *post*.

467. — As to matters of pedigree.—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

See, generally, Sect. 5, sub-sect. 5, *post*.

468. In winding-up proceedings—As clue to information required by liquidator.—A witness summoned under Cos. Act, 1862 (c. 89), s. 115, must answer questions which refer to mere hearsay, since the object of the sect. is to enable the official liquidator to get full information as to all the co.'s affairs, & hearsay may be valuable in putting him on the right inquiries.—*Re OTTOMAN CO., LTD.* (1867), 15 W. R. 1069.

Admissions.—See Sub-sect. 2, *post*.

Confessions.—See CRIMINAL LAW, Vol. XIV., pp. 403 *et seq.*

Statements & declarations forming part of res gestæ.—See Sect. 3, sub-sect. 2, *ante*.

Hearsay as grounds for affidavit of information & belief.—See Part VII., Sect. 11, sub-sect. 7, *post*.

C. Statements in Presence of Party.

469. General rule.—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

470. Statements in presence of party—Statements during judicial proceedings—By judge or magistrate—Statement not replied to.—In an action of assault, what was said by the magistrate to pltf. at a previous investigation of the circumstances before him, cannot be received in evidence at the trial on the part of deft., unless it drew any observations in reply from pltf.—*CHILD v. GRACE* (1825), 2 C. & P. 193, N. P.

471. — — — — ——On the trial of an action for assault & false imprisonment, on a charge of felony, if pltf.'s counsel ask his witness

what was said by deft. when the parties were before the magistrate, deft.'s counsel may ask, on cross-examination, what was said by the magistrate.—*RICHARDS v. TURNER* (1840), Car. & M. 414, N. P.

472. — — — — — Party unable to reply.—In an action for a malicious prosecution & false imprisonment:—*Held*: pltf. could not give in evidence what the magistrate had said on his, pltf.'s, discharge, as if unfavourable to pltf. he had no power of replying to it.—*WETZLAR v. ZACHARIAH* (1867), 16 L. T. 432, N. P.

473. — — — — — Nature of proceedings different.—The observations of a judge at the trial of a criminal action are not evidence against a respondent in a divorce suit.—*COFFEY v. COFFEY* (1898), as reported in 67 L. J. P. 86; 78 L. T. 796.
Annotation:—*Mentd.* *Bosworthick v. Bosworthick* (1901), 86 L. T. 121.

474. — — — — — Subject matter of suit different.—Pltf. brought two actions against deft. one for breach of promise of marriage, the other for money laid out in the purchase of dresses at the request of deft. The verdict in the former action passed for deft., pltf. failing to prove the promise. The second action was referred, & in her evidence on the reference pltf. made certain statements in the presence of deft. tending to prove the supposed promise, & which he was not called to contradict:—*Held*: this could not be considered as legitimate evidence against him in the way of implied admissions in the action for breach of promise of marriage.—*THOMAS v. SHIRLEY* (1862), 11 W. R. 21.

475. — — — — — By witness at inquest—Party unable to reply.—In an action brought by a widow under Lord Campbell's Act, to recover compensation for the death of her husband, who was accidentally killed by a brougham on the highway, evidence as to a statement made by L., the driver of the brougham, before the coroner, to the effect that "he had a Russian prince, who did not understand the English language, & that he would not allow him to pull up, as he was in a hurry to go to a wedding, which was the cause of his not stopping at the time of the accident, & that the brougham belonged to deft. & that L. was driving it for him" was tendered. Deft. having been proved to have been present at the inquest & to have heard the statement:—*Held*: such evidence was inadmissible, it not being competent to him to offer a contradiction in a public ct.—*BROOKER v. FLOYD* (1866), 13 L. T. 803.

476. — — — — — Receivable as evidence of conduct of party on hearing statement.—Where the wife is charged with adultery her conduct & declarations on a confession of guilt by the alleged *particeps criminis* being communicated to her are admissible evidence on behalf of the husband.—*HARRIS v. HARRIS* (1829), 2 Hag. Ecc. 376; 162 E. R. 894; on appeal, 2 Hag. Ecc. 511.

Annotations:—*Mentd.* *Dillon v. Dillon* (1842), 3 Curt. 86; *Graves v. Graves* (1842), 3 Curt. 235; *Otway v. Otway* (1888), 57 L. J. P. 81; *Russell v. Russell* (1897), 66 L. J. P. 122; *Hodgson v. Hodgson*, [1905] P. 233.

properly received.—*R. v. BUDGE* (1881), 20 N. B. R. 531.—*CAN.*

1. — — — — ——In an action to determine the boundary line between two lots, the trial judge, having had a view of the locus & heard evidence, decided in favour of pltf. Two surveyors were called as witnesses, but neither of them had personally made a survey. They spoke from notes & from the survey made by their articulated clerks, who ran the lines, & it appeared that their evidence had influenced the mind of the trial judge:—*Held*: this was

hearsay evidence, improperly admitted, & so there had been a mistrial.—*ANTICKNAP v. SCOTT* (1914), 20 W. L. R. 952.—*CAN.*

m. Declarations as to state of business.—In order to establish fraud in a transfer, declarations & admissions by transferee both before & after the transfer, as to the general state of his business & the value of the property transferred, are admissible in evidence on the part of deft.—*LAWTON v. TARBATT* (1858), 4 All. 1.—*CAN.*

PART II. SECT. 4, SUB-SECT. 1.—C.

n. Statements in presence of party.—*COTTER v. MASON* (1870), 30 U. C. R. 181.—*CAN.*

476 i. — — — — — Receivable as evidence of conduct of party on hearing statement.—It is competent for pursuer to prove a conversation in which he took part, not in proof of the facts stated, but to prove his acts.—*HAMILTON v. HOPE* (1826), 4 Murr. 222.—*SCOT.*

Sect. 4.—Hearsay: Sub-sect. 1, C.; sub-sect. 2, A. & B.]

477. — Not evidence of the facts stated.]—In an action by B. against A. for false imprisonment, A. pleaded a justification, that B. had been guilty of embezzlement. B. & his witnesses having made the charge before a magistrate, depositions were taken in the hearing of B., & he made a statement in answer. On the trial of the action for false imprisonment:—*Held*: these depositions, & pltf.'s statement in answer, were receivable in evidence for deft. as being matters stated in the hearing of pltf., to which he made an answer, but the depositions were no proof of any fact therein stated.—*JONES v. MORRELL* (1844), 1 Car. & Kir. 266.

478. — —.]—Two workmen were lifting a drill weighing one & a half cwts. when the drill slipped. One of the men on getting back to his home told his wife he had a pain in his side. Two days later the wife called in a doctor. The doctor treated the pain in the man's side as being due to a strain, but there were no objective symptoms of strain. Five weeks later the man died from broncho-pneumonia, & the doctor then expressed the opinion that the man had strained his liver, & that the injury extended ultimately to the lungs. The widow further gave evidence that during the time that the man was ill he was visited by his employer, who asked him what was the matter, & the man said he had strained himself lifting the drill, whereupon the employer gave him £2 "to go on with," & told him that his compensation would amount to 35s. per week. This evidence was objected to. The county ct. judge found that the deceased had suffered injury by accident in the way alleged, & that death from broncho-pneumonia had resulted therefrom. He further stated that in coming to this conclusion he did not rely upon the deceased's statement to his employer, "except as not being inconsistent with the facts of the case":—*Held*: there was sufficient evidence to support the findings & no misdirection. The statement was admissible not as direct evidence of the facts therein stated, but as showing the conduct of the employer on hearing such statement, upon which the judge was at liberty to draw inferences of fact.—*CHANTLER v. BROMLEY* (1921), 14 B. W. C. C. 14, D. C.

479. — Statement received in silence.]—*CHILD v. GRACE*, No. 470, *ante*.

480. — —.]—*HAYSLEP v. GYMER*, No. 309, *ante*.

481. — —.]—In trespass by A. against B. for false imprisonment, B. justified on the ground that A. being possessed of a bill of exchange drawn by C. upon D., forged the acceptance of D. Issue being joined upon a replication *de injuria*, a witness called by A. proved that A. & B. went with him to D. on the day following that on which the bill had been dishonoured, when B. reminded D. that D. had on the presentment of the bill for payment stated that A. had forged D.'s acceptance, & that D. neither admitted nor denied that he had made such a statement. A witness called by B. stated that D., when he dishonoured the bill, did say that the acceptance was forged by A.:—*Held*: this statement was admissible in evidence in mitigation of damages. *Semble*: this statement would have been evidence for B., even if

evidence of the subsequent conversation had not been given by A.—*PERKINS v. VAUGHAN* (1842), 4 Car. & Kir. 988; 5 Scott, N. R. 881; 12 Jur. 38; 6 Jur. 1114; 134 E. R. 405.

Annotation:—*Expld.* Hyde v. Palmer (1863), 3 B. & S. 657.

482. — — Party unable to reply.]—*BROOKER v. FLOYD*, No. 475, *ante*.

483. — — —.]—*WETZLAR v. ZACHARIAH*, No. 472, *ante*.

484. Statement in hearing of party—Though not in actual presence.]—A statement made in the pltf.'s hearing, although not in her presence, is evidence against her.—*NEILE v. JAKLE* (1849), 2 Car. & Kir. 709.

SUB-SECT. 2.—ADMISSIONS.

A. In General.

Admissions as mode of proof, see Part III., Sect. 2, *post*.

485. General rule.]—If in conversation the opposite party states the contents of a written paper, you may give such his declaration in evidence, without producing the paper.

They may certainly ask anything that either of pltf.s said (*GIFFORD, C.J.*).—*SEWELL & BRETT v. STURBS & HANCOCK* (1824), 1 C. & P. 73, N. P.

486. —.]—Whatever a party admits may be used as evidence against him, although the jury are to be the judges of its value (*PARKE, B.*).—*TOLL v. LEE* (1849), 4 Exch. 230; 18 L. J. Ex. 264; 13 L. T. O. S. 325; 13 Jur. 614; 154 E. R. 1195.

Annotation:—*Mentd.* Watson v. Spratley (1854), 10 Exch. 222.

487. —.]—Whatever a man says is evidence against him—in criminal cases as in civil—at any time (*POLLOCK, C.B.*).—*R. v. LEE* (1864), 4 F. & F. 63.

Annotations:—*Mentd.* R. v. Parker (1870), L. R. 1 C. C. R. 225; R. v. Edmunds (1909), 25 T. L. R. 658.

488. —.]—That admission, like every other admission made by a deft. or made by his agents in the course of business, is admissible as evidence against him; but it is always for the ct. to consider what weight, if any, is to be given to an admission, or any other evidence; it is not conclusive merely because it is legally admissible (*JAMES, L.J.*).—*BULLEY v. BULLEY* (1874), 9 Ch. App. 739; 44 L. J. Ch. 79; 30 L. T. 848; 22 W. R. 779, L. J.J.

489. —.]—(1) A woman's hand was injured by blood poisoning. She alleged that the injury was caused by pricking her thumb on a nail while working on her employers' premises. They alleged that the injury was received at her home. At the hearing she was cross-examined as to alleged statements made by her to certain persons that she had done it at home, & their evidence as to these statements was heard. The evidence of witnesses called for her of statements made by her to them as to the alleged accident two days after its alleged occurrence was disallowed.

We have simply to apply here the general rule of evidence that statements may be used against a witness as admissions, but that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony (*NEVILLE, J.*).

(2) Upon the trial of an indictment for offences

PART II. SECT. 4, SUB-SECT. 2.—A.

485 i. General rule.]—Admissions of deft. may be used as evidence of a case made by the bill though not put in issue.—*BRUCE v. LIGAR* (1869), 6

W. W. & A'B. 240.—*AUS.*

o. Admission by conduct.]—In coming to a conclusion whether prohibited goods have been imported since the date of prohibition, all the

circumstances of the case including the demeanour, statements & conduct of accused must be taken into consideration.—*HOUGH v. AH SAM* (1912), 15 C. L. R. 452.—*AUS.*

against women & girls involving violence, the fact that complaint is made by the prosecutrix shortly after the occurrence, with the particulars of the complaint made, so far as they relate to the charge against the prisoner, are allowed to be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistence of the conduct of the prosecutrix with the story told by her in the box, & as tending to negative any consent of hers. That is a special class of case in which such evidence has for a very long time been allowed to be admitted, but it has nothing to do with such a case as the present (SWINFEN-EADY, L.J.).—JONES v. SOUTH EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE (1918), 87 L. J. K. B. 775; 118 L. T. 802; 11 B. W. C. C. 38, D. C.

490. Admission by conduct.—Party's disbellet in own case.]—ANNESLEY v. ANGLESEA (EARL) (1743), L. R. 5 Q. B. 317, n.; 17 State Tr. 1139.

*Annotations:—*Consd. Moriarty v. L. C. & D. Ry. (1870), L. R. 5 Q. B. 314. *Reid*, Gartside v. Outram (1856), 26 L. J. Ch. 113; R. v. Watt (1905), 20 Cox, C. C. 852. *Mentd.* Stapleton v. Crofts (1852), 18 Q. B. 367; R. v. Cox & Rallton (1884), 14 Q. B. D. 153.

491. ———.]—On the trial of an action by pltf. & wife for injuries sustained by the wife owing to defts.' negligence, pltf.'s case was proved by the evidence of the wife & other witnesses; & defts. having called evidence to prove that the wife was in fault, tendered the following evidence, which was received, subject to objection. W. deposed that he, pltf., & C., a clerk of pltf.'s attorney, were together at pltf.'s house: pltf. said that if W. would give evidence as to the accident he should share the compensation; pltf. knew that W. was not present at the accident, & W. said he was not, & C. said if W. would not come forward he, C., would get other witnesses. Two other witnesses deposed to similar proposals made to them by C., but not in pltf.'s presence, to give false evidence. Pltf. was not present at the accident; & neither he nor C. had been called as witnesses:—*Held*: the evidence was rightly received, as amounting to evidence of an admission, by conduct, of pltf. that he had a bad case.—MORIARTY v. LONDON, CHATHAM & DOVER RY. CO. (1870), L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; 22 L. T. 163; 34 J. P. 692; 18 W. R. 625. *Annotation:—*Follid. R. v. Watt (1905), 70 J. P. 29.

492. ———.]—The conduct in a litigation of a party to it, if such as to lead to the reasonable inference that he disbelieves in his own case, may be proved & used as evidence against him.—R. v. WATT (1905), 70 J. P. 29; 20 Cox, C. C. 852.

493. ———.]—Omission to claim exemption from tithe.]—Where an exemption by non-payment is set up under 2 & 3 Will. 4, c. 100, the proceedings of Tithe Comrs. at meetings for the commutation of the tithes within it are admissible in evidence for the purpose of showing that at such meetings no exemption by non-payment was claimed.—PEARSON v. BECK (1853), 8 Exch. 452; 22 L. J. Ex. 213; 21 L. T. O. S. 21; 17 J. P. 200; 155 E. R. 1426.

494. Where evidence illegal.]—The ct. will

496 i. Admission referring to document.]—To constitute an admission, the document need not be written by the party against whom it is used: it is sufficient if it is found in his possession, & his conduct thereto creates an inference that he was aware of its contents & admitted their accuracy; but, unless this is done, the document cannot be used against him as proof of its contents. What conduct would properly give rise to such inference depends on the facts of each case. The

mere fact of possession of letters is not of much value, unless it is shown that their contents were recognised & adopted by the replies elicited or the conduct inspired by them.—BARINDRA KUMAR GHOSE v. R. (1909), 1 L. R. 37 Calc. 467.—IND.

PART II. SECT. 4, SUB-SECT. 2.—B.

497 i. Not admissible.]—On the question whether the ct. below should, or should not, have received in evidence

reject evidence in itself illegal, notwithstanding the admissions or omissions of the litigants.—SHAW v. ROBERTS (1818), 2 Stark. 455, N. P.

495. Admission in ignorance of liability.]—Any admission of a demand, or confession to that effect, made by a deft. when he is arrested & ignorant whether he is bound by law to the payment of the demand or not, is inadmissible evidence to charge him.—ROUSE v. REDWOOD (1794), 1 Esp. 155, N. P.

496. Admission referring to document.]—In an action for goods sold & delivered, & on an account stated, a parol admission of the debt by deft. is evidence under the account stated, though it appears that there was a written agreement relating to the goods.

What a deft. says is always evidence against him, although it may have arisen out of a written agreement (PARKE, B.).—NEWHALL v. HOLT (1840), 6 M. & W. 602; 9 L. J. Ex. 293; 4 Jur. 610; 151 E. R. 578.

*Annotations:—*Distd. Vain v. Whittington (1843), Car. & M. 484. *Mentd.* Plumer v. Briscoe (1847), 10 L. T. O. S. 185.

B. Admissions in Party's Own Favour.

497. Not admissible.]—WILSON v. CALVERT (1832), 5 Sim. 194; 58 E. R. 310.

498. ———.]—Unless already given in evidence by opposite party.]—CRAY v. HALLS (1824), cited in Ry. & M. at p. 258, N. P.

*Annotation:—*Apprvd. Smith v. Blandy (1825), Ry. & M. 257.

499. ———.]—SMITH v. BLANDY, No. 267 ante.

500. ———.]—Documentary evidence.]—In an action of trespass against two defts., pltf. in proof of the alleged acts of trespass, gave in evidence a return by one deft. to a writ of *habeas corpus*, in which that deft. stated, that he had committed the acts in question in obedience to certain orders made by his co-deft. Defts. thereupon called in aid the evidence contained in that document in support of certain pleas of justification:—*Held*: the return was evidence for defts. in support of their pleas, & also against them in proof of the trespass.—COBBETT v. GREY (1850), 4 Exch. 729; 19 L. J. Ex. 137; 14 L. T. O. S. 182; 14 J. P. 56; 154 E. R. 1409.

*Annotations:—*Mentd. Howard v. Hudson (1853), 2 E. & B. 1; Moody v. Corbett (1866), 7 B. & S. 541.

501. ———.]—Statements made after accident.—As to cause of accident.]—JONES v. SOUTH EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE, No. 489, ante.

502. ———.]—Rule in criminal proceedings for assault distinguished.]—JONES v. SOUTH EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE, No. 489, ante.

———.]—See, generally, MASTER & SERVANT; NEGLIGENCE.

503. Evidence given on trial for malicious prosecution.]—Where, in case for a malicious charge of felony, pltf. puts in, to prove a formal part of his case, deft.'s & another person's depositions before the magistrates, deft. has a right to use his own deposition as evidence in the cause,

the testimony of a witness who had been informed by pltf. before the adjudication that documents relating to land had then been deposited with him as security by the person who was afterwards insolvent & who was the first deft. in this suit:—*Held*: this being an admission by a party within Evidence Act, 1872, s. 21, could not be used as evidence in pltf.'s favour.—MILLER v. MADDOX (1896), 1 L. R. 19 All. 76; L. R. 23 Ind. App. 106.—IND.

Secl. 4.—Hearsay: Sub-secl. 2, B., C. & D. (a) & (b).]

but not that of the other deponent.—**JACKSON v. BULL & ALISON** (1838), 2 Mood. & R. 176; *subsequent proceedings*, 2 J. P. 695.

C. Admissions against Interest.

504. Admissible—Admission that possession not adverse.]—The declarations of a widow in possession of premises, that she held them for her life, & that after her death they would go to the heirs of her husband, are admissible to negative the fact of her having had twenty years' adverse possession.—**DOE d. HUMAN v. PETTETT** (1821), 1 B. & Ald. 223; 106 E. R. 1174.

*Annotation:—***Apld.** *Doe d. Pritchard v. Jauncey* (1837), 8 C. & P. 99.

505. — Admission against ownership of property—Though rights of ownership exercised.]—If a person is seen felling timber in a wood, it is *prima facie* evidence that he is the owner of it; & therefore anything that he says at that or any other time as to any one else being the owner of it is evidence.—**DOE d. STANSBURY v. ARKWRIGHT** (1833), 5 C. & P. 575.

*Annotation:—***Mentd.** *Re Stepney Election Petn., Isaacson v. Durant* (1880), 34 W. R. 547.

506. — Admission by party in possession.]—**ROE d. TRIMLESTOWN (LORD) v. KEMMIS**, No. 451, *ante*.

507. — Admission that claim already subject of adverse award.]—In an action for work & labour, to which deft. pleads the general issue, a statement made by pltf. that the claim which forms the subject of the action was referred to an arbitrator, who found by his award that nothing was due to pltf., is evidence against pltf. under the issue raised by that plea.—**MURRAY v. GREGORY** (1850), 5 Exch. 468; 19 L. J. Ex. 355; 14 Jur. 555; 155 E. R. 205.

508. — Though relating to contents of documents.]—Pltf. in *assumpsit* gave in evidence an admission of deft., that he owed £147 on a bill of exchange which had been returned dishonoured:—**Held**: such acknowledgment was admissible, though no notice to produce the bill had been given.—**FRYER v. BROWN** (1824), Ry. & M. 145, N. P.

509. — —.]—What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper.—**EARLE v. PICKEN** (1833), 5 C. & P. 542.

*Annotation:—***Consd.** *Slatterie v. Pooley* (1840), H. & W. 18.

510. — —.]—A parol admission by a party to a suit is always receivable in evidence against him, although it relate to the contents of a deed or other written instrument; & even though its

contents be directly in issue in the cause.—**SLATTERIE v. POOLEY** (1840), 6 M. & W. 664; H. & W. 18; 10 L. J. Ex. 8; 4 Jur. 1038; 151 E. R. 579.

*Annotations:—***Consd.** *Boulter v. Peplow* (1850), 9 C. B. 493. **Apld.** *Murray v. Gregory* (1850), 5 Exch. 468; R. v. Basingstoke (1851), 14 Q. B. 611. **Consd.** *Henman v. Lester* (1862), 12 C. B. N. S. 776; *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. **Refd.** *Howard v. Smith* (1841), 3 Man. & G. 254; *Vain v. Whittington* (1843), Car. & M. 484; *Doe d. Groves v. Groves* (1847), 10 Q. B. 486; *Plumer v. Brisco* (1847), 11 Q. B. 46; *Boileau v. Rutlin* (1848), 2 Exch. 685; *Ridley v. Plymouth Grinding & Baking Co., Kingsbridge Flour Mill Co. v. Same* (1848), 2 Exch. 711; *Toll v. Lee* (1849), 13 Jur. 614; *Hughes v. Clark* (1851), 10 C. B. 905; *Pritchard v. Bagshawe* (1851), 11 C. B. 459; *Whyman v. Gath* (1853), 1 W. R. 373; *Darby v. Ouseley* (1856), 1 H. & N. 1; *Sanders v. Karnell* (1858), 1 F. & F. 356; *Chappell v. Bray* (1860), 6 H. & N. 145; *Hill v. Nuttall* (1864), 17 C. B. N. S. 262. **Mentd.** *Stubbings v. Stokes* (1845), 6 L. T. O. S. 123; *Dorrett v. Meux* (1854), 15 C. B. 142; *Tupper v. Foulkes* (1861), 7 Jur. N. S. 709.

511. — —.]—PIKE v. GREEN (1843), 1 L. T. O. S. 56.

512. — — Verbal tenancy on terms of previous written agreement.]—Upon an issue on the tenancy in replevin, the verbal statements of pltf. as to the terms of his tenancy are admissible in evidence, although the tenancy was created by adopting the terms of a former demise in writing.—**HOWARD v. SMITH** (1841), 3 Man. & G. 254; 3 Scott, N. R. 574; 10 L. J. C. P. 245; 133 E. R. 1138.

513. — Though written evidence in existence.]—**NEWHALL v. HOLT**, No. 496, *ante*.

514. — Written entry inadmissible for lack of stamp.]—What a party says, admitting a debt, is evidence notwithstanding the promise to pay is reduced into writing (**LORD LYNDEHURST, C.B.**).—**SINGLETON v. BARRETT** (1832), 2 Cr. & J. 368; 2 Tyr. 409; 1 L. J. Ex. 134; 149 E. R. 157.

*Annotation:—***Refd.** *Remington v. Baker* (1837), 6 L. J. C. P. 117.

515. — Only if against pecuniary interest.]—Statements made by a deceased workman, a blacksmith, to the general manager of his employers as to the nature & cause of an injury to his thumb which ultimately resulted in his death. The statements were to the effect that in answer to the manager's question what was the matter with his thumb the deceased replied that he had a whitlow on his thumb, & in reply to a further question whether he had been hammering his thumb the deceased replied "no":—**Held**: (1) not admissible on behalf of the employers in an application by deceased's dependants for compensation under Workmen's Compensation Act, 1900, as admissions by deceased, inasmuch as

PART II. SECT. 4, SUB-SECT. 2.—C.

505 I. Admissible—Admission against ownership of property—Though rights of ownership exercised.]—A statement of a person, through whom pltf. claims, made to a stranger, not in pltf.'s presence & before the transfer to pltf. that he, the predecessor in title, was not the owner of the property in question is evidence as a declaration against interest.—**LLOYD v. ADAMS** (1906), 37 N. B. R. 590.—**CAN.**

515 I. — Only if against pecuniary interest.]—Pltf. & deft., wife & husband, opened a joint account in a bank in May, 1915, & both signed a direction to the bank: "All moneys which may be deposited by us or either of us to the account are our joint property, but such moneys may be withdrawn by either one of us, or the survivor of us." The money deposited to the credit of the account was all deft.'s, & the purpose for which it was deposited, viz.

to pay the expenses of pltf. & her child, during deft.'s absence, & to make payments in connection with deft.'s property, was shown in evidence:—**Held**: the writing was not a contract between the parties, it was merely a direction to the bank, for the bank's protection; it was none the less evidence against deft., as an admission made by him, but as an admission only.—**SOUTHEY v. SOUTHEY** (1917), 40 O. L. R. 429; 38 D. L. R. 700.—**CAN.**

515 II. — —.]—F. was tenant to C., with a promise of a lease for twenty-one years, from Sept. 1851, to Sept. 1872, at the rent of £84 16s. Afterwards C. entered F.'s name in his rent book as the tenant of 128 acres, at 16s. an acre, at yearly rent of £102 8s., less £4 for county cess, £98 8s. "Tenure, thirty-one years from Sept. 1872, at rent of 16s. per acre, allowed £4 for county cess." The entry was

in C.'s handwriting:—**Held**: it was admissible in evidence as a statement against the proprietary & pecuniary interest of C.—**CONNER v. FITZGERALD** (1883), 11 L. R. Ir. 106.—**IR.**

P. —.]—Deft. being indebted to pltf., gave them a written undertaking to pay when able to do so, in consideration of their forbearing to sue him. At the time he gave the undertaking deft. was possessed of certain property in V. which he represented as being mortgaged, & as not worth more than the mtge. debt. Shortly after giving the above undertaking deft. left the colony. Pltf. discovering that deft. had, while abroad, become able to pay, brought their action. Deft. alleged that at the time he gave the undertaking he was able to pay the debt, his property not being so heavily mortgaged as he had represented:—**Held**: the jury were justified in accepting that statement of

appcts. had, as dependants, a direct statutory right against the employers; the deceased workman was not a party to the litigation; & appcts. did not derive their title to compensation by derivation from him. (2) The statements were not admissible as declarations against interest, inasmuch as it must be shown that the statements were to the knowledge of deceased contrary to his pecuniary interests, & the statements in question did not satisfy that requirement for when they were made no claim had been put forward nor was there any reason to believe that the workman knew that he ever would be able to make a claim. Moreover, the particular statements in question were not necessarily against the interests of the deceased, for neither of them was of such a nature as to be inimical to, or to militate against the success of, a claim on his part if he had lived to make one.—**TUCKER v. OLDBURY URBAN COUNCIL**, [1912] 2 K. B. 317; 81 L. J. K. B. 668; 106 L. T. 669; 5 B. W. C. C. 296, C. A.

Annotations:—As to (2) Refd. Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co., (1913) 2 K. B. 130; Beare v. Garrod (1915), 8 B. W. C. C. 474. Generally, Mentd. Harper v. Dick, Kerr (1920), 90 L. J. K. B. 1313.

Admission that document a copy.]—See No. 2340, post.

Admissibility of secondary evidence of documents.]—See, generally, Part IV., Sect. 5, post.

Admission by solicitor—Whether ground for disciplinary action.]—See SOLICITORS.

D. Admissions in Judicial Proceedings.

(a) By Party.

516. In what proceedings—Arbitration.]—WESTLAKE v. COLLARD (1789), Bull. N. P. 230 b, N. P.

517. Proceedings before commissioners in bankruptcy.]—Qu.: where a party, examined before comrs. of bkpt., admitted that he had received a sum of money on account of the bkpt. after an act of bkpey., but not that it was a subsisting debt, whether an admission obtained by such compulsory examination can be used as evidence to support a count on an account stated with the assignees.—**TUCKER v. BARROW (1828)**, 7 B. & C. 623; 3 C. & P. 85; 1 Man. & Ry. K. B. 518; 6 L. J. O. S. K. B. 121; 108 E. R. 855; *previous proceedings (1827), Mood. & M. 137, N. P.*

Annotations:—Refd. Elcke v. Nokes (1834), 1 Mood. & R. 359; Lubbock v. Tribu (1838), 3 M. & M. 607; Perry v. Slade (1845), 8 Q. B. 115. Mentd. Bevan v. Nunn (1832), 9 Bing. 107; Edwards v. Gabriel (1861), 30 L. J. Ex. 245.

518. What admissions—Evidence previously given by party—Though incomplete.]—The examination of a person taken in shorthand when

examined as a witness, is evidence against him in an action, though he was stopped in giving his testimony, & might have added to, or explained what he had said.—**COLLETT v. KEITH (LORD) (1802)**, 4 Esp. 212, N. P.

519. ——— Though under compulsion.]—TUCKER v. BARROW, No. 517, ante.

520. ———.]—Deft. was let into possession of certain premises by A., & paid rent to A., who gave receipts for it as “for self & C.” After these receipts were given, deft. still continued in possession & corresponded with A. as his landlord upon certain matters connected with the premises. Upon one occasion of his being examined as a witness upon an inquisition deft. deposed that he was tenant to A. In an action of ejectment to recover possession of the premises:—*Held*: there was evidence upon which the jury might find that he had admitted himself to be tenant to A. so as to entitle pltf. to succeed upon a demise by A.—DOE d. NICHOLL v. BOWER (1852)**, 18 L. T. O. S. 221.**

In affidavit.]—See Part VII., Sect. 10, post.

In answers to interrogatories.]—See Part IV., post.

Evidence of party's own witness.]—See Sub-sect. 2, D. (b), post.

521. ——— Plea of guilty in criminal proceedings for same offence.]—ANON. (1808), cited 2 Phillips on Evidence, 10th ed. p. 29.

Annotations:—Refd. Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips (1907), 97 L. T. 266.

(b) By Party's own Witness.

522. Depositions of witness.]—Where a petitioning creditor having ascertained that an agent in his service could prove an act of bkpey., sent him for that purpose to be examined on the opening of the *fiat*:—*Held*: the deposition, then made, was evidence of the act of bkpey. as against such creditor, in an action against him by the assignees, in which the act of bkpey. was put in issue.—GARDNER v. MOULT (1839)**, 10 Ad. & El. 461; 2 Per. & Dav. 403; 8 L. J. Q. B. 270; 3 Jur. 1190; 113 E. R. 176.**

Annotations:—Apld. Richards v. Morgan (1863), 4 B. & S. 641. Consd. British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. Refd. Cole v. Hadley (1840), 11 Ad. & El. 807; Bollean v. Rutlin (1848), 2 Exch. 665.

523. ——— To prove same facts against same party.]—A deposition, taken under the old system, before Nov. 1852, & used by a party to a suit in Chancery for the purpose of proving particular

1 P. & B. 377.—CAN.

t. What admissions—Evidence previously given by party—In another suit.]—The only evidence of deft.'s ownership of real estate was her examination, signed by her when under examination in another suit:—*Held*: clearly admissible.—BROWN v. WINNING (1878)**, 43 U. C. R. 327.—**CAN.****

521 i. ——— Plea of guilty in criminal proceedings for same offence.]—In an action for damages in assault, the plea of guilty made in a criminal prosecution in the same matter is an admission of the fact of the assault which pltf. can take advantage of in the civil action.—FORTIER v. SAUVÉ (1888)**, M. L. R. 4 S. C. 30.—**CAN.****

a. ——— Evidence before commissioner.]—*Held*: the oral answers of deft. before a comr. under an order of the ct. were properly received against him as admissions, although the interrogations & prior examinations were not tendered.—COCHRAN v. CHIFMAN (1877)**, 2 R. & C. 254.—**CAN.****

a 2

deft. which told against his interest in the action.—**DRIVER v. LEARMOUTH**, 1 J. R. 41.—**N.Z.**

g. What may be—Conversation between defendant & third party—Plaintiff being present.]—Pltf. sold & conveyed certain land to deft., the deed containing a receipt for the purchase-money, \$808, with a receipt for same also indorsed. Pltf. then sued deft. upon the common counts for the purchase-money of the land, & on an account stated. Deft. pleaded, among other pleas, payment. After the sale deft. told one M. that he had only paid pltf. \$41, & offered to pay him, M., whatever pltf. was willing he should. It also appeared, though not very clearly, that pltf. was present at this conversation:—*Qu.*: whether the conversation between deft. & M. amounted to a statement of account, or anything more than an admission from which non-payment of the purchase money might be assumed.—CASEY v. MCCALL (1868)**, 19 C. P. 90.—**CAN.****

r. ——— Absolute offer by company

to settle claim.]—The act of incorporation of R. C. & Co. provided for the assumption or guarantee by the co. of the obligations of R. C. & Co., the co. being empowered to take over the assets of the firm & to assume its obligations. A letter written by the co. contained an absolute offer to pay a sum of money in settlement of a claim against the firm which was outstanding at the time of the incorporation of the co.:—*Held*: this offer, unexplained, & not stated to have been made without prejudice, might properly be regarded as an admission of facts which would involve liability on the part of the co.—MURRAY v. RHODES, CURRY & CO., LTD. (1896)**, 28 N. S. 11.**

PART II. SECT. 4, SUB-SECT. 2.—D. (a).

a. In what proceedings—Examination before assignee in bankruptcy.]—Statements of an insolvent on his examination before assignee at creditors' meeting, are evidence against him on a criminal trial.—J. v. McLEAN (1877)**,**

Sect. 4.—Hearsay: Sub-sect. 2, D. (b), E., F. &

facts, is admissible as primary evidence of the same facts against the same party in an action by a stranger.—*RICHARDS v. MORGAN* (1863), 4 B. & S. 641; 3 New Rep. 198; 33 L. J. Q. B. 114; 9 L. T. 662; 28 J. P. 55; 10 Jur. N. S. 559; 12 E. R. 600; *sub nom.* *RICHARDS v. MORGAN*, *MORGAN v. MORGAN*, 12 W. R. 162.

*Annotations:—**Appl.* *Fleet v. Perrins* (1869), 9 B. & S. 575. *Consd.* *Hutchinson v. Glover* (1875), 1 Q. B. D. 138. *Distd.* *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241. *Consd.* *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160.

524. — In suit to perpetuate testimony—Necessity for user or adoption by party.]—A deposition made in the year 1815, in a suit to perpetuate testimony by a witness examined on commission on behalf of a predecessor in title of defts., was admitted in evidence at the trial of this issue as being a statement made by a person vouched by the party on whose behalf deponent was examined, & consequently an admission by conduct of a predecessor in title of defts. This deposition had been sealed up by the examiners, but was now found unsealed:—*Held*: the mere fact that the deposition was now found to be unsealed was not evidence of user or adoption by the party on whose behalf deponent was examined, & in the absence of evidence of such user or adoption, the deposition was inadmissible on the ground on which it was admitted.—*EVANS v. MERTHYR L. URBAN COUNCIL*, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

*Annotations:—**Consd.* *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. *Refd.* *Heath v. Deane*, [1905] 2 Ch. 86. *Mentd.* *Mercer v. Denne*, [1905] 2 Ch. 538.

525. Oral evidence—Distinguished from written evidence.]—Oral testimony, called in judicial proceedings to prove a certain contention, is not such an admission by conduct of the truth of that contention as to be admissible, in other proceedings, as evidence against the party who tendered the testimony.

Oral evidence must stand on a somewhat different footing from written evidence (*RUSSELL, J.*).—*BRITISH THOMSON-HOUSTON CO. v. BRITISH INSULATED & HELSBY CABLES, LTD.*, [1924] 1 Ch. 203; 93 L. J. Ch. 467; 131 L. T. 688; 41 R. P. C. 345; 68 Sol. Jo. 252; *affd.*, [1924] 2 Ch. 160, C. A. *Annotation:—**Mentd.* *British Thomson-Houston Co. v. Horn* (1924), 41 R. P. C. 502.

E. Admissions with a View to Compromise.

526. General rule.]—Hitherto I have made it a rule never to receive any admissions whatever, which were made on a reference that was not effective. I think I have carried that rule too far, & for the future I shall receive evidence of all admissions, such as deft. would be obliged to make in his answer to a bill in equity, & will reject none but such as are merely concessions for the purpose of making peace, & getting rid of a suit. These I think ought not to be admitted in evidence to prejudice deft., when the object for which they were made is at an end (*LORD KENYON, C.J.*).—*SLACK v. BUCHANNAN* (1790), Peake, 7, N. P. *Annotation:—**Mentd.* *Froysell v. Lewelyn* (1821), 9 Price, 122.

527. —.]—An admission of a handwriting made by deft., pending a treaty for compromising the suit, is evidence against him.

Certainly any admission or confession made by the party respecting the subject-matter of the action, obtained while a treaty was depending, under faith of it, & into which the party might have been led by the confidence of a compromise

taking place, cannot be admitted to be given in evidence to his prejudice; but the fact of a handwriting being a person's or not, stands on a different foundation; it is matter no way connected with the merits of the cause, & which is capable of being easily proved by other means (*LORD KENYON, C.J.*).—*WALDRIDGE v. KENNISON* (1794), 1 Esp. 143, N. P.

*Annotation:—**Mentd.* *Froysell v. Lewelyn* (1821), 9 Price, 122.

528. —.]—An agreement, headed "An agreement for compromise," & made between a father & son, whereby the father engaged that on the son's signing certain deeds, for the purpose of settling the title to some reversionary family property, with respect to which there was some dispute between them, he, the father, would give up to the son a promissory note, given by the son to the father, for £1,000:—*Held*: admissible as evidence in an action brought by the administrator of the father against the son, to recover the £1,000, on the note, for the purpose of taking the demand out of Stat. Limitations which had been pleaded, as being an admission that the note was, at the date of the agreement, in existence & unpaid; for such an agreement is not within the rule of law which excludes from evidence admissions made during a treaty for a compromise of litigation. That rule is applicable only to treaties for the purpose of ending suits, which are not, eventually, brought to a conclusion; but does not apply to agreements perfected & executed; although the subject-matter & objects of such agreements may be a compromise of previously existing differences between the parties.—*FROYSSELL v. LEWELYN* (1821), 9 Price, 122; 147 E. R. 41.

529. —.]—A landlord being sued for repairs done upon his estate, it is agreed that the tenant shall advance the amount out of the rent, & that the landlord shall pay two-thirds of deft.'s costs. The costs not being paid, the action proceeds. This arrangement is not such an acknowledgment of deft.'s original liability as will entitle pltf. to a verdict; even supposing that it is not inadmissible in evidence as being in the nature of a compromise.—*LOFTS v. HUDSON* (1828), 2 Man. & Ry. K. B. 481; 7 L. J. O. S. K. B. 242.

530. —.]—Words said by way of compromise of an action are never receivable in evidence in that action (*LORD ERSKINE, C.J.*).—*Re BRERETON, Ex p. BIGNOLD* (1836), 2 Mont. & A. 633; 1 Deac. 712; 6 L. J. Bcy. 17, Ct. of R.

531. Application of rule—Admission during reference to arbitration—Arbitration abortive.]—*SLACK v. BUCHANNAN*, No. 526, *ante*.

532. — Handwriting.]—*WALDRIDGE v. KENNISON*, No. 527, *ante*.

533. — Confined to compromise of suits.]—*FROYSSELL v. LEWELYN*, No. 528, *ante*.

534. — Proposal to refer matter to arbitration—Subsequent admission to proposed arbitrator with view to compromise.]—On *non assumptis* pleaded & notice of set-off given to an action for goods sold & delivered, a witness was called to prove a conversation with pltf., in which the latter began by proposing to refer the matter in dispute between him & deft. to the arbitration of witness, but this being refused, pltf. proceeded to admit that he had received on account of deft. £800, a sum more than covering the demand in the action:—*Held*: this conversation was receivable in evidence under the notice of set-off, & ought not to be rejected as an offer of compromise, although pltf. expressly requested the witness to state the conversation to deft., to induce him to come to a compromise.

If a part of a conversation be received in evidence, then the whole conversation ought to be presented to the jury.—*THOMSON v. AUSTEN* (1823), 2 Dow. & Ry. K. B. 358; 1 L. J. O. S. K. B. 99.

535. — Discharge by tenant of alleged liability of landlord.—*LOFTS v. HUDSON*, No. 529, *ante*.

536. Interview to effect compromise — Expressed intention to repeat statements made.—Where a person called on deft. with a view to making an amicable arrangement, & said, "you may expect I shall repeat what you say":—*Held*: the conversation which ensued was not a privileged communication, & it was properly received in evidence.—*LAIDLAW v. LEECH* (1851), 16 L. T. O. S. 344.

— **Letters "without prejudice."**—*See* Part IV., Sect. 13, sub-sect. 7, *post*.

F. Admissions in Pleadings.

See PLEADING; PRACTICE.

G. Admissions by Particular Parties.

(a) By Predecessors in Title.

537. Admissible against parties claiming under them—Assignor & assignee.—Declarations made by the owner of an estate against his own interest, are admissible in evidence against his vendee, although such vendor be alive & even in ct. at the time that his declarations are proposed to be used.—*WOOLWAY v. ROWE* (1834), 1 Ad. & El. 114; 3 Nev. & M. K. B. 849; 3 L. J. K. B. 121; 110 E. R. 1151.

Annotations:—*Refd.* Doe d. Daniel v. Coulthred (1837), 7 Ad. & El. 235; Doe d. Rowlandson v. Wainwright (1838), 8 Ad. & El. 691; Phillips v. Cole (1839), 10 Ad. & El. 106; Papendick v. Bridgwater (1855), 5 E. & B. 166; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360.

538. ——Upon an issue between A. & B., whether C. died possessed of certain property, evidence may be given of declarations made by C. that she had assigned the property to A.—*IVAT v. FINCH* (1808), 1 Taunt. 141; 127 E. R. 785.

Annotations:—*Apld.* Smith v. Smith (1836), 3 Bing. N. C. 29. *Distd.* Coole v. Braham (1848), 3 Exch. 183. *Expld.* & *Distd.* Ward v. Pitt, [1913] 2 K. B. 130. *Refd.* James v. Salter (1836), 2 Bing. N. C. 505; Roberts v. Justice (1843), 1 Car. & Kir. 93; Bewley v. Atkinson (1879), 13 Ch. D. 283.

539. — Incumbent & successor.—An answer by a former rector to a bill filed to establish a modus of a certain measure of meal, as to one farm, admitting that the parish is exempt, in consideration of a commutation for meal, is not only admissible but strong evidence to prove a

district modus.—*DE WHELPDALE v. MILBURN* (1818), 5 Price, 485; 146 E. R. 671, Ex. Ch.

540. ——*—*—An ancient document, signed by the rector of a parish for the time being, setting out the payment of tithes by a modus is admissible in evidence in support of such modus, although such document was not produced from the registry of the bishop or archdeacon, but was found among the title deeds of a landowner in the parish, on the ground that, as it was evidence against the rector who signed it, it was admissible against his successors.—*MADDISON v. NUTTALL* (1829), 6 Bing. 226; 3 Moo. & P. 544; 8 L. J. O. S. C. P. 27; 130 E. R. 1266.

541. ——*—*—Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible in evidence for deft.—*DOE d. COYLE v. COLE* (1834), 6 C. & P. 359, N. P.

542. — Vendor & purchaser.—*WOOLWAY v. ROWE*, No. 537, *ante*.

543. — Admissions under seal.—In a suit by resp., lately an insolvent, to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of resp.'s equity of redemption of a certain mtge., for accounts against applts., the mtgees., & in effect to have the benefit of a subsequent resale by the releasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, & that resp. had thereafter taken a conveyance from him of all the estate vested in him under the insolvency:—*Held*: the *onus* was upon resp., who was *primâ facie* bound by the admissions under the seal of his vendor, to prove the falsehood of the representations, & not upon applts. to establish their truth.—*MELBOURNE BANKING CORPN. v. BROUGHAM* (1882), 7 App. Cas. 307; 51 L. J. P. C. 65; 46 L. T. 603; 30 W. R. 925, P. C.

Annotation:—*Mentd.* Mainland v. Upjohn (1889), 41 Ch. D. 126.

544. — Intestate & administrator.—In trover for a watch, deft. pleaded that it was the property of pltf., & proved that it had been in deft.'s possession for four years previous to the death of a former owner; but having also put in evidence letters of administration granted to him of the effects of the former owner:—*Held*: the declarations of such owner were evidence against him.—*SMITH v. SMITH* (1836), 3 Bing. N. C. 29; 7 C. & P. 401; 2 Hodg. 130; 3 Scott, 352; 5 L. J. C. P. 305; 132 E. R. 320.

545. — Bishop & successor.—*MEATH (Bp.) v. WINCHESTER (MARQUESS)*, No. 38, *ante*.

PART II. SECT. 4, SUB-SECT. 2.—G. (a).

538 i. Admissible against parties claiming under them.—In trespass for mesne profits against one who came into possession under the tenant in the action of ejectment, the agreement for the consent rule, signed by the attorney of the tenant in possession, & the judgment in ejectment against the casual ejector, are evidence for pltf., the first as a precedent to connect the tenant, under whom deft. in this action claimed, with the action of ejectment, & the latter, to show pltf.'s right to the possession of the property.—*FRASER v. HARDING* (1845), 3 Kerr, 94.—*CAN.*

538 ii. ——Declarations of a party adverse to his title are admissible against a person claiming through him, if made while the title was in the party making the declarations.—*HAMILTON v. HOLDER* (1874), 2 Pug. 222.—*CAN.*

538 iii. ——The deed of conveyance of land in C. recited that the vendor was "seized of, or otherwise

well entitled to, the property intended to be sold, for an estate of inheritance in fee simple"; & it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser:—*Held*: as the purchaser bought the property as & for an estate of inheritance & paid for it as such, the recital was *primâ facie* evidence against the purchaser, & persons claiming through him that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them.—*SARKIES v. PROSONOMYEE DOSSEE* (1881), 1 L. R. 6 Calc. 794.—*IND.*

538 iv. ——Testator, by his will, left his house & business establishment to his wife for life, & after her death to his son, & a pecuniary legacy to his daughter; the son borrowed the money from his sister, & as security, he & his mother executed to his sister a bill of sale of the property which had been left to them; in a contention

between the sister & an execution creditor of the son, as to the *bona fides* of the bill of sale:—*Held*: to show the nature of the transaction, the will, though unproved, ought to have been received in evidence as a signed declaration of the former owner of the property before it passed out of his possession.—*O'SULLIVAN v. BURKE* (1875), 1 R. 9 C. L. 105.—*IR.*

b. Not admissible to cut down title.—Declarations by a party having the documentary title to land, made after the lapse of sufficient time to give another title by possession, are not admissible to cut down the latter's title.—*HAMILTON v. HOLDER* (1874), 2 Pug. 222.—*CAN.*

c. Not admissible in favour of parties claiming under them.—W. sold certain mineral claims to A., who sold in turn to defts., after which W., as agent for pltf., located a fraction between two of the claims in pltf.'s name:—*Held*: defts. could not invoke against pltf. a statement in a bill of

Sect. 4.—Hearsay: Sub-sect. 2, G. (a), (b) & (c) i.]

546. — Former tenant.]—In an action for pltf.'s close & destroying a hatch, deff. pleaded that the water of the stream ought to have flowed to his mill, & because the hatch prevented its so doing, he pulled it down. Evidence may be given of what a former tenant said as to asking permission to have the water, as this is an act done, & may be proof of an exercise of a right by one side, & an acquiescence in it by the other.—*WAKEMAN v. WEST* (1837), 8 C. & P. 105, N. P.

547. Party claiming under predecessor in title — Lessee of deceased vicar.]—On the trial of a modus, the receipts of a lessee of a deceased vicar are evidence, & if a witness proves that her father & brother were tenants of the tithes for above forty years, that is sufficient to let in their receipts, without proving a lease to them.—*CARRINGTON v. JONES* (1824), 2 Sim. & St. 135; 57 E. R. 297; *sub nom. JONES v. CARRINGTON*, 1 C. & P. 497. *Annotation:—Mentd. Carrington v. Cornock* (1829), 2 Sim. 587.

548. Admission must relate to predecessor's title.]—On an interpleader issue to try the right to certain goods claimed by pltf. under an assignment to secure a debt alleged to be due to him, the admissions of the assignor before the date of the assignment, that he was indebted, are not receivable in evidence for pltf.

It was suggested, that the admission of the son might be received as evidence against deff., the execution creditor, as a person claiming under him; & probably an execution creditor, though in one sense he claims against the debtor, yet, in truth, may be considered as claiming under him, for he can take only such title as the debtor had. Admitting this view to be correct, it does not apply to such admissions as that offered in evidence in this case, which do not qualify or affect the title of the assignor to the chattel assigned (*PARKE, B.*).—*COOLE v. BRAHAM* (1848), 3 Exch. 183; 18 L. J. Ex. 105; 12 L. T. O. S. 272; 154 E. R. 808.

549. Title must be claimed by derivation.]—*TUCKER v. OLDBURY URBAN COUNCIL*, No. 515, ante.

550. —.]—In an action by A. against B. in which the title to a chattel is in question, admissions by a person previously entitled which were made during the continuance of his or her interest, & which qualify or affect the title, may be given in evidence against B.; but such evidence is not admissible where no question of title arises & where the question at issue is merely the right to a sum of money.

It is said that where "title" is in question, statements made by persons from whom that title is derived, which qualify or affect the title are evidence against those who have acquired the title. It is I think true that, if a chattel is transferred, admissions made by the transferor at the time of or prior to the transfer, which qualify or affect

his title, are admissible in evidence against the transferee; but no title is in question in this case (*LUSH, J.*).—*LA ROCHE v. ARMSTRONG*, [1922] 1 K. B. 485; 91 L. J. K. B. 342; 126 L. T. 699; 38 T. L. R. 347; 66 Sol. Jo. 351.

551. Title must be in question—Application of rule.]—*LA ROCHE v. ARMSTRONG*, No. 550, ante.

Admissions relating to Bills of Exchange.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 182, 183, 486, Nos. 1137, 1141, 3085–3089.

(b) By Lessees.

552. General rule.]—In an action to restrain trespass upon land & for a declaration of title, where pltf.'s title is disputed by deff., an ancient document produced from pltf.'s custody, & purporting to be signed by a deceased person, by which the deceased agreed to pay a sum in consideration of pltf.'s predecessor in title stopping proceedings against him for trespass upon part of the land in question, & also agreed that he would refrain from trespassing upon the land for the future, is admissible in evidence as showing an act of ownership by pltf.'s predecessor in title.

The fact that deceased was a tenant of the predecessor in title of deff. who claimed commonable rights over the land in question will not prevent the document being admissible.—*BLANDY-JENKINS v. DUNRAVEN (EARL)*, [1899] 2 Ch. 121; 68 L. J. Ch. 589; 81 L. T. 209; 43 Sol. Jo. 656, C. A. *Annotation:—Generally, Mentd. Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

553. Evidence as to title & evidence of acts of ownership distinguished.]—*BLANDY-JENKINS v. DUNRAVEN (EARL)*, No. 552, ante.

554. Lessee of deceased predecessor in title.]—*JONES v. CARRINGTON* (1824), 1 C. & P. 497.

555. In action for recovery of land.]—Ejectment against T., the tenant in possession, & L., who came in to defend as landlord. The lessor of pltf. having proved his title against L., the latter set up the title of the tenant T., who had paid rent to the lessor of pltf. as tenant from year to year. In order to show the determination of T.'s interest, the lessor of pltf. produced an admission signed by T. after the commission day of the assizes, whereby he acknowledged having attorned to L., upon L.'s executing a writ of possession in a prior ejectment:—*Held*: this admission was evidence against L. as well as T.—*DOE d. MEE v. LUTHERLAND* (1836), 4 Ad. & El. 784; 6 Nev. & M. K. B. 313; 6 L. J. K. B. 267; 111 E. R. 978.

556. —.]—*DOE d. FOX v. BOWBANK* (1843), 1 L. T. O. S. 34.

557. When right to easement in issue.]—On an issue, whether pltf. had an easement in deff.'s land, the declaration of a former occupier of deff.'s land is not admissible against him.—*SCHOLES v. CHADWICK* (1843), 2 Mood. & R. 507, N. P. *Annotation:—Apld. Papendick v. Bridgwater* (1855), 5 E. & B. 166.

sale from H. to W., that the end of the two claims between which the fraction in question was located adjoined each other.—*GIBSON v. MCARTHUR & LUEKMAN* (1899), 7 B. C. R. 59; 1 M. M. Cas. 382.—*CAN.*

d. Admissions made by parties when deed executed not admissible.]—Pltf. claimed under a deed from one C. of "all that parcel of land being composed of lot 26, as laid down upon a plan of lots laid out by T. & W., being on the west side of G. street in the town of B.," adding a description which left a small strip at the south

end of the lot uncovered:—*Held*: evidence of what took place between the parties when C. afterwards conveyed the small strip to deff., & as to deff.'s possession thereunder, & the acquiescence therein of the person through whom pltf. claimed, etc., was properly rejected.—*GILLEN v. HAYNES* (1873), 33 U. C. R. 516.—*CAN.*

PART II. SECT. 4, SUB-SECT. 2.—G. (b).

e. In action of trespass.]—Pltf. brought an action of trespass, claiming to be entitled to the locus under a deed

from the I. & R. N. Co. Deff. claimed to be entitled under a deed from the exors. of one S., who had acquired a possessory title by more than twenty years' possession. To meet this, pltf. gave evidence of admissions by S. that he held the land under a sublease from lessees of the S. C. Co., who then owned the land, but no lease was produced, & no such lease had ever been recorded:—*Held*: the possessory title of deff.'s grantor could not be affected by the alleged admissions of S., the lease not having been produced.—*ORIGHTON v. KUHN* (1882), 2 R. & G. 147; *Cass. Dig.* 514.—*CAN.*

(c) *By Nominal, Representative and Real Parties.*
i. *By Nominal and Representative Parties.*

558. Admission by guardian—As against superannuated person.]—The answer of a superannuated person put in by guardian, shall be read against him, as an answer of one of full age; *secus* of an infant, who is to have a day to show cause.—*LEVING v. CAVERLY (LADY) (1704)*, Prec. Ch. 229; 24 E. R. 111.

Annotations:—N.F. Stanton v. Percival (1855), 5 H. L. Cas. 257. *Consd. Ingram v. Little (1883)*, 11 Q. B. D. 251.

559. — As against infant.]—*LEVING v. CAVERLY (LADY)*, No. 558, *ante*.

560. — — —.]—What the guardian said admitted as evidence against the infant.—*JAMES v. HATFIELD (1723)*, 1 Stra. 548; 93 E. R. 692.

561. — — —.]—The answers of a guardian of minors, parties in the cause, cannot be called for nor his declarations received as evidence, against the minors for whom he is guardian.—*ECCLES v. HARRISON (1848)*, 6 Notes of Cases, 204; *sub nom. HARRISON v. ECCLES*, 12 Jur. 506.

562. — — —.]—Where a minor sues by his guardian, the declaration of the guardian is not evidence against pltf.—*COWLING v. ELY (1818)*, 2 Stark. 366, N. P.

563. Admissions by guardian ad litem—As against infant or lunatic.]—(1) A guardian [*ad litem*] is only appointed for the purpose of defending the rights of the infant, & although for the advantage of an infant a guardian might perhaps be permitted to give evidence on affidavit, he would not be permitted to give such evidence against the interest of an infant (*LORD COLERIDGE, C.J.*).

(2) Pltf. who sues a lunatic may apply to have a guardian *ad litem* appointed, & it would be a singular consequence if the person appointed upon the application of pltf. could make admissions which could be given in evidence against the lunatic deft. (*MANISTY, J.*).—*INGRAM v. LITTLE (1883)*, 11 Q. B. D. 251; 31 W. R. 858, D. C.

Annotation:—Generally, Mentd. Paspati v. Paspati, [1914] P. 110.

564. Admission before representative character assumed—Assignee of bankrupt.]—The declarations of a party suing as assignee of a bkpt., made before he became such, are not admissible against him.—*FENWICK v. THORNTON (1827)*, Mood. & M. 51, N. P.

Annotation:—Refd. Metters v. Brown (1863), 1 H. & C. 686.

565. — Administrator.]—A declaration made by a person who afterwards assumes & is sued in the character of administratrix cannot be used as an admission made by a party in the cause; & this although she may combine the character of *cestui que trust* with that of administratrix.—*LEGG v. EDMONDS (1855)*, 25 L. J. Ch. 125; 26 L. T. O. S. 117; 20 J. P. 19; 4 W. R. 71.

Annotations:—Refd. Humphrey v. St. George Assce. (1858), 32 L. T. O. S. 131; *Mettors v. Brown (1863)*, 1 H. & C. 686. *Mentd. Ulverstone Union Grdns. v. Park (1889)*, 53 J. P. 629; *Russell v. Russell, [1924] A. C. 687.*

566. — — —.]—*Q.:* whether when a party is suing in a representative character as adminis-

trator, assignee or the like, what he has said or written before he was clothed with that character is to be admitted as evidence against him, when suing in that representative character.—*HUMPHREY v. ST. GEORGE ASSURANCE CO. (1858)*, 32 L. T. O. S. 131; *sub nom. HUNTLEY v. ST. GEORGE INSURANCE CO.*, 7 W. R. 51.

567. Admission by trustee.]—Deft. may give in evidence the declarations or admissions of pltf. on the record, to defeat the action, although such pltf. appear to be only a trustee for a third person.—*BAUERMAN v. RADENIUS (1798)*, 7 Term Rep. 603; 2 Esp. 653; 101 E. R. 1186.

Annotations:—Consd. Harrison v. Vallance (1822), 7 Moore, C. P. 304. *Refd. Fairlie v. Hastings (1804)*, 10 Ves. 123; *Duckham v. Wallis (1805)*, 5 Esp. 251; *R. v. Hardwick (1809)*, 11 East, 578; *Goss v. Watlington (1821)*, 6 Moore, C. P. 355; *Fox v. Waters (1840)*, 9 L. J. Q. B. 329. *Mentd. Fothergill v. Walton (1828)*, 4 Bing. 711; *Gibson v. Winter (1833)*, 5 B. & Ad. 96; *Glyn v. Soares (1835)*, 1 Y. & C. Ex. 644.

568. Admission by alleged agent—Agency admitted in other party's pleadings.]—Pltf. having brought an action against A., for goods supplied to a joint-stock co., of which deft. was a member, & the action having been stayed under 11 & 12 Vict. c. 35, until pltf. should prove his claim before the master, which he failed to do, he obtained an order to be allowed to proceed in the action, & to substitute C., the official manager of the co., as deft. in lieu of the then deft. Pltf. thereupon entered a suggestion on the record, which stated that "the action was commenced & had hitherto been prosecuted against A., as a person authorised to be sued as the nominal deft., on behalf of the co."—*Held:* the acts of A. were not admissible in evidence on the trial of the cause against C., as pltf.'s suggestion alleged that A. had been sued as a mere nominal deft.—*ARMSTRONG v. NORMANDY (1850)*, 5 Exch. 409; 19 L. J. Ex. 343; 15 L. T. O. S. 258; 14 Jur. 579; 155 E. R. 179.

Annotation:—Mentd. Beardshaw v. Lonsborough (1851), 11 C. B. 498.

569. Admission by husband suing in respect of injuries to wife.]—*MORIARTY v. LONDON, CHATHAM & DOVER RY. CO.*, No. 491, *ante*.

570. Admission by committee of lunatic.]—A., B., & C. were committees of a lunatic. To a bill filed against the lunatic & themselves, as committees, they put in an answer stating certain facts. That cause went to issue, & witnesses were examined. The lunatic died; A. & the wives of B. & C., who were relatives, obtained letters of administration to her estate as her next of kin. Pltf. in the original suit then filed a bill of revivor against A., the two wives, & their husbands, merely praying for a revival of the suit. The ordinary order was made. Defts. to the bill of revivor put in an answer, in which they craved to have the full benefit of the answer to the original bill; there was no replication to this answer. The original answer contained statements which at the hearing were admitted to be read against the defts.—*Held:* under the circumstances of this case these statements were properly admitted in evidence.—*STANTON v. PERCIVAL (1855)*, 5 H. L.

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G. (c.) i.

1. General rule.]—Admissions made by a party suing in a representative capacity are receivable while made in that capacity, but not otherwise.—*CANADIAN NORTHERN WESTERN RY. CO. v. MOORE (1915)*, 30 W. L. R. 676; 7 W. R. 1327, CAN.

565 l. Admission before representative character assumed—Administrator.]—In an action by an administrator on a fire insurance policy one of the issues was,

whether the occupation of the insured house had been abandoned. The administrator stated in his evidence that the occupation of the house had not been abandoned, & that he had occupied it.—*Held:* statements of the administrator, before assuming that character, tending to contradict his evidence, were properly received.—*CORMIER v. OTTAWA AGRICULTURAL INSURANCE CO. (1881)*, 20 N. B. R. 526.—CAN.

g. Admission by alleged agent.]—

In an action for goods sold & delivered in which the question, whether the credit was given to deft. or to D., to whom the goods were actually delivered, & who carried on a retail trade near deft.'s shipyard, & supplied the men in deft.'s employ, in part payment of their wages, the evidence for pltf. being that by agreement the credit was given to deft., & that the goods were to be paid for by D.'s notes at three months, to be taken up at maturity by deft.'s notes at four months.—*Held:* D.'s statement to

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Cas. 257; 24 L. J. Ch. 369; 26 L. T. O. S. 49; 3 W. R. 391; 10 E. R. 898, H. L.; *affg.* S. C. *sub nom.* PERCIVAL v. CANEY (1852), 4 De G. & Sm. 610, L. C.

Annotations:—*Mentd.* Barbat v. Allen (1852), 21 L. J. Ex. 155; Stapleton v. Crofts (1852), 18 Q. B. 367; M'Neillie v. Acton (1853), 22 L. J. Ch. 820.

ii. By Real Parties.

571. Admission of member of corporation.]—In an action at the suit of a corpn. what is said by an individual member of it is not admissible evidence for defts.—*LONDON CORPN. v. LONG* (1807), 1 Camp. 22, N. P.

Annotations:—*Refd.* R. v. Adderbury East (1843), 8 J. P. 375; *Moody v. L. B. & S. C. Ry.* (1861), 1 B. & S. 290.

572. Admission by ratepayer—As against parish.]—*R. v. HARDWICK (INHABITANTS)*, No. 22, *ante*.

573. Admission by ratable inhabitants—As against township—On indictment for non-repair of highways.]—(1) On indictment against a township for non-repair of a bridge, declarations of ratable inhabitants, whether actually rated or not, may be given in evidence for the Crown, such inhabitants being defts. on the record. The admissibility of such evidence is not affected by 3 & 4 Vict. c. 26.

(2) If such inhabitants are surveyors of highways, & on inquiry by the attorney for the prosecution, have given details as to the liability & practice of the township in respect of repairs, their statements are admissible as the communications of authorised official agents (*LORD DENMAN, C.J.*).—*R. v. ADDERBURY EAST (INHABITANTS)* (1843), 5 Q. B. 187; 1 Dav. & Mer. 324; 13 L. J. M. C. 9; 2 L. T. O. S. 118; 8 J. P. 375; 7 Jur. 1035; 114 E. R. 1219.

Annotation:—*Mentd.* R. v. Vickery (1848), 3 New Sess. Cas. 193.

574. Admission by owner of ship—As against master in action for freight.]—In an action by the master of a ship for freight, the declarations of the owner for whose benefit the action is brought, are evidence for deft.—*SMITH v. LYON* (1813), 3 Camp. 465, N. P.

Annotation:—*Consd.* *Harrison v. Vallance* (1822), 7 Moore, C. P. 304.

575. Admission by indemnifying creditor—As against sheriff in action for false return.]—In an action against the sheriff for a false return to a writ of *fi. fa.* where the defence rests upon the validity of a commission of bkpcy., if it appears that the assignees are the real parties, a declaration by one of them who was the petitioning creditor, made subsequently to the suing out of the commission, that bkpt. did not owe him £100 is admissible evidence on the part of pltf.—*DOWDEN v. FOWLE* (1814), 4 Camp. 38, N. P.

Annotation:—*Distd.* *Harwood v. Keys* (1832), 1 Mood. & R. 204.

576. Admission by wife—As against husband in whose name she sues.]—Where an action is brought by the orders of a wife in the name of her husband to recover a sum of money taken from her on the ground that it was the produce of goods she had been concerned in stealing—what she after-

wards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is evidence for deft.—*CAREY v. ADKINS* (1814), 4 Camp. 92, N. P.

577. Admission by debtor—As against trustee for division of assets.]—A. having deposited with B. £100 to distribute amongst A.'s creditors in proportion to their claims, no one of these can maintain an action against B. before the proportions of all the claimants have been ascertained. A.'s declaration in such case is evidence to show that C. is a creditor of his to a specific amount.—*ROBSON v. ANDRADE* (1816), 1 Stark. 372, N. P.

578. Admission by cestui que trust—As against trustee.]—In trover for a deed which deft. had, by letter, admitted he detained at the request of W., & in the detainer of which W. was substantially interested:—*Held*: declarations of W., in favour of pltf.'s claim, were properly received in evidence.—*HARRISON v. VALLANCE* (1822), 1 Bing. 45; 7 Moore, C. P. 304; 130 E. R. 19.

Annotations:—*Distd.* *Spargo v. Brown* (1829), 9 B. & C. 935. *Refd.* *Shaw v. Broom* (1824), 4 Dow. & Ry. K. B. 730. *Mentd.* *Butler v. Capel* (1823), 2 B. & C. 251.

579. ———.]—On the trial of an ejectment upon demise of J., deft., to prove that the premises had passed by a deed conveying a messuage with the appurtenances, offered in evidence another deed by which M., for whom J., if pltf. recovered, would be trustee during M.'s life, conveyed the messuage by a description which, as contended, disposed of the premises in question as appurtenant thereto. M.'s conveyance recited a previous unsatisfied mtge. of the messuage, by her late husband, who had devised to her for her life, & purported to be made in consideration of the forbearance of certain sums owing by her as her husband's extrix., & of further advances then made to her. Deft. offered M.'s deed, first as a declaration made by the *cestui que trust* of the lessor of pltf., & therefore a party equitably represented by the party on the record; secondly, as an act of user of the premises, as appurtenances, by the occupier:—*Held*: M.'s conveyance was not admissible, inasmuch as M., in her conveyance, appeared, not only to admit a fact in derogation of her own title, but to gain a benefit by the forbearance & advance of money.—*DOE d. ROWLANDSON v. WAINWRIGHT* (1838), 8 Ad. & El. 691; 3 Nev. & P. K. B. 598; 1 Will. Woll. & H. 508; 7 L. J. Q. B. 222; 3 Jur. 7; 112 E. R. 1000.

580. ———.]—To render the declarations of *cestui que trust* admissible for a deft. in an action by the trustees, the nature of his interest must appear, in order that it may be seen that he is the party really & substantially suing.—*MAY v. TAYLOR* (1843), 6 Man. & G. 261; 6 Scott, N. R. 974; 12 L. J. C. P. 314; 1 L. T. O. S. 256; 7 J. P. 690; 7 Jur. 515; 134 E. R. 891.

(d) By Opposite Party.

581. Admission by plaintiff—Whether one defendant can read as against co-defendant.]—Def't. cannot, as against a co-def't., read any part of pltf.'s evidence, even as to a question of costs.—*THOMPSON v. CHAPMAN* (1834), 4 L. J. Ch. 20.

582. Admissions between co-defendants —

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G. (d).

k. Admission by defendant—As to title.]—Application was made to set aside a verdict for def't. in an action for trespass to lands, & for a new trial on the ground of newly discovered evidence favourable to pltf. At the trial, the point submitted to the jury was whether def't. occupied as tenant of W. or in assertion of his own right.

pltf. when he gave him a note of def't.'s to take up D.'s note, given for the price of goods, was admissible without producing def't.'s note.—*STEPHENSON v. FRASER* (1885), 24 N. B. R. 482.—*CAN.*

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G. (c) ii.

h. Admission by party for whose benefit action brought.]—Action upon a policy by A., the person insured,

averring an assignment to B. & C., notified to defts. & indorsed on the policy, & an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, etc.:—*Held*: the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defts.—*ROSS v. COMMERCIAL UNION ASSURANCE CO.* (1867), 26 U. C. R. 559.—*CAN.*

Whether admissible as against plaintiff.]—Admissions between co-defts. cannot be used as evidence against pltf., & the cost of those admissions cannot be included in an order for the taxation of the general costs of the action.—*DODDS v. TUKE* (1884), 25 Ch. D. 617; 53 L. J. Ch. 598; 50 L. T. 320; 32 W. R. 424.

(c) *By Partners.*

See, generally, PARTNERSHIP.

583. General rule.]—In an action of *assumpsit* against one partner, evidence may be given of the admission of another.—*THWAITES v. RICHARDSON* (1790), Peake, 23.

584. —.]—*Prima facie* evidence of a partnership having been given, the declaration of one partner is evidence against another partner.—*NICHOLLS v. DOWDING & KEMP* (1815), 1 Stark. 81, N. P.

585. —.]—Where one of defts. in a cause informed a third person of the partnership of defts., reports of such information by that person are admissible in evidence, though not made to pltf., or in the presence of a deft.—*SHOTT v. STREALFIELD* (1830), 1 Mood. & R. 8, N. P.
*Annotation:—**Refd.* *Martyn v. Gray* (1863), 14 C. B. N. S. 824.

586. —.]—Where it appeared on the record, that an agreement sued on was made by pltf., on behalf of himself & the other proprietors of a theatre, evidence of the declarations of one of such other proprietors was admissible on the part of deft.—*KEMBLE v. FARREN* (1829), 3 C. & P. 623, N. P.; *subsequent proceedings*, 6 Bing. 141.
*Annotation:—**Refd.* *Sage v. Robinson* (1848), 18 L. J. Ex. 31.

587. — In equity.]—In an action against other partners, on a bill accepted by one in the name of the firm, the admissions in his answer filed to a bill in equity against him, are not admissible in evidence against the rest.—*ROOTH v. QUIN & JANNEY* (1819), 7 Price, 193; 140 E. R. 944.

*Annotation:—**Consd.* *Perham v. Raynall* (1824), 9 Moore, C. P. 566.

588. Whether evidence of knowledge of partner

necessary—Circular issued in firm name.]—In an action of contract against two, one of whom suffered judgment by default, & the other pleaded, it appeared, at the trial, that deft. who pleaded had stated to a witness that she considered herself a partner in the business carried on by the other deft., & that, shortly after this statement, a circular had issued from the house at which the business was carried on, announcing that thenceforth the business was to be conducted in the names of the two defts. There was no evidence that this circular ever came to the knowledge of deft. who pleaded:—*Held*: nevertheless it was admissible in evidence.—*NORTON v. SEYMOUR* (1847), 3 C. B. 702; 2 New Pract. Cas. 99; 16 L. J. C. P. 100; 8 L. T. O. S. 339; 11 Jur. 312; 136 E. R. 317.

589. Admission made after dissolution of partnership—As to transaction before dissolution—When joint liability has ceased.]—An answer put in by one of several partners, after dissolution of the partnership, containing an admission of a representation having been made by such partner in a partnership transaction, prior to the dissolution:—*Held*: not admissible as evidence of such admission against his co-partners, on the ground that since the dissolution of the partnership the party whose answer it was had become bkpt. & obtained his certificate, & had therefore at the time of putting in the answer no common liability with the co-partners. Even independently of that objection, such answer would not have been admissible in evidence, though made in the existing suit, without other evidence to identify the party whose answer it was with the partner.—*PARKER v. MORRELL* (1848), 2 Ph. 453; 2 Car. & Kir. 599; 17 L. J. Ch. 226; 12 L. T. O. S. 1; 12 Jur. 253; 41 E. R. 1018, L. C.

*Annotations:—**Mentd.* *Hepworth v. Heslop* (1819), 6 Haro, 622; *Drake v. Drake* (No. 1) (1858), 25 Beav. 641.

590. — Of payment of partnership debt made after dissolution.]—Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner.—*PRITCHARD v. DRAPER* (1831), 1 Russ. & M. 191; 39 E. R.

The issues submitted to the jury on this point were found in favour of deft. The newly discovered evidence went to show that deft. on several occasions had admitted the title of W. & if believed by the jury would be conclusive on the point upon which the case turned. A new trial was ordered.—*GARLAND v. CURRY* (1887), 20 N. S. R. (8 L. & G.) 4.—**CAN.**

1. — As to boundary line.]—Dft. addressed the following letter to pltf.: "In reference to your claim that my building on W. street is on your property, while I have contended to date that it was not, I have now to say that after having a talk with M., who made the survey, I must now admit that the building is some sixteen inches or so on your land, & that I agree with the survey as made by M., & hereby accept same as the proper line between us".—*Held*: the letter might be treated by the trial judge as an admission by deft. that the line as laid down by the surveyor was the correct one.—*MCINTYRE v. WHITE* (1911), 10 E. L. R. 248.—**CAN.**

m. Admission by execution debtor—Not admissible as against plaintiff.]—In an interpleader to try the right to goods seized under execution against A. & B., & claimed by pltf., C., a brother of B.:—*Held*: B.'s statement, while in possession of the property with pltf.'s assent, that it belonged to his sister, could not be evidence, as against pltf., to disprove pltf.'s right.—*EARNSHAW v. TOMLINSON* (1867), 26

U. C. R. 610.—**CAN.**

n. Admission favourable to both plaintiff & defendant—How far whole statement credible.]—Where counsel for one party in an action places in evidence an admission made by the opposite party, which admission contains some statements in favour of the contention of pltf. & some in favour of that of deft., it is not necessary to give equal credence to the several statements, but the jury must consider under the circumstances how much of the entire statement they deem worthy of belief.—*HUCK v. C. P. R.* (1916), 34 W. L. R. 1177; 9 Sask. L. R. 288; 29 D. L. R. 571.—**CAN.**

PART II. SECT. 4. SUB-SECT. 2. — G. (e).

583 i. General rule.]—In an action brought by pltf. against deft. for breach of agreement not to go into business for a certain time, by reason of which breach pltf. claimed that he had been compelled to pay a higher rate of wages, etc.:—*Held*: a paper purporting to be a scale of wages paid by deft.'s firm, & found in pltf.'s workshop, & which was stated to be in the handwriting of deft.'s partner, was properly admitted in evidence.—*WHITTAKER v. WELCH* (1874), 2 Pug. 436.—**CAN.**

583 ii. —.]—In an action against two defts., where it is sought to charge them as partners, a declaration made by one is inadmissible to prove the

partnership, & at all events before such evidence is admissible at all, defts.' counsel has a right to interpose & cross-examine the witness called to prove the declaration.—*BURFEE v. SMITH & MANN* (1880), 20 N. B. R. 408.—**CAN.**

583 iii. —.]—The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to.—*TAYLOR v. COOK* (1885), 11 P. R. 60.—**CAN.**

583 iv. —.]—Pltf. sought to give evidence, in proof of the partnership, of *ante litem* statements by the former deft. that the latter was his partner in the transaction in question:—*Held*: inadmissible, as the foundation for the admission of such evidence is the implied authority & agency of the person making the statement to make it on behalf of the person sought to be bound by it, arising from the nature of their relationship, which was itself the matter sought to be proved.—*BRITISH COLUMBIA IRON WORKS CO. v. BUSE* (1894), 4 B. C. R. 419.—**CAN.**

o. Whether evidence of knowledge of partner necessary.]—Private books kept by a partner, containing among numerous other entries, memoranda relative to the affairs of the co., but which it did not appear had ever been

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74, L. O. C.; *on appeal, sub nom.* NOTTIDGE v. PRICHARD (1834), 8 Bli. N. S. 493, H. L.

*Annotations:—*Consd. Parker v. Morrell (1848), 2 Ph. 453. *Mentd.* Percy v. Fynney (1871), L. R. 12 Eq. 69.

591. Admission made before partnership.—In an action for work & labour by A. & B. who were partners at the time that the cause of action accrued, deft. put in evidence a letter written by C. who had since the transaction become a partner with B. in the room of A., admitting that pltf. had given credit to another party:—*Held*: inadmissible, without proof that C. had authority from B. to make the statement.—TUNLEY v. EVANS (1845), 2 Dow. & L. 747; 14 L. J. Q. B. 116; 9 Jur. 428.

(f) *By Co-Plaintiffs.*

592. General rule.—The declarations & conduct of co-pltf. are evidence against any one of them.—HUGHES v. EVANS (1823), 1 Sim. & St. 185; 1 L. J. O. S. Ch. 129; 57 E. R. 74.

*Annotations:—**Mentd.* Wake v. Parker (1838), 2 Keen, 59; *Re Defries*, Nordon v. Levy (1883), 31 W. R. 720.

(g) *By Co-Defendants.*

593. General rule.—In an action against two persons on a bill of exchange accepted by one of them in blank in the name of himself " & Co.," & filled up & delivered by the other, the former having suffered judgment by default, the question was left to the jury upon the whole of the facts, whether defts. were partners at the time, & if not, whether deft. who denied the joint acceptance had acted in such a way as would lead a reasonable man to suppose that they were partners, & whether pltf. in fact acted upon the faith that they were so, & gave credit to them as such; & acts such as signing a bill & orders for goods, on which the bill was accepted, in the partnership name & style, were cogent evidence of liability for pltf.

Anything which is evidence against B. [one of the co-defts.] would be general evidence in the cause, because pltf. must establish the liability of both defts., his action being joint. Anything said or done by B. would therefore be evidence in the cause, but not admissible against G. [the other co-deft.] alone (WATSON, B.).—FALDO v. GRIFFIN (1858), 1 F. & F. 147.

594. Admission tending to prove conspiracy.—If three defts. have jointly imprisoned pltf., the declaration of one of defts., made some weeks after, in the absence of the others, tending to show that the imprisonment arose from malice, is admissible in evidence in an action for false imprisonment brought against all three.—WRIGHT v. COURT (1825), 2 C. & P. 232.

595. Admission by respondent.—Not admissible against co-respondent.—The admissions or confessions of resp. are not admissible evidence against the co-resp.—ROBINSON v. ROBINSON &

seen by the other partner, cannot be admitted as evidence against the representatives of the one partner, in an accounting at the instance of the exor. of the other.—SMITH v. LOGAN (1830), 4 Wils. & S. 47; *aff.*, 5 Sh. (Ct. of Sess.) 32.—SCOT.

p. Admission made after dissolution of partnership.—As to transaction before dissolution.—A witness stated in his examination that defendants had had a share in all his business, though he had not a share in all theirs, but that their connection in business was terminated & settled, & that he could not lose or gain by this suit. This evidence was objected to on the ground

that he was a partner & interested in the suit:—*Held*: witness was not a general partner of defendants; they were parties to transactions of a peculiar nature; & the witness should be admitted.—WRIGHT v. LIDDEL (1829), 5 Murr. 35.—SCOT.

PART II. SECT. 4, SUB-SECT. 2.—G. (e).

593 i. General rule.—An admission or even a confession of judgment by one of several defts. in a suit is no evidence against another deft.—AMIR-TOLAL BOBE v. RAJONEKANT MITTER (1), 15 B. L. R. 10; 23 W. R. 214; 2 Ind. App. 113.—IND.

LANE (1859), 1 Sw. & Tr. 362; 29 L. J. P. M. & A. 178; 31 L. T. O. S. 268; 5 Jur. N. S. 392; 164 E. R. 767.

*Annotations:—*Consd. Williams v. Williams & Padfield (1865), L. R. 1 P. & D. 29. *Follid.* Crawford v. Crawford (1866), 11 P. D. 150. *Held.* Codrington v. Codrington & Anderson (1864), 33 L. J. P. M. & A. 62. *Mentd.* Re Forster v. Forster & Berridge (1863), 4 B. & S. 187; Wilson v. Wilson (1872), L. R. 2 P. & D. 353; R. v. Manning (1883), 12 Q. B. D. 241; R. v. Plummer, [1902] 2 K. B. 339.

596. ———.—In a husband's suit for dissolution of marriage on the ground of his wife's adultery with D., the co-resp., the evidence principally consisted of confession by the wife of adultery with D. On the ground that the confession, though evidence against the wife, was not evidence against D., the ct. granted a decree nisi, but dismissed the suit as against D.—CRAWFORD v. CRAWFORD & DILKE (1886), 11 P. D. 150; 2 T. L. R. 768; *Times*, Feb. 13.

597. Admission in answer of co-defendant.—ANON. (1623), Godb. 326; 78 E. R. 192.

598. ———.—PITT v. WILLIS (1715), Dick. 24; 21 E. R. 175, L. C.

599. ———.—The answer of one deft. is not evidence against another.—MORSE v. ROYAL (1806), 12 Ves. 355; 33 E. R. 134, L. C.

*Annotations:—**Mentd.* Trevelyan v. Charter (1835), 4 L. J. Ch. 209; Tomson v. Judge (1855), 3 Drew. 306; Plowright v. Lambert (1885), 52 L. T. 646; Bartram v. Lloyd (1904), 90 L. T. 357.

600. ———.—A trustee sold out trust stock, & subsequently advanced money to one of his *cestuis que trust* for the purchase of an estate, which was when purchased mortgaged to the trustee for the advance. He afterwards deposited the deeds with his bankers to secure a debt due from himself. Certain of the *cestuis que trust* instituted a suit for the delivery up of the deeds, on the ground that the money advanced on mtge. was trust money; & the trustee, by his answer in the suit, admitted a promise by himself to execute a declaration of trust of the mtge. in favour of his *cestuis que trust*:—*Held*: the admission by the trustee that the money advanced by him for the purchase of the estate was trust money, was not evidence as against the bankers.—NEWTON v. NEWTON (1868), as reported in 38 L. J. Ch. 145; 19 L. T. 588, L. C. & L. J.

*Annotations:—**Mentd.* Perrin v. Burhey, [1869] W. N. 160; Heath v. Crealock (1873), L. R. 18 Eq. 215; Taylor v. Russell, [1891] 1 Ch. 8.

601. ———.—An admission in an answer of one deft. of a certain fact, is not evidence of that fact against another deft. upon motion for decree, though notice to read the answer has been given.—SALTMARSH v. HARDY (1873), 42 L. J. Ch. 422.

602. Co-defendant suffering judgment by default.—In an action for an injury to a person, occasioned by the negligent & careless placing, by a tradesman, of the flap of a cellar opening to the public street, the declaration of one deft., who has suffered judgment by default, cannot be used as evidence against the other defts.—DANIELS v.

593 ii. ———.—CHUNDERESHWUR NARAIN PERSHAD v. CHUNI AHIR (1881), 9 C. L. R. 359.—IND.

593 iii. ———.—AMBAR ALI v. LUTFE ALI (1917), 1 L. R. 45 Calc. 159.—IND.

q. Admission by silence.—In an action for false imprisonment against four defts. the only evidence connecting two of them with an order given by the third of them for pltf.'s arrest was the evidence of a witness given on the hearing of a charge against pltf. in a police ct. when the two defts. were present. The witness stated that he had the authority of all defts., for the arrest. The two defts. heard this

POTTER (1830), 4 C. & P. 262; Mood. & M. 501, N. P.

Annotation:—*Mentd.* Clark v. Chambers (1878), 3 Q. B. D. 327.

603. — **To what extent admissible.**—*HAWKS v. HOWARD* (1847), 10 L. T. O. S. 2.

604. — **Defendant's interest not identical.**—An admission by deft., upon his answer, of an allegation in the will that such deft. claims to be heir-at-law, is not such evidence of his heirship as to prevent the necessity of an inquiry, the admission not being binding upon co-defts.—*TEE v. FERRIS* (1854), 3 W. R. 133.

605. **Affidavit filed by co-defendant.**—An affidavit filed on the part of a deft. cannot in a cause, be read as evidence against a co-deft.—*FEILDEN v. SLATER* (1869), L. R. 7 Eq. 523; 38 L. J. Ch. 379; 20 L. T. 112; 17 W. R. 485.

Annotations:—*Refd.* Allen v. Allen & Bell (1894), 63 L. J. P. 120. *Mentd.* L. & N. W. Ry. v. Garnett (1869), 39 L. J. Ch. 25; Jones v. Bone (1870), L. R. 9 Eq. 674; Thornewell v. Johnson (1881), 50 L. J. Ch. 641; Stuart v. Diplock (1889), 43 Ch. D. 343; Holloway v. Hill, [1902] 2 Ch. 612.

Deposition in winding up of company.—*See COMPANIES, Vol. X., p. 900.*

(h) By Co-Trustees.

606. **General rule.**—An admission by one trustee will not bind his co-trustees: *aliter*, where parties are personally liable.—*DAVIES v. RIDGE* (1800), 3 Esp. 101, N. P.

Annotation:—*Refd.* Doe d. Rowlandson v. Wainwright, (1838), 8 Ad. & El. 691.

See, generally, TRUSTS & TRUSTEES.

(i) By Co-Executors.

607. **Whether admissible against administrator durante absentia.**—In an action by a special administrator, under Administration of Estates Act, 1798 (c. 87), the declarations of the exor. named in the will made by him whilst he was the acting exor., are not admissible against pltf.—*RUSH v. PEACOCK* (1838), 2 Mood. & R. 102, N. P.

608. **Admission not relating to the executorship.**—In covenant against two exors. upon a covenant of testator for quiet enjoyment against all claiming under him, the breach assigned was that the two defts. having at the time when the indenture was made, lawful title in their own right, entered, & evicted the covenantee. Entry & eviction by the two was proved; the only evidence showing that it was under lawful title was a declaration by one deft., after the entry, that the two had lawful title through testator, under a deed prior to that now sued upon:—*Held*: assuming it to be admissible as against the party making it, the declaration was not evidence against the other deft., as it did not relate to the affairs of the exorship & therefore, no proof had been given to support the action of covenant.—*FOX v. WATERS* (1840), 12 Ad. & El. 43; 4 Per & Dav. 1; 9 L. J. Q. B. 329; 4 Jur. 555; 113 E. R. 727.

609. **Admission against wishes of co-executor.**—An acknowledgment by one of two exors. & devisees in trust of real estate against the wishes of the other that more than six years' interest is

evidence given & were silent:—*Held*: such silence in a ct. of justice could not be given in evidence of an admission by the two defts. of the facts stated by the witness.—*FISHER v. WHEATLAND, CROOK, ANDREWS & THOMSON* (1863), 2 W. & W. 130.—*AUS.*

r. Admissibility in subsequent action between co-defendants.—Pltf. & deft. had been co-defts. in a common law action. During negotiations for

the settlement of that action an interview "without prejudice" was held between the parties to this suit as co-defts. in that action on the one side & the solr. for the then pltf. on the other side. At this interview an admission not material to the issue in that action, but material as between the then defts. as pltf. & deft. in this suit was made by the present deft. This admission was tendered as evidence against deft. in this suit:—*Held*: it was admissible.—*BARDEN v.*

due on a mtge. created by their testator cannot be treated as the valid act of the two in their capacity of trustees, & is not a good acknowledgment within Real Property Limitation Act, 1833 (c. 27), s. 42.—*ASTBURY v. ASTBURY*, [1898] 2 Ch. 111; 67 L. J. Ch. 471; 78 L. T. 494; 46 W. R. 536.

Annotation:—*Refd.* *Re* Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330.

See, generally, EXECUTORS.

(j) By Joint Contractors.

610. **By co-obligor on bond.**—Bill by the obligee in a bond, who had delivered it up, by mistake, as he alleged, to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, & that one of them had destroyed it; but traversed the allegation as to mistake:—*Held*: declarations made by the obligor to whom the bond had been delivered, tending to prove pltf.'s allegation, were admissible against the co-obligor.—*CROSSE v. BEDINGFIELD* (1841), 12 Sim. 35; 10 L. J. Ch. 219; 5 Jur. 836; 59 E. R. 1043.

Annotation:—*Mentd.* *Re* Powell's Trust (1852), 10 Hare, 134.

Release by co-obligee.—*See BONDS, Vol. VII., p. 237, Nos. 788-790.*

Admission of debt by one—Debt statute-barred.—*See LIMITATION OF ACTIONS.*

(k) By Co-Owners.

See, generally, PERSONAL PROPERTY; REAL PROPERTY.

611. **Admission by lessee—Declaration of trust.**—The owner of land having, at his own expense, built a chapel, which was used for the purpose of public worship, & the congregation having subscribed a sum of money for the purpose of enlarging & improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a peppercorn rent, during his life, & £10 per annum after his death. A declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, & that in case the public worship should be there discontinued, then that they would assign the premises for civil purposes:—*Held*: the declaration of trust, although executed only by some out of the several lessees, was evidence against all of the purpose for which the lease was granted.—*DOE v. HAWTHORN* (1818), 2 B. & Ald. 96; 106 E. R. 302.

Annotation:—*Mentd.* *Bourne v. Keane*, [1919] A. C. 815.

(l) By Principals.

612. **Whether binding on common agent—In action by other principal.**—A. undertakes to act as the agent of B. in recovering the amount of an insured cargo subject to the superior claim of C. who resides abroad. In an action by B. against A. to recover his proportional share of the amount recovered by B., an invoice sent by C. but to which A. is not privy, is not admissible in evidence against A. in order to show the extent of B.'s interest.—*MENDHAM v. THOMPSON* (1816), 1 Stark. 316, N. P.

BARDEN (1921), 21 S. R. N. S. W. 588.—*AUS.*

PART II. SECT. 4, SUB-SECT. 2.—G. (1).

s. In action against principal & sureties on bond.—In an action against principal & sureties as co-obligors on a collector's bond:—*Held*: the admissions of the principal were clearly evidence against himself.—*EASTHOPE MUNICIPAL COUNCIL v. HELMER* (1858), 7 C. P. 506.—*CAN.*

Sect. 4.—Hearsay: Sub-sect. 2, G. (m) i. & ii.]

(m) *By Agents.*

i. *In General.*

See, generally, AGENCY, Vol. I., pp. 605 et seq.

613. Proof of agency necessary—Knowledge that letters written—No proof of knowledge of contents.]—FOOTE v. HAYNE, No. 456, *ante*.

614. — Admission in connection with matter in excess of authority.]—A. having assigned his stock in trade & business to two trustees, one of them directed pltf. to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, & it was arranged that L. should remit pltf. money while there. Pltf. went there, & L. sent a letter to him there announcing that he had done so. In an action by pltf. against the trustees for a compensation for going that journey:—*Held*: the declarations of a person whom the trustees had placed at the house of business to manage the shop, were not evidence to show that pltf. was entitled to be paid for taking an account of the stock.

If he conducts the business he is an agent to bind defts. in every thing that concerns the business, but not I think to employ a person to take stock (LORD DENMAN, C.J.).—LAWRENCE v. THATCHER (1834), 6 C. & P. 669, N. P.

615. —.]—In debt against an exor. for a legacy, which, it was alleged, he was, by agreement with the legatee, to retain & to pay interest upon, deft. pleaded Stat. Limitations. It was proposed to take the case out of the Stat. of Limitations, by putting in letters written by deft.'s son, who assisted him in his trade, & received for him money due to him in the way of his business as a shoe manufacturer:—*Held*: though this would be good evidence to show that the son was his father's agent in matters relating to the father's trade, it was not such evidence of agency as would render the letters of the son admissible in evidence in this case, as it was not evidence to show that the son was authorised to make admissions as to a legacy or exorship. accounts. To show agency as to accounts, evidence must be given of some authority pointing to such accounts.—WHITEHOUSE v. ABBERLEY (1845), 1 Car. & Kir. 642, N. P.

616. — Admission within scope of agency.]—In a cause of collision the libel pleaded declarations of the man who was at the helm of the ship proceeded against, at the time the collision took place:—*Held*: the declarations could not be pleaded, he not being the agent of the owners.

The declaration of an individual is only to be taken when he is a party in the cause, or an agent of that party, the subject being within the scope of his agency. Upon that principle the admissions of the master are to be received as evidence (DR. LUSHINGTON).—THE EUROPA (1849), 14 L. T. O. S. 66; 13 Jur. 856.

617. —.]—Before a conversation between one of the parties to the action & a third person can be given in evidence to prove an agreement by the other party, proof must be given of preceding authority to the third person to make the agreement or of subsequent ratification.

PART II. SECT. 4, SUB-SECT. 2.— G. (m) i.

t. *Admission by agent as against principal—Employer & workman.]—*An admission by deft.' car driver, who was in charge of the sleigh at the time of the accident by which pltf. was injured, made a few days after the accident, that the harness & brake

were defective, is inadmissible.—RAINNIE v. ST. JOHN CITY RY. CO. (1891), 31 N. B. R. 552.—CAN.

u. —.]—Statements made by a foreman in regard to the cause of an accident resulting in the death of a man under his orders are not admissible in evidence against his employers, as admissions made on their behalf,

A., a landowner, objects to a railway passing through his lands. B. promises that it shall be carried past his land by means of a tunnel. A parliamentary notice is sent to A. stating that the railway would pass through his land by means of a tunnel, & his consent is asked. He does not oppose it. The Act passes. The co. begin to construct their railway on the surface of his land. In an action by A. against the co. for not carrying it through his land by a tunnel, A. seeks to give in evidence a conversation between himself & B.:—*Held*: he must first prove B.'s agency.—LIDDEL v. NEWPORT, ABERGAVENNY & HEREFORD RY. CO. (1852), 20 L. T. O. S. 66.

— *Admission of adultery.]—See HUSBAND & WIFE.*

Evidence of Agency—Generally.]—See AGENCY, Vol. I., pp. 286 et seq.

618. Admission by agent as against principal—Employer & clerk.]—EDWARDS v. REES, No. 791, *post*.

619. — Admissions of breach of duty.]—The ct. will refuse to admit evidence of statements by defts.' clerks in answer to inquiries by pltf. in regard to the business as evidence of breach of duty on their parts.—DELL v. EMMETT (1859), 1 F. & F. 441, N. P.

620. — Theatre lessee & stage manager.]—What a stage manager says at the close of a season, in his farewell address from the stage, as to the success of the theatre, is evidence against the lessee or proprietor upon that subject.—LACY v. OSBALDISTON (1837), 8 C. & P. 80, N. P.

Annotation:—Mentd. Pearce v. Foster (1886), 34 W. R. 602.

621. — Employer & workman—Rules in contract & tort distinguished.]—An admission by a servant of a negligent act is not evidence as against his master.

It is said that the words of a servant are evidence against his employer but that is not so. The words of an agent may be evidence against his principal, & that is where the agent has power to make a contract. But in the case of tort a different rule applies (POLLOCK, B.).—JOHNSON v. LINDSAY (1889), 53 J. P. 599; 5 T. L. R. 454, D. C.; *affd.*, 23 Q. B. D. 508, C. A.; *reversd.* on other grounds, [1891] A. C. 371, II. L.

Annotations:—Mentd. Cameron v. Nystrom, [1893] A. C. 308; Donovan v. Laing, Wharton & Down Construction Syndicate, [1893] 1 Q. B. 629; Hedley v. Pinkney S.S. Co., [1894] A. C. 222; Stamp v. Williams (1896), 12 T. L. R. 516; Cooper & Crane v. Wright, [1902] A. C. 302; Kay v. British Westinghouse Electric & Manufacturing Co. (No. 1) (1905), 49 Sol. Jo. 296; Burr v. Theatre Royal, Drury Lane, [1907] 1 K. B. 544; Cribb v. Kynoch, [1907] 2 K. B. 548; Jones v. Canadian Pacific Ry. (1913), 83 L. J. P. C. 13; Williams v. Linotype & Machinery (1914), 84 L. J. K. B. 1620; Hayward v. Drury Lane Theatre & Moss' Empires, [1917] 2 K. B. 899; Heasmer v. Pickfords (1920), 36 T. L. R. 818.

622. — Whether within prohibition in insurance policy.]—An admission of liability, made by a driver of a traction engine after a collision caused by his negligence, is not a breach of a condition contained in a policy of insurance made with his employer that the assured shall not by his agent make any admission of liability, unless the admission is authorised by the employer.—TUSTIN v. ARNOLD & SONS, BRITISH DOMINIONS GENERAL INSURANCE CO., LTD., THIRD PARTIES

where they were not made in the course of any business he was transacting for his employers.—WRIGHT & SONS v. CASSIDY (1898), 17 N. Z. L. R. 193.—N.Z.

—.]—Where a servant, after his discharge from his master's employment, made an admission with reference to a transaction performed by

(1915), 84 L. J. K. B. 2214; 113 L. T. 95; 31 T. L. R. 368.

623. — Insurance company & assured.]—An Insurance Co. who were contesting a workmen's compensation case as agents for the employer, had written a letter to appt. admitting liability. The letter, however, had not been acted upon, & the county ct. judge decided against the workman on the merits of the case:—*Held*: without hearing the merits, the letter was an admission of liability binding on the employer.—*FRASER v. DRISCOLL* (1916), 9 B. W. C. C. 264, C. A.

Annotations:—**Consd.** Dutton v. Sneyd Bycars Co., [1920] 1 K. B. 414. **Mentd.** Maloney v. Pink (1923), 130 L. T. 500.

— **Company & chairman.]**—See COMPANIES, Vol. IX., p. 678, Nos. 4524, 4525.

— **Of statute barred debt.]**—See LIMITATION OF ACTIONS.

— **Of title.]**—See LIMITATION OF ACTIONS.

624. — After transaction.]—The statement of an agent made after a transaction is not evidence against the principal (*LUSH, J.*).—*HARWICH CASE*, *TOMLINE v. TYLER* (1880), 44 L. T. 187; 3 O'M. & H. 61.

Annotations:—**Mentd.** McLaren v. Home (1881), 7 Q. B. D. 477; Westbury Case (1881), 3 O'M. & H. 78.

625. Agent's reports to his principal — Action taken on report.]—A public body passed a resolution directing their solr. to write a letter to pltf., the resolution being based upon the report of their own surveyor. Pltf. wished to put the report in evidence to show the grounds for passing the resolution & to explain the letter:—*Held*: the report was not admissible.—*COOPER v. METROPOLITAN BOARD OF WORKS* (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709, C. A.

Annotation:—**Mentd.** West London Syndicate v. I. R. Comrs., [1898] 2 Q. B. 507.

— **Report by Chairman to Company.]**—See COMPANIES, Vol. IX., p. 678, No. 4524.

ii. Officers of Corporations.

626. Admission by surveyor — Of township — Though ratable inhabitant.]—*R. v. ADDERBURY EAST (INHABITANTS)*, No. 573, ante.

627. ——In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby pltf.'s house was injured, a letter written to pltf., respecting the pulling down of the house by deft.'s surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, & is therefore evidence against them.—

him by his master's orders during his engagement:—*Held*: the statement was not admissible in evidence against the former master.—*WOOD v. DEISLEY* (1882), 2 E. D. C. 200.—**S. AF.**

623 i. — Insurance company & assured.]—The declarations of a co.'s agents made while engaged in adjusting a loan under a policy issued by the co. are admissible in evidence in an action against the co.—*BOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. B. R. 437.—**CAN.**

623 ii. ——An agent of an insurance co., having authority to solicit insurances & receive proposals is a general agent, whose representations will bind the co.—*SPLENTH v. LEFEVRE* (1863), 16 Ir. Jur. 62.—**IR.**

624 i. — After transaction.]—The statements of agents, made after the contract has been perfected, are inadmissible as evidence.—*REDPATH v. SUN MUTUAL INSURANCE CO. & REDPATH* (1869), 14 L. C. J. 90.—**CAN.**

624 ii. ——A principal is

not bound by the statements of his agent, after the happening of the act sued upon, unless the agent has authority to make such statements.—*DOWN v. LEE* (1887), 4 Man. L. R. 177.—**CAN.**

b. — Admission by election agent.]—A conversation with a witness, or the admission of an agent, had & made on the day of the election, immediately after the close of the polls, is admissible in evidence.—*DUFFY v. RYAN & ROGERS* (1875), 3 Pug. 110.—**CAN.**

c. — Oral admission.]—In an action of trespass to premises which had been held by pltf. under a tenancy from year to year, determinable by notice of surrender:—*Held*: to prove a surrender before the acts complained of, evidence was admissible on behalf of deft. of oral admissions made by pltf.'s son, who had been acting as his manager, that notice of surrender had been given by pltf.—*MARTIN v. DOHERTY* (1880), 6 L. R. Ir. 194.—**IR.**

d. Admission not on oath.]—An

PEYTON v. ST. THOMAS' HOSPITAL (1828), 3 C. & P. 363, N. P.; *subsequent proceedings, sub nom. PEYTON v. LONDON CORPN.* (1829), 9 B. & C. 725.

628. Admission by engineer — Of company.]—The directors of a railway co. appoint an engineer to the co., & his name is advertised in the prospectus as the engineer to the co.:—*Held*: this does not constitute the engineer agent to the co., so as to make them responsible to persons employed by him in taking surveys; & therefore, in an action against one of the directors by an engineer who had been so employed by the engineer to the co., letters from the engineer to pltf. are not admissible without further proof of his authority to bind the co.—*SYKES v. COOPER* (1846), 7 L. T. O. S. 452.

629. Admission by secretary of company.]—Where an allottee in a projected railway co. had paid his deposit into the bank named in the prospectus, which had been circulated by deft.'s sanction, his name appearing therein as one of the provisional committee & as chairman of the committee of management; but deft. had not personally superintended the allotment of shares, & had taken no active part in the concern, & had been present once only at any meeting, when he acted in the capacity of chairman, but dissented from the proceedings: in an action by pltf. against deft. for the recovery of his deposit, on the abandonment of the scheme:—*Held*: letters written by the secretary of the co. to pltf., there being no other evidence of their being written by deft.'s authority, are not admissible in evidence against deft.—*BURNSIDE v. DAYRELL* (1849), 3 Exch. 224; 6 Ry. & Can. Cas. 67; 19 L. J. Ex. 46; 12 L. T. O. S. 312; 154 E. R. 825; *previous proceedings* (1847), 10 L. T. O. S. 115.

Annotation:—**Mentd.** Johnson v. Goslett (1857), 3 C. B. N. S. 569.

Authority of secretary generally.]—See COMPANIES, Vol. IX., p. 541.

630. Admission by director — After bond given under Lands Clauses Consolidation Act, 1845 (c. 18), s. 85.]—In an ejection brought by a landowner to recover land taken possession of by a co.:—*Held*: letters written to the lessor of pltf. by one of the directors who had executed a bond to him under above sect., were admissible in evidence against the co.—*DOE d. ARMISTEAD v. NORTH STAFFORDSHIRE RY. CO.* (1852), 19 L. T. O. S. 374, N. P.

631. — That goods supplied.]—Goods had been supplied to a co. on the credit of the manager, who had given bills in his own name for the goods so supplied, & for money advances. The directors

admission not on oath by an agent is only admissible when it is part of the *res geste*, or is made in the course of making a contract for his principal.—*CASEY v. WENTWORTH* (1877), Knox, 16.—**AUS.**

PART II. SECT. 4, SUB-SECT. 2.— G. (m) ii.

e. Admission by manager of company.]—In an action for the amount of an insurance policy, for the premium of which a promissory note had been given, which was dishonoured at maturity, but for which no policy or interim receipt had been issued by the co.:—*Held*: the admission of the manager of the co. was admissible to prove the existence of the contract.—*MONTREAL INSURANCE CO. & MCGILLIVRAY* (1857), 2 L. C. J. 221.—**CAN.**

f. ——*LYON v. STADACONA INSURANCE CO.* (1879), 44 U. C. R. 472.—**CAN.**

g. Admissions respecting matters not within scope of duties.]—In an action

Sect. 4.—Hearsay: Sub-sect. 2, G. (m) ii., iii. & iv.]

supposing the bills to be entirely for goods, gave the creditor in exchange other bills drawn by the manager, & accepted in a form not binding on the co.:—*Held*: these bills were an admission by the co. that the goods had been supplied for the co.—*Re CATHOLIC PUBLISHING & BOOKSELLING CO., LTD.* (1864), 3 New Rep. 551; 33 L. J. Ch. 325; 10 L. T. 49; 10 Jur. N. S. 192; 12 W. R. 455; *reversd.* on other grounds, 2 De G. J. & Sm. 116, L. J.J.

Annotations:—*Mentd.* *Re General Exchange Bank* (1866), 14 W. R. 826; *Re Railway Finance Co.* (1866), 14 W. R. 785; *Re Imperial Silver Quarries Co.* (1868), 16 W. R. 1220; *Re London & Paris Banking Corp.* (1874), L. R. 19 Eq. 444; *Re Caerphilly Colliery Co., Ex p. Dolling* (1875), 32 L. T. 15; *Re Globe New Patent Iron & Steel Co.* (1875), L. R. 20 Eq. 337.

632. Admission by waywarden.—Of highway district.]—When proceedings are taken before justices, under Highway Act, 1862 (c. 61), s. 18, for the non-repair of a highway in a parish forming part of a highway district, a *bond fide* admission by the waywarden of the parish that the road is a highway which the parish is bound to repair, is binding on the highway board, & it is not competent for them, after such an admission to deny these facts so as to oust the jurisdiction of the justices.—*LOUGHBOROUGH HIGHWAY BOARD v. CURZON* (1886), 17 Q. B. D. 344; 55 L. J. M. C. 122; 55 L. T. 50; 50 J. P. 788; 34 W. R. 621; 2 T. L. R. 678, C. A.

Annotations:—*Mentd.* *R. v. Poole Corp.* (1887), 19 Q. B. D. 602; *Payne v. Wright* (1892), 61 L. J. M. C. 114.

633. Admission by bank manager.—Admission in former proceedings as to practice of bank.]—The bank manager had in a previous action by another pltf. given evidence of the practice of the bank in making such loans to customers:—*Held*: the manager being a person authorised to make admissions on the part of the bank, his evidence might be read on the part of the pltf. in this action so far as relevant to the matters now in question.—*SIMMONS v. LONDON JOINT STOCK BANK, LITTLE v. LONDON JOINT STOCK BANK* (1890), as reported in 62 L. T. 427; *affd.*, [1891] 1 Ch. 270, C. A.; *reversd.* on other grounds, *sub nom.* *LONDON JOINT STOCK BANK v. SIMMONS*, [1892] A. C. 201, H. L.

Annotations:—*Mentd.* *Baker v. Nottingham & Nottinghamshire Banking Co.* (1891), 60 L. J. Q. B. 542; *Venables v. Baring*, [1892] 3 Ch. 527; *Bentick v. London Joint Stock Bank*, [1893] 2 Ch. 120; *Thomson v. Clydesdale Bank*, [1893] A. C. 282; *Manchester Trust v. Furness*, [1895] 2 Q. B. 539; *Redfern v. Rosenthal* (1901), 85 L. T. 313; *Molyneux v. Hawtrey*, [1903] 2 K. B. 487; *Weiner v. Gill*, *Weiner v. Smith*, [1905] 2 K. B. 172; *Smith v. Prosser*, [1907] 2 K. B. 735; *Louth Northern Division Case* (1911), 6 O'M. & H. 103; *Fuller v. Glyn, Mills, Currie*, [1914] 2 K. B. 168.

634. Admissions by servants of dock company —Reports to police as to goods stolen.]—LAMPSON

against the corp. of St. J. for negligence in constructing a sewer, whereby pltf.'s land was overflowed, declarations of aldermen, members of the corp. relative to the sewer, are not evidence against defts., but declarations of members of a committee appointed by the corp. to superintend the construction of the sewer, made while the work was in progress, & relative thereto, are evidence, being the declarations of an agent relative to a matter within his authority.—*RILEY v. ST. JOHN CORPN.* (1865), 6 All. 264.—CAN.

b.—[In an action against a corp., the declarations of the mayor & auditor respecting matters not within the scope of their duties, are not evidence for pltf.—*GIRVAN v. ST. JOHN CORPN.* (1866), 6 All. 411.—CAN.

& Co. v. LONDON & INDIA DOCK JOINT CO. (1901), 17 T. L. R. 663.

iii. Ships' Officers.

635. Admissions by master.—As to incompetence of crew.]—In action for negligently steering a ship, whereby she was wrecked, & pltf. lost his passage in her, you may give evidence, that the captain had often expressed his conviction, that the officer to whom he gave charge of the ship was incompetent for that situation.—*MALTON v. NESBIT* (1824), 1 C. & P. 70, N. P.

636. —As to ship being unseaworthy —Necessity for proof of acquiescence by owner.]—In an action against the underwriters by the owner of a ship to recover freight, the defence being that the ship was unseaworthy, letters from the captain to pltf. are not admissible against pltf., without proof of his acquiescence in the correctness of the statements contained therein.—*PARFITT v. RAYDEN* (1846), 7 L. T. O. S. 452, N. P.

637. —.]—THE EUROPA, No. 616, ante.

638. —As to cause of damage.]—In a cause of damage the allegation responsive to the libel pleaded as an exhibit a paper signed by the master & crew of the ship proceeding in the cause, & a declaration of the mate of the same ship. The mate & rest of the crew were interested in the suit in respect of their clothes, which had gone down in the ship:—*Held*: admissions & declarations of the mate & crew were not admissible.

I am quite ready to admit in this case as I have done in many other cases, the declaration of the master, who is the servant & the agent of the owners (*DR. LUSHINGTON*).—*THE MIDLOTHIAN* (1851), 15 Jur. 806.

639. —Letter to owners.—Statement of facts & opinion distinguished.]—(1) A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated.

(2) The opinion of the master in such a matter is not evidence.—*THE SOLWAY* (1855), 10 P. D. 137; 54 L. J. P. 83; 34 W. R. 232; *sub nom.* *BURT v. LIVINGSTONE, THE SOLWAY*, 53 L. T. 680; 5 Asp. M. L. C. 482.

640. Admissions by mate.]—THE MIDLOTHIAN, No. 638, ante.

641. Admissions by crew.]—THE MIDLOTHIAN, No. 638, ante.

642. —.]—In an action of collision, brought by the owners of a vessel & the crew for their private effects, admissions by the crew as to the circumstances of the collision cannot be pleaded.—*THE FOYLE* (1860), 1 Lush. 10; 167 E. R. 5.

See, further, ADMIRALTY, Vol. I., pp. 199, 120.

Declarations forming part of the res gestæ.]—*See* Sect. 3, sub-sect. 2, *ante*.

PART II. SECT. 4, SUB-SECT. 2.—G. (m) iii.

637 i. Admissions by master.]—The master is agent for the owners; & statements made by him may be given in evidence by the underwriters.—*CAIRNS v. KEPEN* (1820), 2 Murr. 245.—SCOT.

637 ii. —.]—The report by the master of a ship to her owner is not admissible as evidence against the owner of the facts contained in it, but in an action to which the owner is a party such reports, if made *de recent*, may be recovered under diligence.—*ADMIRALTY LORDS COMRS. v. ABERDEEN STEAM TRAWLING & FISHING CO., LTD.*, [1909] S. C. 335.—SCOT.

638 i. —As to cause of damage.]—In an action for collision:—*Held*:

evidence of declarations made by the captain of defts. vessel, as to the cause of the accident, on the day after it had happened, were inadmissible, but the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident.—*SHAW v. DE SALABERRY NAVIGATION CO. OF MONTREAL* (1859), 18 U. C. R. 541.—CAN.

k. —Regarding goods sold by him.]—In an action brought against the charterers of a vessel for non-delivery of goods shipped under a bill of lading signed by the captain, a declaration of the latter, while in charge of the vessel, that he had sold the goods, was properly admitted in evidence.—*HENDER v. CARVILL* (1875), 3 Pug. 141.—CAN.

iv. Counsel, Solicitors, etc.

643. Admissions by counsel—Whether admissible as proof of amount of debt.]—To take a case out of Stat. Limitations pltf. produced a deed whereby deft. had assigned to pltf. & one C. the whole of his property, in trust to secure 6s. 8d. in the pound to his creditors, in which deed was a recital that deft. was indebted to pltf. & the other creditors whose names were thereunder written in the several sums set opposite their respective names in a schedule annexed to the deed. The deed also contained a proviso that "the deed & all the covenants therein" should be void, unless all the creditors signed by a given day. The deed was not executed by all the creditors; neither was pltf.'s name or the amount of his debts inserted in the schedule; nor did he execute the deed:—*Held*: the amount of pltf.'s debt could not be supplied by the admission of counsel at the trial.—KENNETT v. MILBANK (1831), 8 Bing. 38; 1 Moo. & S. 102; 1 L. J. C. P. 8; 131 E. R. 314.

Annotations:—*Mentd.* Brigstocke v. Smith (1833), 1 Cr. & M. 483; Lechmere v. Fletcher (1833), 1 Cr. & M. 623; Edmunds v. Downes (1834), 4 Tyr. 173; Elcke v. Nokes (1834), 1 Mood. & R. 359; Cheslyn v. Dalby (1836), 2 Y. & C. Ex. 170; Bird v. Gammon (1837), 3 Bing. N. C. 883; Cheslyn v. Dalby (1840), 4 Y. & C. Ex. 238; Hartley v. Wharton (1840), 11 Ad. & El. 934; Courtenay v. Williams (1844), 3 Hare, 539; Smith v. Thorne (1852), 18 Q. B. 134.

644. Conditions precedent to admissibility.—Where a party appears by counsel before the court or a judge at chambers in any stage of the cause, & counsel makes an admission of a fact, though unsupported by affidavit, the court will regard such statement as presumably true, & will admit it in evidence when offered by the other side.—HALLER v. WORMAN (1861), 3 L. T. 741; 9 W. R. 348; *previous proceedings* (1860), 2 F. & F. 165, N. P.

See, generally, BARRISTERS, Vol. III., pp. 345, 346.

645. Admissions by solicitor—Within scope of authority—Offer to third party.]—Offers made by pltf.'s attorney in the hearing of a third person to do an act relative to the deft., which lay within the scope of his authority, are not admissible evidence to affect the pltf. with such offer. Otherwise, if the offers had been made to the deft.—WILSON v. TURNER (1808), 1 Taunt. 398; 127 E. R. 888.

646. Offer to defendant.—WILSON v. TURNER, No. 645, *ante*.

647. Admissions for purposes of trial—Whether receivable at new trial.]—An agreement by the attorneys to admit on the trial of a cause the execution of an instrument, is evidence on every trial of the cause, though not renewed after the first trial.—ELTON v. LARKINS (1832), 1 Mood. & R. 196; 5 C. & P. 385, N. P.; *subsequent proceedings*, 8 Bing. 198.

648.—Previously to the trial of an ejectment, deft.'s then attorney signed admissions, commencing, "We hereby agree to admit on the trial of this cause," etc. On the trial the admissions were read. The Ct. of K. B. afterwards granted a new trial, & the attorney for deft. died. The second trial took place on Feb. 11, & on Feb. 7, deft.'s then attorney gave notice to the attorney of the lessor of pltf. that he should make no admissions; & the latter sent back an answer stating that the admissions already made were binding:—*Held*: on the second trial these admissions were receivable in evidence.

Are not these admissions receivable as being admissions made by a person who was at that time

attorney for deft. (LORD DENMAN, C.J.).—DOE d. WETHERELL v. BIRD (1835), 7 C. & P. 6, N. P.

See, generally, PRACTICE.

649. If employed in former proceedings.—The only evidence to affect pltf. was, that one S. whom he had employed as the attorney in an action on one of the bills sued on, the actions on which were afterwards consolidated, made a statement, before the other bill was due, that "all the bills," meaning the bills now sued on & those on which the composition had been accepted, were pltf.'s bills:—*Held*: although the admissibility of the evidence had not been objected to at the trial, as it was the only evidence against pltf., & it was doubtful whether it was admissible, the verdict for deft. was unsatisfactory as not supported by evidence, & a new trial was granted.—BLACKSTONE v. WILSON (1857), 26 L. J. Ex. 229.

650. Before litigation begun—Mere conversation.]—In the year 1845, & before ejectment brought, N. applied to W. who was afterwards attorney for deft. in the ejectment, to demand possession of the property, & they had a conversation:—*Held*: on the trial of the ejectment, evidence of this conversation was not receivable.—DOE d. HULIN v. RICHARDS (1845), 2 Car. & Kir. 216.

651. Discussion between solicitors of both parties.—In a discussion between the attorneys of pltf. & deft., touching the dispensing with certain witnesses at the trial, pltf.'s attorney stated to deft.'s attorney that the debt was one owing from the late husband of deft.:—*Held*: such statement could not be given in evidence against pltf.—PETCH v. LYON (1846), 9 Q. B. 147; 1 New Pract. Cas. 603; 15 L. J. Q. B. 393; 11 Jur. 37; 115 E. R. 1231.

Annotation:—*Mentd.* Camillo Tank S.S. Co. v. Alexandria Engineering Works (1921), 38 T. L. R. 134.

652.—A plea of set-off referring to an agreement "expressed to be made," between pltf. & deft., & a notice, on the part of deft., to admit the agreement referred to in the plea:—*Held*: conversation between the attorneys after the notice to admit inadmissible to extend the admission under such nature.—CORBETT v. LEES (1859), 1 F. & F. 679, N. P.

653. Solicitor acting for both parties—Funds misappropriated.]—Pltf. lent to deft. £1,000, upon the security of an indenture, which contained a covenant by deft. to surrender certain copyhold premises to pltf.'s use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, & the title-deeds were delivered to him, & he prepared & delivered to deft., but without pltf.'s knowledge, a schedule of the deeds, at the foot of which was a memorandum signed by D., acknowledging the receipt of the deeds, & undertaking to deliver them up on payment of the principal money & interest. The mortgage deed remained in D.'s possession, & he from time to time received the interest & paid it over to pltf. The principal money was paid to D., who appropriated it to his own use, & died insolvent:—*Held*: D.'s receipt for the principal, & the memorandum signed by him, were admissible in evidence for deft.—WILKINSON v. CANDLISH (1850), 5 Exch. 91; 19 L. J. Ex. 168; 155 E. R. 39.

Annotations:—*Mentd.* Sims v. Brutton (1850), 5 Exch. 802; Kent v. Thomas (1856), 1 H. & N. 473; Bourdillon v. Roche (1858), 27 L. J. Ch. 681; Sweeting v. Pearce (1859), 29 L. J. C. P. 265.

See, generally, SOLICITORS.

654. Admission by solicitor's clerk.—If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the

Sect. 4.—Hearsay: Sub-sect. 2, G. (m) iv., v., vi. & vii., (n) & (o) & H. (a), (b), (c), (d) & (e); sub-sects. 3 & 4. Sect. 5: Sub-sect. 1.]

same as if it had been said by the attorney himself.—*STANDAGE v. CREIGHTON* (1832), 5 C. & P. 406, N. P.

655. Admission by parliamentary agent.]—A. & B. appeared in Parliament as the agents for the promoters of a bill; the proceedings resulted in an Act being made:—*Held*: statements made by A. & B. for the purposes of the bill, were admissible against the promoters, without further proof of authority to act for such promoters.—*FISHMONGERS' CO. v. DIMSDALE* (1850), 17 L. T. O. S. 7; *subsequent proceedings* (1852), 12 C. B. 557.

v. Husband and Wife.

656. Where wife agent of husband.]—Observations made by the wife are admissible in evidence, where she acts as the agent of her husband.—*PRATT v. BAKER* (1822), 1 L. J. O. S. K. B. 12.

How far admission binding.]—*See* Part III., Sect. 2, sub-sect. 8, F. (b), *post*.

Admissibility of evidence of spouses.]—*See, generally*, Part V., Sect. 1, sub-sect. 1, A. (d), *post*.

vi. Referees.

657. General rule.]—If a person says, I'll pay you money, if A. says it is due, & A. being applied to, says it is due, but is dead at the time of the action brought, what he had said respecting the debt is evidence.—*DANIEL v. PITT* (1806), 1 Camp. 366, n.; 6 Esp. 74; Peake, Add. Cas. 238, N. P. *Annotations*:—*Consd.* *Sybray v. White* (1836), 1 M. & W. 435. *Refd.* *R. v. Mallory* (1884), 13 Q. B. D. 33.

658. —.]—In an action for work & labour, etc., one item of the demand was for £2 which had been inserted in a former bill paid by debt.; but in paying which, as pltf. alleged, she had given him a forged £2 Bank of England note. The inspector of notes proved that he carried back the note to debt., who said if she paid it away she had it from one J., & desired him to inquire of J. about it. Witness then proceeded to state what J. had told him. This evidence was allowed as debt. had referred to J. for information upon this subject.—*BROCK v. KENT* (1807), 1 Camp. 366, n.

659. Admission by arbitrator that award improperly made—Admission out of court.]—Evidence of an admission out of ct. by an arbitrator that he made his award improperly is not admissible in support of an application to set aside the award.—*Re WHITELEY & ROBERTS*, [1891] 1 Ch. 558; 60 L. J. Ch. 149; 64 L. T. 81; 39 W. R. 248; 7 T. L. R. 172.

Annotation:—*Mentd.* *Lendon v. Keen*, [1916] 1 K. B. 994.

vii. Sheriff's Officers.

See SHERIFFS & BAILIFFS.

(n) By Execution Debtor.

See SHERIFFS & BAILIFFS.

(o) By Strangers.

660. General rule.]—*ANON.* (1881), cited in 6 App. Cas. p. 500, C. A.

Compare Part III., Sect. 2, sub-sect. 8, *post*.

H. Admissibility in Particular Proceedings.

(a) In Bankruptcy Proceedings.

661. As proof of act of bankruptcy.]—*EWENS v. GOLD* (1735), Bull. N. P. 40.

Annotation:—*Refd.* *Re Prescott, Ex p. Prescott* (1840), 4 Jur. 852.

662. —.]—A declaration by bkpt. of his motives for absents himself from his home, made at the time, is evidence in an action by the assignees

against a creditor of the bkpt.'s in order to prove the act of bkpcy.—*BATEMAN v. BAILEY* (1794), 5 Term Rep. 512; 101 E. R. 288.

Annotations:—*Consd.* *Oxlade v. Perchard* (1795), 1 Esp. 287; *Rawson v. Haigh* (1824), 2 Bing. 99. *Apld.* *Newman v. Stretch* (1829), Mood. & M. 338. *Refd.* *Ridley v. Gyde* (1832), 9 Bing. 349; *Re Prescott, Ex p. Prescott* (1840), 4 Jur. 852; *Rouch v. G. W. Ry.* (1841), 1 Q. B. 51.

See, further, *BANKRUPTCY*, Vol. IV., pp. 63, 72, 76, 77, 81, Nos. 535, 615, 656, 658, 676, 719, 720.

663. As proof of petitioning creditor's debt.]—An acknowledgment by the bkpt. that before the act of bkpcy. he owed to petitioning creditor above £100 made before the suing out of the commissions is good evidence to prove petitioning creditor's debt.—*DOWTON v. CROSS* (1704), 1 Esp. 167, N. P.

Annotation:—*Consd.* *Smallcombe v. Bruges* (1824), M'Cle. 45.

664. —.]—(1) The date upon a promissory note made by bkpt. is *prima facie* evidence to show that the note existed before the act of bkpcy. was committed so as to establish a petitioning creditor's debt in an action by the assignees. (2) But no declaration by bkpt. whether oral or written, subsequent to his bkpcy., would be admissible in evidence to prove this.—*TAYLOR v. KINLOCH* (1816), 1 Stark. 175, N. P.

Annotations:—*As to* (1) *Refd.* *Obbard v. Betham* (1830), Mood. & M. 483; *Wright v. Lalson* (1837), 2 M. & W. 739; *Anderson v. Weston* (1840), 8 Scott, 583. *As to* (2) *Consd.* *Smallcombe v. Bruges* (1824), M'Cle. 45.

See, further, *BANKRUPTCY*, Vol. IV., p. 143, No. 1335.

As proof of debts.]—*See* *BANKRUPTCY*, Vol. IV., p. 327, Nos. 3071, 3072.

665. As proof of collusive bankruptcy.]—Declaration made by bkpt. previous to his bkpcy. "that he did not owe £10 to any one, & inquired whether a friendly commission could not be issued out against him"; is admissible in evidence, to show a collusion between bkpt. & petitioning creditor to create a debt, although the latter was not an assignee under the commission.—*THOMPSON v. BRIDGES* (1818), 8 Taunt. 336; 2 Moore, C. P. 376; 129 E. R. 411.

666. —.]—The declarations of petitioning creditor, since dead, made after the commission, are not evidence against the assignees, in an issue to try whether the commission was concerted between the petitioning creditor, the bkpt., & the attorney.—*HARWOOD v. KEYS* (1832), 1 Mood. & R. 204.

See, generally, *BANKRUPTCY*, Vol. IV., pp. 126 *et seq.*

667. Admissions as proof of trading.]—The declarations of a bkpt. to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bkpt.—*BRINLEY v. KING* (1825), 1 C. & P. 646; *sub nom.* *BROMLEY v. KING*, Ry. & M. 228.

Admissibility of bankrupt's admissions in other proceedings, *see* *BANKRUPTCY*, Vol. IV., pp. 341, 510 *et seq.*, Nos. 3205, 4620 *et seq.*, & p. 341, No. 3205.

(b) In Divorce Proceedings.

See HUSBAND & WIFE.

(c) In Admiralty Proceedings.

See Sub-sect. 2, G. (m) iii., *ante*, & *generally*, *ADMIRALTY*, Vol. I., pp. 199, 200.

(d) In Election Petitions.

See ELECTIONS, Vol. XX., pp. 168, 169.

(e) *In Proceedings relating to Negotiable Instruments.*

As proof of acceptance.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 65, 66, Nos. 530–533.

Proof of consideration generally.]—See BILLS OF EXCHANGE, Vol. VI., pp. 181 *et seq.*

Admissibility of evidence generally.]—See BILLS OF EXCHANGE, Vol. VI., pp. 484 *et seq.*

SUB-SECT. 3.—CONFESSIONS.

668. General rule.]—The confession of the party is evidence, but the worse sort of evidence (HOLT, C.J.).—ANON. (1701), 12 Mod. Rep. 602; 88 E. R. 1548.

In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 410 *et seq.*

Confession of forgery by dead witness.]—See Nos. 725, 761, 762, *post*.

*Compare Part III., Sect. 3, *post*.*

SUB-SECT. 4.—STATEMENTS BY DECEASED PERSONS.

*See Sect. 5, *post*.*

SECT. 5.—STATEMENTS BY DECEASED PERSONS.

SUB-SECT. 1.—IN GENERAL.

669. General rule.]—(1) It was proved that in 1859 the agent of the owner of S.'s tenement paid to him sixpence, stating verbally that it was for the lights in G.'s house:—*Held*: the agent being dead, this was evidence of payment of the rent by G. in 1859.

(2) The principle upon which written entries of a deceased person are admissible in evidence is this, that in the interest of justice where a person who might have proved important material facts in an action is dead, his statements before death relating to that fact are admissible, provided that there is a sufficient guarantee that the statements made by him are true; & it is properly considered that when the statements made by a person were against his interest, those statements in the general run of cases are true. Nor is there any distinction between the written entries of such a deceased person, under such circumstances, & his verbal declarations, although the evidence adduced to prove mere verbal declarations must of course be more carefully watched (THESIGER, L.J.).—BEWLEY v. ATKINSON (1879), 13 Ch. D. 283; 49 L. J. Ch. 153; 41 L. T. 603; 28 W. R. 638, C. A. *Annotations*:—As to (2) *Reid*. Tucker v. Oldbury U. C. (1912), 81 L. J. K. B. 668. *Generally*, *Mentd*. Mitchell v. Cantrill (1887), 37 Ch. D. 56; *Re* Thompson, *Ex p.* Baylis, [1894] 1 Q. B. 462; *Re* Jones, [1895] 2 Ch. 719; Simpson v. Godmanchester Corpn. (1895), 64 L. J. Ch. 837; Gardner v. Hodgson's Kingston Brewery Co., [1901] 2 Ch. 198; Greenhaigh v. Brindley, [1901] 2 Ch. 324; Ruscoe v. Grounell (1903), 89 L. T. 426; Bake v. French (No. 2), [1907] 2 Ch. 215; Hyman v. Van den Bergh, [1907] 2 Ch. 516; Smith v. Colbourne, [1914] 2 Ch. 533.

PART II. SECT. 4, SUB-SECT. 3.

1. *Libel & slander—Evidence of confession of criminal offence—When admissible.*—Where in an action for slander & libel, imputing criminal offences, deft. set up by way of mitigation of damages, that pltf. had confessed to a third party that he had done the acts charged against him:—*Held*: evidence of such a confession was only admissible under a plea of justification, unless deft. added on the record that she had now good cause for discrediting that part of the admission or confession alleged to have been believed to be true at the time she repeated the words complained of.—SWITZER v.

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LAIDMAN (1889), 18 O. R. 420.—CAN.

PART II. SECT. 5, SUB-SECT. 1.

m. *General rule—Greater latitude in Scotland.*—In receiving in evidence the statements of deceased persons the law of Scotland admits greater latitude than the law of England.—MACPHERSON, ETC. v. DUNCAN (1877), 4 R. (Ct. of Sess.) 87, H. L.—SCOT.

n. *Declarations by party assured—To agent of insurance company.*—The agent of a life insurance co. is competent to give evidence on behalf of such co. of any statements or acknowledgments of deceased insured in an action

670. Facts within his knowledge.]—DYSART PEERAGE CASE, No. 971, *post*.

671. Affidavit as to marriage.]—Affidavit of a dead man read to prove his marriage though taken before a surrogate, no cause being in ct.—SACHEVERELL v. SACHEVERELL (1716), 1 Stra. 35; 93 E. R. 368.

672. Declaration of person admissible as witness if alive.]—SOWTER v. BRADFIELD (1729), 1 Barn. K. B. 300; 94 E. R. 204.

673. Declaration of person not admissible as witness if alive.]—An entry by a deceased person may be evidence though he could not in his lifetime have been examined to the fact.

Those qualifications . . . always make the declarations of deceased persons evidence, namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation, & their written declarations being directly at variance with their only interest (PLUMER, M.R.).—SHORT v. LEE (1821), 2 Jac. & W. 464; 37 E. R. 705.

Annotations:—*Consd*. Gleadow v. Atkin (1833), 1 Cr. & M. 410. *Reid*. Orrett v. Corser, Corser v. Orrett (1855), 21 Beav. 52; Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130. *Mentd*. Holwell v. Blake (1824), M'Cle. 559; Fisher v. Graves (1825), M'Cle. & Yo. 362; Tomlinson v. Lymer (1831), 4 Sim. 467.

674. Declarant not compellable witness while alive.]—SUSSEX PEERAGE CASE, No. 725, *post*.

675. Deceased declarant only person with material knowledge.]—ANON. (1773), Lofft, 282; 98 E. R. 652.

676. Declarations as to deceased's own acts.]—Evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible.—GARNONS v. BARNARD (1793), 1 Anst. 290; 145 E. R. 878; *revid.* on other grounds, *sub nom.* BARNARD v. GARNONS (1797), 7 Bro. Parl. Cas. 105, H. L.

Annotations:—*Mentd*. Foxcroft v. Parris (1800), 5 Ves. 221; Kennicott v. Watson (1814), 2 Price, 250, n.; Byam v. Booth, etc. (1816), 2 Price, 231; Williams v. Price (1817), Dan. 13; Willis v. Farrer (1823), Y. & J. 217.

— *Against interest.*—*See* Sub-sect. 2, *post*.

— *In discharge of duty or course of business.*—

—*See* Sub-sect. 3, *post*.

677. Declarations as to settlement.]—R. v. HENSINGHAM (INHABITANTS) (1782), Cald. Mag. Cas. 206; 2 Bott. 4th ed. p. 91, pl. 131.

Annotation:—*Reid*. R. v. St. Mary, Beverley (1830), 1 B. & Ad. 201.

678. —.]—R. v. ERISWELL (INHABITANTS), No. 454, *ante*.

679. —.]—Hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information respecting her own settlement were dead.—R. v. CHADERTON (INHABITANTS) (1801), 2 East, 27; 102 E. R. 278.

Annotations:—*Mentd*. R. v. Chatham (1807), 8 East, 498; R. v. St. Giles in the Fields (1844), 5 Q. B. 872.

680. —.]—Neither the hearsay of a pauper

by his exor. or administrator against such co.—CONFEDERATION LIFE ASSOCN. CO. OF CANADA v. O'DONNELL (1879), Cass. Dig. 208.—CAN.

o. *Gift to daughter—Subsequent verbal declaration of trust inadmissible.*—Pltf. & deft. were sisters. Their father shortly before his death, transferred certain money in the Govt. Savings Bank & certain bank deposit receipts into the name of deft., under circumstances *prima facie* importing an advancement:—*Held*: evidence of subsequent declaration by the father was not admissible to show an intention that the money should be held by deft. in trust for herself & pltf.—

H

Sect. 5.—Statements by deceased persons: Sub-sects.

who is dead nor his *ex parte* examination in writing taken on oath before two magistrates touching his settlement, are admissible evidence of such settlement.—*R. v. FERRY FRYSTONE (INHABITANTS)* (1801), 2 East, 54; 102 E. R. 289.

681. —[An *ex parte* examination in writing of a pauper touching his settlement cannot be received in evidence of such settlement though he be dead.—*R. v. ABERGWILLY (INHABITANTS)* (1801), 2 East, 63; 102 E. R. 292.

682. —[*R. v. ERITH (INHABITANTS)*, No. 930, *post*.

683. **Declarations as to indenture of apprenticeship.**—The statement of a deceased person respecting his indenture of apprenticeship is not admissible to prove that the deed ever existed.—*R. v. FORDINGBRIDGE (INHABITANTS)* (1858), E. B. & E. 678; 27 L. J. M. C. 290; 31 L. T. O. S. 197; 23 J. P. 38; 4 Jur. N. S. 951; 6 W. R. 649; 120 E. R. 604.

See, generally, POOR LAW.

Declarations by tenants or occupiers of lands—As admission against interest.—*See* Nos. 792-801, *post*.

684. **As corroborative evidence.**—The declaration of a dead person is good admissible proof in support of other witnesses, but not of itself sufficient to support facts contrary to his own acts.—*ROBINS v. WOLSELEY* (1757), 2 Lee, 421.
Annotation:—Mentd. Anon. (1857), Dea. & Sw. 295.

Evidence given at former trial—Witness since dead.—*See* Sect. 10, *post*.

685. **Allegation of undue influence on testator—Declarations of party exercising influence—Not in presence of testator.**—In a probate suit deft. alleged that the will propounded by the exors. had been obtained by the undue influence of one C., who died a few days before the execution of the will. C.'s estate was not represented in the suit:—*Held*: evidence of a statement by C., not in the presence of testator, was admissible so far as it went to the plea of undue influence.—*RADFORD v. RISDON* (1912), 28 T. L. R. 342; 56 Sol. Jo. 416.

686. **Declarations by party assured—To medical attendant—As to state of health.**—In an action by the husband upon a policy of insurance on the life of his wife, declarations by the wife made by her when lying in bed apparently ill, stating the bad state of her health at the period of her going to M., whither she went a few days before in order to be examined by a surgeon & to get a certificate from him of good health preparatory to making the insurance, down to that time, & her apprehensions that she could not live ten days longer,

by which time the policy was to be returned, are admissible in evidence to show her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to M., & the day on which such declarations were made. Particularly after *pltf.* had called the surgeon as a witness to prove that she was in a good state of health when examined by him at M.; his judgment being formed in part from the satisfactory answers given by her to his inquiries.—*AYESON v. KINNAIRD (LORD)* (1805), 6 East, 188; 102 E. R. 1258; *sub nom.* *AYISON v. KINNAIRD (LORD)*, 2 Smith, K. B. 286.

Annotations:—Reid. R. v. Foster (1834), 6 C. & P. 325; *Stobart v. Dryden* (1836), 2 Gale, 146; *Gilbey v. G. W. Tr.* (1910), 102 L. T. 202. *Mentd. Doe d. Sutton v. Ridgway* (1820), 4 B. & Ald. 53; *R. v. Mead* (1824), 4 Dow. & Ry. K. B. 120; *R. v. Osborne* (1842), Car. & M. 622; *Witt v. Witt & Kilnworth* (1862), 3 Sw. & Tr. 143; *R. v. Black* (1922), 16 Cr. App. Rep. 118.

687. —**As evidence of intention to insure.**—*SHILLING v. ACCIDENTAL DEATH INSURANCE CO.*, No. 301, *ante*.

SUB-SECT. 2.—DECLARATIONS AGAINST INTEREST.**A. In General.**

688. **General rule.**—If a person have peculiar means of knowing a fact, & make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death, if have been examined to it in his lifetime. Therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery.—*HIGHAM v. RIDGWAY* (1808), 10 East, 109; 103 E. R. 717.

Annotations:—Consd. Short v. Lee (1821), 2 Jac. & W. 464. *Apld. Middleton v. Melton* (1829), 10 B. & C. 317. *Consd. Gleadow v. Atkin* (1833), 1 Cr. & M. 410. *Apld. Marks v. Lahee* (1837), 3 Bing. N. C. 408; *Davies v. Humphreys* (1840), 6 M. & W. 153. *Expld. Sussex Peerage* (1844), 11 Cl. & Fin. 85. *Consd. Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456; *Percival v. Nanson* (1851), 7 Exch. 1; *Bradley v. James* (1853), 13 C. B. 822. *Distd. Webster v. Webster* (1858), 1 F. & F. 401. *Apld. R. v. Birmingham Overseers* (1861), 1 B. & S. 763. *Consd. Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Whaley v. Carlisle* (1867), 15 W. R. 1183; *R. v. Exeter* (1869), L. R. 4 Q. B. 341. *Apld. In the Goods of Thomas* (1871), 41 L. J. P. & M. 32. *Reid. Chambers v. Bernasconi* (1831), 1 Cr. & J. 451; *Davies v. Morgan* (1831), 1 Tyr. 457. *Chambers v. Bernasconi* (1834), 4 Tyr. 531; *R. v. Lower Heyford* (1840), 2 Sm. L. C. 12th ed. 313; *Edie v. Kingsford* (1854), 14 C. B. 759; *Orrett v. Corser*, *Corser v. Orrett* (1855),

COLLETT v. NAIRN (1899), 9 Q. L. J. 164.—**AUS.**

p. Action against administrators after issue joined—Declarations of deceased debtors—Whether admissible.—C. sued M. & R., M. accepted service & acknowledged amount due, but R. pleaded to the action. Before trial both defts. died. Then C. R. & R., as administrators of R., were, before trial, made parties to the action. At the trial C. was examined as a witness in support of his own case, & when asked what had taken place between him & deceased M. & R., the judge ruled that the evidence was inadmissible:—*Held*: in an action against administrators made parties to an action after issue joined, but before trial, *pltf.* could not give any evidence in his own favour of dealings with a deceased deft.—*CHESLEY v. MURDOCH* (1877), 2 S. C. 48.—**CAN.**

q. Declaration of agency—Not admissible against alleged principal.—

Evidence of an admission made by a deceased person that he was the agent of another is not receivable in evidence as against that person.—*CONFEDERATION LIFE ASSOCN. CO. OF CANADA v. O'DONNELL* (1889), Cam. Cas. 154.—**CAN.**

PART II. SECT. 5, SUB-SECT. 2.—A.

688 i. **General rule.**—In an action charging a person as exor. *de son tort* by meddling with the goods of deceased, a declaration of deceased, while in possession, that the goods did not belong to him, is evidence for deft.—*POWELL v. WATHEN* (1862), 5 All. 258.—**CAN.**

688 ii. —[In general, declarations of a deceased person against his own interests are admissible.—*EVANS v. TRUSTS & GUARANTEE CO.*, [1920] 3 W. W. R. 103.—**CAN.**

688 iii. —[Where a father purchases property in the names of his

sons, the law presumes that it is an advancement; but this is a secondary presumption which rebuts the primary presumption of a resulting trust which arises when a person purchases property in the name of another. The father being dead contemporaneous statements & acts, & subsequent statements made by him against his interest are evidence to show what his real intention was.—*LE LEUNG SHI v. LO LIM YU* (1912), 7 Hong Kong L. R. 66.—**HONG KONG.**

688 iv. —[Declaration of F. deceased, that her husband made a will, & that he thereby gave her a life interest in his property & legacies to others amounting to £8,000 or £9,000, admitted in evidence as being a declaration against pecuniary or proprietary interest made by a deceased person on the ground that F. would, if her husband had died intestate, have been entitled absolutely to a moiety of a certain sum mentioned in a marriage

21 Beav. 52; *Watson v. Little* (1860), 5 H. & N. 472; *Turner v. Hutchinson* (1861), 3 L. T. 815; *Milne v. Lelander* (1862), 7 H. & N. 786; *Taylor v. Witham*, *Witham v. Taylor* (1876), 24 W. R. 877; *Bewley v. Atkinson* (1879), 13 Ch. D. 283; *Sturle v. Freccio* (1880), 5 App. Cas. 623; *Haines v. Guthrie* (1884), 13 Q. B. D. 818; *Bradshaw v. Widdington* (1902), 71 L. J. Ch. 627; *Mercer v. Denne*, [1905] 2 Ch. 538; *Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130. **Mentd.** *Papendick v. Bridgwater* (1855), 5 E. & B. 166.

689. —.]—Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the Dean & Chapter of E., entitled Rentals, & containing columns of the names of their estates with the rents reserved on each, & *solvits* written in different hand-writings against such rents, were entries made by the receivers of the dean & chapter charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by showing that the receivers of the dean & chapter for the last sixty years had kept their books of accounts in the same form. But it appearing that some of the entries in such books, though not the entries as to the rent of the estate in question, contained internal evidence of their being the books of receivers; by such entries as "*solvit mihi*," & "*solvit per me*." Signed with the initials N. W.; which entries imported that N. W. was therein accounting to the dean & chapter for money paid to himself, & with the receipt of which he debited himself; the ct. directed a new trial, in order to have the inspection of the books again submitted to the judge at *Nisi Prius*.—*Doe d. WEBBER v. THYNNE* (1808), 10 East, 206; 103 E. R. 753.

690. —.]—It is no objection to the admissibility of a book, containing an account in which a deceased receiver charges himself with money paid to him, that, on the opposite side of the account, the receiver discharges himself to the same extent, or that the account, being in his handwriting, is not signed by him; or that the name of the party on whose account the money is received, does not appear in the book, it being shown *aliunde*, that the person making the entry did not receive the money on his own account. An entry in a man's own handwriting, charging himself with the receipt of money, is evidence after the party's death.—*Rowe v. BRENTON* (1828), 8 B. & C. 737; 2 State Tr. N. S. 251; 3 Man. & Ry. K. B. 133; *Concanen's Rep.* 1; 108 E. R. 1217.

Annotations:—Mentd. *Doe d. Carthew v. Brenton* (1830), 4 Moo. & P. 186; *Whittingham v. Bloxham* (1831), 4 C. & P. 597; *Evans v. Taylor* (1838), 7 Ad. & El. 617; *R. v. Richmond Manor* (1841), 5 Jur. 605; *Anglesey v. Hatherton* (1842), 10 M. & W. 218; *Doe d. William IV. v. Roberts* (1845), 13 M. & W. 520; *Doe d. David v. Thompson* (1845), 7 Q. B. 897; *Rogers v. Rogers* (1847), 10 Q. B. 26; *Ex p. Exeter (Bp.)* (1850), 10 C. B. 102; *Shaw v. Beck* (1853), 8 Exch. 392; *Jessop v. Jessop* (1861), 30 L. J. P. M. & A. 193; *A. G. to Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381; *Dixon v. Farrer* (1886), 18 Q. B. D. 43; *Sutton Harbour Improvement Co. v. Plymouth Town Grdms.* (1890), 63 L. T. 772; *Mercer v. Denne*, [1905] 2 Ch. 538.

691. —.]—The rent-rolls of an estate were inscribed, & were drawn out in four columns. The first & second columns, containing the tenants' names, & the amount to be paid by each, were in the handwriting of the owner of the estate. The third & fourth columns, containing the amount

actually received of each tenant, & the date when received, were in the handwriting of a deceased steward:—**Held:** these rent-rolls were receivable in evidence as accounts of a deceased steward charging himself.—*Doe d. BODENHAM v. COLCOMBE* (1841), Car. & M. 155.

692. —.]—In an action by an exor. for work done by testator, it appeared that the claim was for extras & alterations in a machine which had been made by testator for deft. under a written contract which was not produced. It appeared that the contract price of the machine had been paid: &, in order to show that deft. had assented to the alterations, evidence was offered, & received, of a declaration by deceased that deft. had paid him £20 on account:—**Semle:** this declaration was properly received, as being an admission against the interest of the party making it.—*EDIE v. KINGSFORD* (1854), 14 C. B. 759; 23 L. J. C. P. 123; 139 E. R. 311; *sub nom.* *EDYE v. KINGSFORD*, 2 C. L. R. 832.

693. **Principles governing admission.**—Where A., tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants & rents of the estate, which letter the tenant for life indorsed "a particular of my estate," etc., & handed down to B. the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved & handed amongst the muniments of the estate to the first tenant in tail:—**Held:** (1) such paper was evidence for the tenant in tail against a lessee of B., in order to show that the rent reserved by B., the tenant for life, was less than the ancient rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, & who had an interest the other way, viz., to diminish the rent in order to increase his fine upon renewal under the power; (2) entries by A., the tenant for life, in his book of the receipt of the rent to the amount stated, were also evidence of the same fact.—*ROE d. BRUNE v. RAWLINGS* (1806), 7 East, 279; 3 Smith, K. B. 254; 103 E. R. 107.

Annotations:—As to (1) *Apld.* *Higham v. Ridgway* (1808), 10 East, 109. **Consd.** *Gleadow v. Atkin* (1835), 1 Cr. & M. 410; *Haines v. Guthrie* (1884), 13 Q. B. D. 818. **Refd.** *Doe v. Robson* (1812), 15 East, 32; *Marks v. Lahee* (1837), 3 Bing. N. C. 408; *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *R. v. Birmingham Overseers* (1861), 1 B. & S. 763. **Generally, Mentd.** *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703; *Lorton v. Kingston* (1838), 5 Cl. & Fin. 269.

694. —.]—Entries of charges made by an attorney in his books, showing the time when a certain lease prepared for a client of his was executed; which charges were shown to have been paid; are evidence after the attorney's death, to show that the lease executed under a power to lease in possession & not in reversion, which lease bore date Aug. 31, 1770, & purported to grant a term from Sept. 20 then next ensuing, was not in fact executed till after Sept. 29, inasmuch as the charge for drawing & engrossing the lease was under the date of "Oct. 1770."

If a party who has knowledge of the fact make an entry of it, whereby he charges himself, or discharges another upon whom he would otherwise

settlement.—*FLOOD v. RUSSELL* (1892), 29 L. R. Ir. 91.—**IR.**

r. Entries in cash-book.—Showing receipt of rent.—In ejectment for a cottage, deft. claimed by length of possession, which she proved. The widow of T., deceased, who had owned the property, stated that deft.'s hus-

band came to live in the cottage, which was on T.'s farm, as T.'s servant, paying no rent; that deft., on her husband's death in 1866, remained in the house, & in 1870 agreed with T. to pay him \$1 a month rent which she paid every three months until the fall of 1873. T. died in Jan. 1873:—**Held:**

the following & similar entries in T.'s cash-book, in his handwriting, relating to deft.:—"1871, Feb., Mrs. D. (def't.) \$3; May, Mrs. D., \$3; Aug. 1, Mrs. D., \$3," etc., were admissible, as entries against interest.—*TURNER v. DEWAN* (1877), 41 U. C. R. 361.—**CAN.**

s. Declaration by deceased bishop

Sect. 5.—Statements by deceased persons : Sub-sect.

have a claim, such entry is admissible in evidence of the fact, because it is against his own interest (BAYLEY, J.).—DOE, LESSEE OF REECE *v.* ROBSON (1812), 15 East, 32; 104 E. R. 756.

Annotations:—*Consd.* Bullen *v.* Michel (1816), 2 Price, 399; Short *v.* Lee (1821), 2 Jac. & W. 464; Gleadow *v.* Atkin (1833), 1 Cr. & M. 410. *Apld.* Davies *v.* Humphreys (1840), 6 M. & W. 153. *Consd.* Doe d. Kinglake *v.* Beviss (1849), 7 C. B. 456. *Refd.* Chambers *v.* Bernasconi (1831), 1 Cr. & J. 451; Chambers *v.* Bernasconi (1834), 1 Cr. M. & R. 347.

695. —.]—SHORT *v.* LEE, No. 673, *ante*.

696. —.]—MIDDLETON *v.* MELTON, No. 782, *post*.

697. —.]—An endorsement by obligee of a bond, either contemporaneously with the execution of the bond, or before the presumption of satisfaction arises, of a fact peculiarly within his own knowledge, against his own interest, & which he has no interest to misrepresent, is admissible in evidence for himself or his representatives, in an action on the bond. Thus, in an action by exors. of obligee against exors. of obligor, on a bond more than twenty years old, an endorsement by obligee, that the money secured was trust-money, which appeared to have been made contemporaneously with the execution of the bond, but was not proved to have been seen by obligor:—*Held*: admissible for the purpose of applying a payment of interest to the *cestui que trust* to the bond, to repel the presumption of satisfaction.—GLEADOW *v.* ATKIN (1833), 1 Cr. & M. 410; 3 Tyr. 289; 2 L. J. Ex. 153.

Annotations:—*Apld.* Marks *v.* Laheo (1837), 3 Bing. N. C. 408. *Refd.* Briggs *v.* Wilson (1854), 5 De G. M. & G. 12; Edey *v.* Kingsford (1854), 2 C. L. R. 832; Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130.

698. —.]—PERCIVAL *v.* NANSON, No. 726, *post*.

699. —.]—BEWLEY *v.* ATKINSON, No. 669, *ante*.

700. —.]—The admissibility in evidence of statements by a deceased person as being against his interest is governed by the following rules: (a) deceased must have made a statement of some fact of the truth of which he had peculiar knowledge. The rule applies only as to acts done by deceased & not by third parties; (b) such fact must have been to deceased's immediate prejudice—that is, against his interest at the time when he stated it; (c) deceased must have known the fact to be against his interest when he stated it; (d) the interest to which the statement must be adverse must be a pecuniary or a proprietary one.

Seemle: a statement of a contract is not in itself a statement against interest.—WARD *v.* PITT (H. S.) & Co., LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., [1913] 2 K. B. 130; 82 L. J. K. B. 533; 108 L. T. 201; 29 T. L. R. 291; 57 Sol. Jo. 301; 6 B. W. C. C. 142, C. A.; *revid.* on other grounds, *sub nom.* LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., LTD., [1914] A. C. 733, H. L.

Annotation:—*Refd.* *Re* Wright, Hegan *v.* Bloor, [1920] 1 Ch. 108.

701. **Must be certain.**]—HADDOW *v.* PARRY, No. 777, *post*.

702. **Must be made ante litem motam.**]—EDIE *v.* KINGSFORD, No. 749, *post*.

—*Whether binding on successor.*—MEATH (BP.) *v.* WINCHESTER (MARQUIS) (1833), Alc. & N. 508.—IR.

t. *Not admissible against third*

parties.]—An account stated between a judgment debtor & his creditor, in which the latter admits payments on account, & a balance is struck of the sum due, cannot, after the parties'

B. Form of Declaration.

703. **Whether oral declaration admissible.**]—*Qu.*: whether a verbal statement, made by a deceased collector of rents, at the time of paying over to his employer monies received by him from the tenants as to the person from whom he received a particular sum entered by him in the rental, is admissible in evidence against that person.—FURSDON *v.* CLOGG (1842), 10 M. & W. 572; 152 E. R. 599.

Annotation:—*Consd.* Papendick *v.* Bridgwater (1855), 24 L. J. Q. B. 289.

704. —.]—In an action by an exor. to recover a debt due to the estate, a parol statement by testator against his pecuniary interest with reference to such debt is admissible.—WATSON *v.* SANDFORD (1879), 40 L. T. 39.

705. **May be written or oral.**]—The principle laid down in *Higham v. Ridgway*, No. 688, *ante*, that entries made by a deceased person against his pecuniary interest are receivable to prove collateral facts, is applicable also to declarations cutting down the proprietary interest of the person making them; & there is no difference, for this purpose, between written & oral declarations.

Where, therefore, in order to prove the settlement of a pauper, a witness swore that the deceased father of the pauper made to him a verbal statement that he, the father, occupied a tenement in the parish sought to be charged, at a yearly rent of £20, such statement being made during the occupation:—*Held*: the statement, being one which tended to cut down & explain the interest of the father in the tenement in his occupation, was admissible in evidence to prove the amount of the rent.—R. *v.* BIRMINGHAM OVERSEERS (1861), 1 B. & S. 763; 31 L. J. M. C. 63; 5 L. T. 309; 26 J. P. 198; 10 W. R. 41; 121 E. R. 897; *sub nom.* KINGSWOOD (INHABITANTS) *v.* BIRMINGHAM (INHABITANTS), 8 Jur. N. S. 37.

Annotations:—*Apld.* R. *v.* Exeter (1869), L. R. 4 Q. B. 341. *Consd.* Ward *v.* Pitt, Lloyd *v.* Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130. *Refd.* Watson *v.* Sandford (1879), 40 L. T. 39; *Re* Adams, Beiton *v.* Powell, [1922] P. 240.

706. —.]—BEWLEY *v.* ATKINSON, No. 669, *ante*.

707. **May be by conduct—Entering on allotment under enclosure award.**]—In 1818, R. enclosed a piece of land of 11 perches lying by the side of a lane which was a highway in the manor of W. At that time G. was the owner in fee of the adjoining freehold land. In 1820 G. died having devised his estates to H. W. G. for life with remainders over. In 1836 a private Act was passed by which comrs. were empowered to enclose & allot the wastes of the manor, including encroachments made within 20 years of the passing of the Act & pieces of waste land lying by the sides of any public roads or lanes. In 1837 R. died & W. F. R., his heir, took possession of the 11 perches. In 1838 the comrs. made & published their award by which they awarded to H. W. G. two allotments, one of 24 perches which included the 11 perches, & another of 29 perches, similarly situate. H. W. G. took possession of the second allotment; but W. F. R. remained in possession of the piece of 11 perches till he sold it in 1859 to deft. In 1874 H. W. G. died & pltf. succeeded to the estate under the will of G. He then brought ejectment against deft. to recover the 11 perches:—*Held*: the admission of H. W. G. against his

deaths, be made use of in evidence, as an admission against interest, to prove these payments against third persons.—FOSTER *v.* M'MAHON (1847), 11 I. Eq. R. 287.—IR.

interest by accepting the allotment under the award, was strong evidence that the land was waste of the manor, & rebutted the presumption arising from the situation of the slips of land that they belonged to him as owner of the adjoining land. Consequently pltf.'s right of entry commenced from the time of the award, when there was a tenancy for life, & not from 1818; therefore Stat. Limitations had not run against pltf. & he was entitled to recover.—*GERY v. REDMAN* (1875), 1 Q. B. D. 161; 45 L. J. Q. B. 267; *sub nom. REDMAN v. GERY*, 24 W. R. 270.

708. Sufficiency of acknowledgment of receipts.]

—In an action by the corpn. of Exeter, for petty customs & port duties payable on goods landed at T., pltf.s., to show the receipt of such dues in former times, produced a series of accounts purporting to be of the receipts by the receivers of the city. It was proved that the receivers accounts were regularly audited, & that no one could, at the time to which the evidence related, be mayor till he had been receiver & had his accounts audited. Down to a certain time, the accounts were not signed at all; afterwards they were regularly signed by the auditors only. One entry of the latter class stated the receipt by B., a receiver, of a sum for town dues from W.; & with this entry, was found a paper stating that W. had received a sum for town dues, almost exactly corresponding with that stated in the entry, & at the time of which it bore date. No evidence was given as to the handwriting of the latter paper. B. & W. were both dead. The documents were more than thirty years old. No one of them stated the receipt to be "by me"; but the third person was used:—*Held*: all the documents were admissible evidence.—*EXETER CORPN. v. WARREN* (1844), 5 Q. B. 773; 1 Dav. & Mer. 524; 8 J. P. 181; 8 Jur. 441; 114 E. R. 1441.

Annotations:—*Consol. A.-G. v. Stephens* (1855), 1 K. & J. 724. *Mentd.* *Whitstable Free Fishers v. Foreman* (1868), L. R. 3 C. P. 578.

709. Endorsement by principal on agent's account.]—ROE d. BRUNE v. RAWLINGS, No. 693, ante.

710. Entry not in declarant's handwriting—Adopted by declarant—By signature.]—BARRY v. BEBBINGTON, No. 732, post.

711. ———.]—Entries, signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable in evidence.—*DOE d. LICHFIELD (EARL) v. STACEY* (1833), 6 C. & P. 139, N. P.

712. ——— Memorandum written thereon.]—DOE d. STURT v. MOBBS, No. 347, ante.

713. ——— Presented for auditing.]—

Entries, in the account book of a deceased steward, of the receipt of money by the steward, in the handwriting of his clerk, is evidence of such receipt, although the clerk who made the entries is alive & not called as a witness, where it appears that the steward adopted such entries by presenting them to be audited.—*DOE d. GRAHAM v. HAWKINS* (1841), 2 Q. B. 212; 1 Gal. & Dav. 551; 10 L. J. Q. B. 285; 6 Jur. 215; 114 E. R. 83.

714. ——— Account submitted to employer.]

—E., now dead, a clerk to pltf., submitted to pltf. a book containing entries in the handwriting of F., which charged E. with the receipt of interest on a sum owing by R. & W. to pltf.:—*Held*: evidence could be given of E.'s so doing, as of a parol representation made by him against his interest.—*KETTLEWELL v. WATSON* (1882), as reported in 30 W. R. 402; *on appeal* (1884), 26 Ch. D. 501, C. A.

Annotations:—*Mentd.* *National Provincial Bank of England*

v. Jackson (1888), 33 Ch. D. 1; *Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182; *Re Payne, Young v. Payne*, [1904] 2 Ch. 608; *Berwick v. Price*, [1905] 1 Ch. 632; *Manks v. Whiteley*, [1912] 1 Ch. 735; *Barker v. Stickney*, [1919] 1 K. B. 121.

715. ——— Entries made by declarant's son—With declarant's authority.]—DOE d. STURT v. MOBBS, No. 347, ante.

716. Unsigned account—Supported by signed account.]—A paper, signed by a deceased steward, charged him with the receipt of a gross sum. In the same box was found an ancient rental, in the same handwriting, but unsigned, containing an account of items, which, added together, made up the gross sum with which the deceased steward so debited himself:—*Held*: admissible in evidence.—*MUSGRAVE v. EMMERSON* (1847), 10 Q. B. 326; 16 L. J. Q. B. 174; 9 L. T. O. S. 36; 11 Jur. 732; 116 E. R. 126.

Annotation:—*Reid. Doe d. Kinglake v. Bevis* (1849), 18 L. J. C. P. 128.

717. ———.]—In ejectment, the question being whether the premises were parcel or no parcel of a manor, lessor of pltf. produced from his muniments, books purporting to be the books of J. V., steward to pltf.'s ancestor, the then Earl of A. In one of those books J. V. was debited, in 1782, with the receipt of rent for the premises in question. The balance of the account for the half year was struck but was not signed: under it was written in a different hand "The above balance is accounted for in a general statement at the end of the year's account ending Michaelmas 1793, entered in a subsequent book." This entry was dated Feb. 18, 1795, & was signed by the then earl & by "J. V. jun." The balance was carried down in the account, & balances were struck in each half year: none were signed by J. V.; but under each was a similar entry signed by the earl & J. V. jun. until the end of the last book, where was entered: "Balance due to J. V., £70, Feb. 18, 1795. The above account was this day settled; & the balance, £76, due thereon to J. V. sen., was paid by the Earl of A. to J. V. jun., & the vouchers delivered up to his lordship." This was signed by the earl & J. V. jun. No evidence was given of the character or position of J. V. jun., or that he was dead, or that he had ever existed:—*Held*: inasmuch as the entry was produced from the proper custody, & purported to be 55 years old, it was not necessary to prove that J. V. jun. was dead. Inasmuch as J. V. jun. charged himself with the receipt of the last balance, & the entry of the payment of rent was part of the balance in that year which was carried down so as to form part of the last balance, the entry was admissible evidence of the payment of rent.—*DOE d. ASHBURNHAM (LORD) v. MICHAEL* (1851), 17 Q. B. 276; 20 L. J. Q. B. 480; 17 L. T. O. S. 154; 15 Jur. 677; 117 E. R. 1286.

718. ——— Rights of parochial chapelry.]—CARR v. MOSTYN, No. 806, post.

719. Entries in books of firm—Whether declarations by deceased partner.]—Entries made in books of account kept by firm of solrs. showing moneys received & paid by them on behalf of the trust estate are not admissible in evidence against the trustees as an acknowledgment of liability by them after the death of one partner in the firm on the mere ground of being entries against interest by the deceased partner, at any rate where they are not shown to have been made by him personally or by his personal direction.—*Re FOUNTAINE, Re DOWLER, FOUNTAINE v. AMHERST (LORD)*, [1909] 2 Ch. 382; 78 L. J. Ch. 648; 101 L. T. 83; 25 T. L. R. 689, C. A.

Sect. 5.—Statements by deceased persons : Sub-sect. 2, C., D. & E. (a).]

C. Proof of Death of Declarant.

720. Whether necessary.]—In an action against the overseers of a parish, the books of a deceased overseer are not admissible for debts without proof of his death. *Qu.*: whether his handwriting must be proved.—*DOE d. ROBINSON v. HIRD* (1843), 1 L. T. O. S. 58, N. P.; *subsequent proceedings*, 7 J. P. 290.

Annotation:—*Mentd.* *Doe d. Edney v. Benham, Doe d. Edney v. Billett* (1845), 7 Q. B. 976.

721. When presumed—Ancient document.]—*DOE d. ASHBURNHAM (LORD) v. MICHAEL*, No. 717, *ante*.

722. —Solicitor absconding nine years before.]—*WILLS v. PALMER*, No. 786, *post*.

723. Entries by clerk of deceased declarant—Clerk still alive.]—*DOE d. GRAHAM v. HAWKINS*, No. 713, *ante*.

Presumption of death generally, *see* Part III., Sect. 6, sub-sect. 6, *post*.

D. Whether Personal Knowledge Necessary.

724. General rule.]—(1) An entry by a deceased person charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge.

(2) Ancient answers of conventional tenants of a manor, stating the rights of the lord of manor, are admissible in evidence even against the freeholders of the manor, but, if they state facts only, *e.g.* that "the commons of the manor do belong to the tenants of the manor unstinted, who have always enjoyed the same under the yearly rent of 33s. 4d. as by the records thereof remaining with the auditor of the duchy appeareth; unto which, for the more certainty, we refer ourselves," they are not admissible in evidence.

(3) Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible in evidence: *aliter*, if spoken of the extent of the wastes only.—*CREASE v. BARRETT* (1835), 1 Cr. M. & R. 919; 5 Tyr. 458; 4 L. J. Ex. 297; 149 E. R. 1353.

Annotations:—*As to (1)* *Consd.* *Doe d. Welsh v. Langfield* (1847), 16 M. & W. 497. *Reid.* *Beaufort v. Smith* (1849), 4 Exch. 450; *Hammond v. Bradstreet* (1854), 2 C. L. R. 1195; *Hardcastle v. Dennison* (1861), 10 C. B. N. S. 606; *R. v. Norfolk County Council* (1910), 26 T. L. R. 269. *As to (2)* *Consd.* *Evans v. Taylor* (1838), 7 Ad. & El. 617; *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578. *Generally Mentd.* *De Rutzen v. Farr* (1835), 4 Ad. & El. 53; *Doe d. Tatham v. Wright* (1836), 1 Har. & W. 729; *Ward v. Suffolk* (1839), 5 Bing. N. C. 381; *Mortimer v. McCallan* (1840), 6 M. & W. 58; *Gerish v. Chartier* (1845), 1 C. B. 13; *Hughes v. Hughes* (1846), 15 M. & W. 701; *Quilter v. Jorss* (1863), 14 C. B. N. S. 747; *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.* (1873), L. R. 8 C. P. 685; *Mors-Le-Blanch v. Wilson* (1873), L. R. 8 C. P. 227.

725. ——(1) The next ground of argument is that in all cases where the party has known the facts & is dead, & has made declarations & these declarations are against his interest, & would, if he had been living, subject him to a prosecution, such declarations are receivable in evidence. That is the broad & general proposition. That proposition cannot be sustained (LORD LYNDEHURST, C.).

(2) It is not true that the declarations of deceased persons are in all circumstances receivable in evidence, when in some way or other they might injuriously affect the interest of the party making them (LORD LYNDEHURST, C.).

(3) Nor is it true that because, while living, a party would be excused from answering as to certain facts, his declarations as to those facts become evidence after his death (LORD LYNDEHURST, C.).

(4) In the first place we must see that the evidence there was admitted, not because the subject matter of the declaration was within the peculiar knowledge of the party making the declaration, but that it was a declaration made against an interest of a very specific nature, viz., a pecuniary interest (LORD BROUGHAM).

(5) The rule, as understood now, is that the only declarations of deceased persons receivable in evidence made against the proprietary or pecuniary interest of the party making them, when the subject matter of such declarations is within the peculiar knowledge of the party so making them (LORD BROUGHAM).—*SUSSEX PEERAGE CASE* (1844), 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 8 Jur. 793; 8 E. R. 1034, H. L.

Annotations:—*As to (1)* *Reid.* *Papendiek v. Bridgewater* (1855), 5 E. & B. 166; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130. *As to (5)* *Consd.* *Periak Petroleum Maatschappij v. Deen*, [1924] 1 K. B. 111. *Reid.* *Davis v. Lloyd* (1844), 1 Car. & Kir. 275; *Stapylton v. Clough* (1853), 2 E. & B. 933; *Bright v. Legerton* (No. 1) (1860), 29 Bear. 60; *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Whaley v. Carlisle* (1867), 15 W. R. 1183; *Re Lambert* (1886), 56 L. J. Ch. 122; *Tucker v. Oldbury U. C.*, [1912] 2 K. B. 317; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130. *Generally Mentd.* *Vander Donckt v. Thellusson* (1849), 8 C. B. 812; *Leroux v. Brown* (1852), 12 C. B. 801; *R. v. Povey* (1852), *Dears. C. C.* 32; *Fenton v. Livingstone, Livingstone v. Livingstone* (1859), 5 Jur. N. S. 1183; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *A.-G. v. Sillem* (1863), 2 H. & C. 431; *Di Sora v. Philipps* (1868), 10 H. L. Cas. 624; *Re Coppin* (1866), 2 Ch. App. 47; *Gaudet v. Brown, Gelpel v. Cornforth (Cargo Ex.) Argos, The Hewsons* (1873), L. R. 6 P. C. 134; *Rowley v. L. & N. W. Ry.* (1873), 29 L. T. 180; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Special Purposes Income Tax Comrs. v. Pömsel*, [1891] A. C. 531; *R. v. City of London Court Judge*, [1892] 1 Q. B. 273; *R. v. Brixton Prison, Re Percival* (1907), 76 L. J. K. B. 619; *R. v. Dibden*, [1910] P. 57; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Re Bosler*, [1915] 1 K. B. 21; *R. v. Naguib*, [1917] 1 K. B. 359; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414; *Bourne v. Keane*, [1919] A. C. 815; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

726. ——(1) On an issue as to the right of L. to a certain fishery, entries of a deceased receiver, charging himself with the receipt of rent from a sub-receiver, due from certain persons, of whom the sub-receiver was one, for fixing a net in the fishery, are evidence in support of L.'s right.

(2) If a person have peculiar means of knowing a fact, & make a declaration or written entry of that fact, which is against his interest at the time, it is evidence of that fact, as between third persons, after his death (PARKES, B.).

(3) If an entry is admissible as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, it does not go beyond those matters which it was his duty to enter (POLLOCK, C.B.).—*PERCIVAL v. NANSON* (1851), 7 Exch. 1; 21 L. J. Ex. 1; 155 E. R. 830.

727. ——*WARD v. PITT* (H. S.) & Co., *LLOYD v. POWELL DUFFRYN STEAM COAL CO.*, No. 700, *ante*.

See, also, Nos. 673, 688, 693, 694, 697, *ante*.

E. Must be against Interest.

(a) In General.

728. General rule.]—On the question whether a place is parcel of a certain parish, old entries

PART II. SECT. 5, SUB-SECT. 2.—E. (a).

7281. General rule.]—Where a person

in possession of land as caretaker for the owner, expresses to a third person an intention to hold it for his own

benefit, such statement is not against his interest, so as to make evidence of it admissible after his death.

made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs, etc., done to a chapel in the parish church, alleged to belong to the place in question are not evidence. A matter of history is not evidence. General reputation may perhaps be evidence, but not a statement of particular facts.—*COOKE v. BANKS* (1826), 2 C. & P. 478, N. P.

Annotation:—*Refd.* *Fowke v. Berrington*, [1914] 2 Ch. 308.

729. —[—]—On the trial of an appeal, resps., to defeat an alleged settlement by hiring & service in 1824, 1825, produced a book in which the master, then dead, had kept minutes of his contracts with servants, & which contained the following entries in his writing. "Apr. 4, 1824. W. W., [the pauper] "came; & to have for the half year 40s. Sept. 29. Paid this £2. Oct. 27. Ditto came again, & to have 1s. per week: to Mar. 25, 1825, is 21 weeks 2 days: £1 1s. 6d. Mar. 25. Paid this "—*Held*: these entries were not admissible, either as made against the writer's interest, or as written in the course of a business or employment, or as embodying a contract.—*R. v. WORTH (INHABITANTS)* (1843), 4 Q. B. 132; 3 Gal. & Dav. 376; 12 L. J. M. C. 47; 7 J. P. 287; 7 Jur. 172; 114 E. R. 847.

Annotations:—*Mentd.* *R. v. Ickham* (1843), 7 J. P. 529; *It. v. Kesteven JJ.* (1844), 8 J. P. 629; *Ward v. Pitt*, [1913] 2 K. B. 130.

730. —[—]—An entry in the handwriting of a deceased person is not admissible in evidence where there was no duty imposed on him to make, & when it is not against his interest.—*WEBSTER v. WEBSTER* (1858), 1 F. & F. 401, N. P.

731. —Must charge declarant.]—*FRANKS v. CARRY* (1740), 2 Atk. 140; 26 E. R. 488.

732. —[—]—Where the right to the soil is in issue, entries written by the steward of a former owner from whom title is derived are admissible evidence, if the steward be dead.

The single question here is, whether these entries be not admissible evidence? It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to show that such sum was received by him. But it has been objected that the steward's accounts should have been signed by him: if the entry be not in the handwriting of the steward, undoubtedly it must be signed by him: but here all these entries were written by the steward himself, & therefore they were evidence to charge him with the receipt of the money; & if so, they should have been received in evidence on the trial of this cause (*LORD KENYON, C.J.*).—*BARRY v. BEBBINGTON* (1792), 4 Term Rep. 514; 100 E. R. 1149.

Annotations:—*Distd.* *Outram v. Morewood* (1793), 5 Term Rep. 121. *Expld. & Apld.* *Middleton v. Melton* (1829), 10 B. & C. 317. *Refd.* *Bullen v. Michel* (1816), 2 Price, 399; *Rowe v. Brenton* (1828), 3 Man. & Ry. K. B. 133; *Gleadow v. Atkin* (1833), 3 Tyr. 289.

—*M'CRACKEN v. WOODS* (1879), 5 V. L. R. 23.—*AUS.*

728 ii. —[—]—*CHAPMAN & CO., LTD. v. ROLL*, [1914] St. R. Qd. 332.—*AUS.*

728 iii. —[—]—*YUILL v. WHITE* (1902), 5 Terr. L. R. 375.—*CAN.*

a. Admission of receipt of sum of money—Supporting claim for larger sum.—In an action by the exors. of A., the father, against the extrix. of B., the son, on an agreement said to be lost, to recover £300 alleged to have been lent by A. to B., the defence was that the money was a gift, on condition that the son should pay the father an annuity at the rate of 4 per cent. during his life. It was clearly proved that the £300 was advanced by A. to B., &

that B. gave a note or writing of some kind for it; & it appeared that A., during his lifetime, had, in Oct. 1861, sued B.'s extrix. for the money. B. died on June 15, 1861. Pltf. gave in evidence the following receipt, signed by A., dated Apr. 28, 1861, which had been found among A.'s papers, attached to a memorandum book kept by him: "Received from my son B. the sum of £48 for interest of £300 at 4 per cent. due May 1 next, according to agreement, which I cannot find, so I have put the receipt on this paper." There was no evidence to show at what time this was made. Deft. put in the following receipt, also signed by A., dated May 3, 1858: "Received from my son B. the sum of £12, being one

733. —[—]—Entries made by a third person, deceased, in his books of receipts of rent from his tenant for a particular estate are not evidence to prove the identity of the land in a cause between two others.

The case of *Barry v. Bebbington*, No. 732, *ante*, is distinguishable from the present, because there the entry was made by a steward who charged himself with the receipt of the money (*GROSE, J.*).—*OUTRAM v. MOREWOOD* (1793), 5 Term Rep. 121; 14 East, 330; 101 E. R. 70.

Annotations:—*Consd.* *Higham v. Ridgway* (1808), 10 East, 109. *Distd.* *Doe d. Bloomer v. Branson* (1837), 1 Jur. 842; *Giffard v. Williams* (1869), L. R. 8 Eq. 494. *Refd.* *Gleadow v. Atkin* (1833), 1 Cr. & M. 410. *Mentd.* *Barrs v. Jackson* (1842), 7 Jur. 54; *Jones v. Lewis* (1918), 120 L. T. 200.

734. —[—]—An entry made in the books of pltf., specifying the terms of an agreement, is not evidence, where the person who made it is dead, by proving his hand-writing.

The entry here is not to charge the servant (*LORD KENYON, C.J.*).—*CALVERT v. CANTERBURY (ARCHBP.)* (1798), 2 Esp. 646, N. P.

735. —[—]—A book in which the steward of a manor entered the fines assessed, as well those paid as those unpaid:—*Held*: not evidence for the lord of the manor, to show what fines had been paid, although the steward had received it from his predecessor, & it was accessible to all the tenants.—*ELY (DEAN & CHAPTER) v. CALDECOTT* (1831), 7 Bing. 433; 5 Moo. & P. 272; 9 L. J. O. S. C. P. 171; 131 E. R. 167; *subsequent proceedings* (1832), 8 Bing. 439.

Annotations:—*Refd.* *R. v. Woodham Walter Manor* (1869), 10 B. & S. 439; *Smith v. Hobbs* (1887), 3 T. L. R. 293.

736. —[—]—*SMITH v. BLAKEY*, No. 754, *post*.

737. —[—]—Though combined with entries discharging declarant of accident.]—*FINCH v. MESSING* (1820), cited in 2 Jac. & W. at p. 472; 37 E. R. 709.

Annotation:—*Refd.* *Short v. Lee* (1821), 2 Jac. & W. 464.

738. —[—]—Balance in favour of declarant.]—*Qu.*: whether a paper containing entries of accounts by a deceased steward, who debited himself with sums received on the one side, & discharged himself by disbursements on the other, & at the end was an entry in his handwriting, stating that he had paid the balance to his employer, is admissible in evidence.—*DOE d. TEYNHAM (LORD) v. TYLER* (1830), 6 Bing. 561; 4 Moo. & P. 377; 8 L. J. O. S. C. P. 222; 130 E. R. 1397.

Annotations:—*Mentd.* *Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *De Rutzen v. Farr* (1835), 4 Ad. & El. 53; *Meath (Bp.) v. Winchester* (1836), 10 Bll. 330; *Wright d. Tatham v. Doe* (1837), 7 Ad. & El. 313; *Barker v. Birch* (1843), 7 J. P. 641; *Hughes v. Hughes* (1846), 15 M. & W. 701; *Doe d. Welsh v. Langfield* (1847), 16 M. & W. 497; *Atkinson v. Pecoock* (1848), 10 L. T. O. S. 330.

739. —[—]—It is no objection to the admissibility of an entry by which a deceased

year's annuity due to me according to agreement bearing date May 1, 1858 ":

—*Held*: the first mentioned receipt was inadmissible for pltf. as an entry against interest, for though it admitted the receipt of £48, yet it supported a claim for £300 by stating the existence & loss of the agreement, & describing the payment as interest instead of an annuity, as in the previous receipt; & the whole entry therefore was much more for the declarant's interest than against it.—*CANTON v. SIZE* (1863), 22 U. C. R. 473; 2 E. & A. 368.—*CAN.*

b. Surveyor's notes—Entry of payment—Must be connected to make former admissible.—Notes of a survey made of a deceased surveyor in a book

Sect. 5.—Statements by deceased persons: Sub-sect. 2, E. (a) & (b).]

steward charges himself, that the balance of the account is in favour of the steward.—**WILLIAMS v. GEAVES** (1838), 8 C. & P. 592.

740. ———. — Accounts of a steward or agent rendered to the landlord, containing entries of rent, & purporting to be signed by a clerk of that agent, are not admissible in evidence, as the entries of a person deceased, charging himself with the receipt of money; & if received, however great the preponderance of evidence may be, to prove the fact for which they were put in, independent of such inadmissible evidence, the ct. will grant a new trial, unless they can be convinced, that the documents improperly admitted did not weigh with the jury; or that the verdict, if given the other way, without reference to the documents, would have been against evidence.

We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear (**LORD DENMAN, C.J.**).—**DE RUTZEN (BARON) v. FARR** (1835), 4 Ad. & El. 53; 1 Har. & W. 735; 5 Nev. & M. K. B. 617; 5 L. J. K. B. 38; 111 E. R. 707.

Annotations:—Consd. Doe d. Graham v. Hawkins (1841), 2 Q. B. 212. **Distd.** Doe d. Ashburnham v. Michael (1841), 17 Q. B. 276. **Mentd.** Wright d. Tatham v. Doe (1837), 7 Ad. & El. 313; 11 v. O'Connell (1844), 5 State Tr. N. S. 1.

741. ———. — (1) Entry of a payment of a deceased person against his interest:—**Held**: admissible.

(2) Entry by a deceased person showing, in contradiction to a deed evidencing a rightful payment by him, that the payment had been made in breach of trust to A. instead of to the trustees, was admissible in evidence to show the receipt by A., on the ground that such entry tended to charge the maker of it.—**ORRETT v. CORSER**, **CORSER v. ORRETT** (1855), 21 Beav. 52; 25 L. T. O. S. 278; 1 Jur. N. S. 882; 3 W. R. 604; 52 E. R. 778.

742. ———. **Statement of opinion.**—The declarations of B. that "she had no doubt the names of the parties had been rightly spelt on a paper delivered to her, & had been wrongly copied by her," were inadmissible.—**MEDDOWCROFT v. HUGUENIN** (1843), 3 Curt. 403; 2 Notes of Cases, 156; 163 E. R. 771; *sub nom.* **HUGUENIN v. MEDDOWCROFT**, 7 Jur. 354; *affd.* on other grounds, *sub nom.* **MEDDOWCROFT v. HUGUENIN** (1844), 4 Moo. P. C. C. 386, P. C.

Annotations:—Mentd. Perry v. Meddowcroft (1846), 10 Beav. 122; The Justyn (1862), 6 L. T. 553.

743. ———. **Recital of document.**—In an action of ejectment the question was:—whether certain lands, known as K. P., were part of the manor of H. The lands had been purchased from the Duke of N. An entry in a book found among the muniments of the N. family was tendered in evidence, for the purpose of proving the affirmative of the issue. The entry, which was made by a

steward of that family, spoke of an indenture which "recited a lease made by the Earl of A.," & which, tracing the lands into the possession of R. H. went on to say that "R. H. demiseth unto, etc., all those pasture grounds lying in K., in the parish of P., parcel of the manor of H.":—**Held**: this entry was a mere recital of some document which the writer had seen or heard of, & was not admissible either as an entry made by a person in the discharge of his duty, or as an entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor.—**PADWICK v. WITTCOMB** (1853), 4 H. L. Cas. 425; 21 L. T. O. S. 257; 10 E. R. 527, H. L.

Annotation:—Mentd. McKay v. McNally (1879), 41 L. T. 230.

744. ———. **Statement in declarant's own favour.]**

—At the trial of an action of detinue by pltf., as administratrix of her deceased husband, for the recovery of a policy of insurance, effected by him on his own life, evidence was tendered by defts. & admitted, that the policy had been given by deceased in his lifetime to his mother, deft. R., accompanied with words to the effect that it was given to her for her own use & benefit; evidence of other conversations of the deceased to the same effect was also tendered by deft. & admitted. Pltf., who questioned the truth of this evidence, tendered evidence of conversations between herself & her deceased husband, tending to show that deceased intended the policy as a provision for his wife, pltf., or at all events that she should share in the produce & benefit of it, but this evidence was rejected by the learned judge as inadmissible:—**Held**: assuming the policy to have been given to deft. as alleged & proved by her at the trial, it was no longer the property of deceased, & any words of his tending to derogate from the validity of the gift were clearly not admissible in evidence, & therefore the evidence tendered by pltf. to that effect was rightly rejected, on the ground that the conversations in question were statements of the deceased in his own favour; & for the converse reason, the evidence of deft., objected to by pltf., was rightly received as being admissions of deceased against his own interests.—**RUMMENS v. HARE & RUMMENS** (1875), 32 L. T. 428; *affd.* on other grounds (1876), 1 Ex. D. 169, C. A.

Annotation:—Mentd. *Re* Richardson, Shillto v. Hobson (1885), 30 Ch. D. 396.

745. Declaration *prima facie* against interest.]

—Where an entry in the handwriting of a deceased person is *prima facie* against his interest, it is admissible as evidence for all purposes, irrespective of its effect or value when received. The following entry in the handwriting of a deceased person: "J. W. paid me three months' interest," which was followed by other entries pointing to a loan to J. W.:—**Held**: admissible as evidence, whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator.

in which he kept a diary of matters, private & professional, were tendered in evidence to prove the boundary between lots 3 & 4. The entry of the survey was as follows: "June 6, 1827.—Got A. to show the stake between Nos. 3 & 4, etc.," & in another part of the book the following entry appeared: "June 15, 1827.—B., Esq. #2 16s. 3d. At B.'s house for fence, #0 4s. 0d., #3 0s. 3d. pd." There was no evidence that at or about the time of the survey B. had any interest in either lot 3 & 4; but it was shown that he obtained a conveyance of lot 2

two months afterwards, & of lot 3 in 1830. Surveyors were not at that time under any obligation to make notes of surveys; & it was not proved that the entry was made contemporaneously with the transaction:—**Held**: the notes of the survey were not sufficiently connected with the entry of payment to be read with it as an entry against interest.—**O'CONNOR v. DUNN** (1877),

c. Account—Balance in favour of declarant—May be against interest.]—The fact that the balance on foot of a

debtor & creditor's account is struck in favour of the party having made the entry & since deceased does not prevent the entries from being admissible in evidence as entries against interest.—**WHALEY v. CARLISLE** (1866), 17 I. C. L. R. 792.—**IR.**

d. — Charging & discharging items—Must be connected.]—An account written by a deceased person credited him with various items for work done. At the opposite side was the word *contra*, followed by several items with which he charged himself, reducing the

—**TAYLOR v. WITHAM, WITHAM v. TAYLOR** (1876), 3 Ch. D. 605; 45 L. J. Ch. 798; 24 W. R. 877.

Annotations:—*Consd.* Hudson & Humphrey v. Swiftsure (Owners), *The Swiftsure* (1900), 82 L. T. 389. *Reid.* Bradshaw v. Widdington (1902), 71 L. J. Ch. 627; *Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382; *Ward v. Pitt*, [1913] 2 K. B. 130; *Re Adams, Benton v. Powell*, [1922] P. 240.

746. — Declaration in fact in declarant's favour.]—In testing the admissibility of a declaration against interest, it is sufficient that it is *prima facie* against interest in its natural meaning, although on a full investigation of all the facts the declaration may turn out not to have been detrimental to interest. The declaration of a deceased person, to the effect that he had destroyed a will which gave him a life interest in certain freehold property, was admitted, as being *prima facie* against the presumption, arising from his possession of it, of his being the freeholder, although on a full examination of all the facts it would appear that the declaration was actually to his advantage, because, apart from the existence of a will, he, in fact, took no interest in the property. —*Re ADAMS, BENTON v. POWELL*, [1922] P. 240; 91 L. J. P. 209; 127 L. T. 528; 38 T. L. R. 702.

Equal possibility of advantage or disadvantage.] —*See* No. 515, *ante*; No. 756, *post*.

747. Admission of payment by deceased creditor —On account of statute-barred debt.]—*BOSWORTH v. COTCHETT* (1824), 1 Phillpotts & Arnold on Evidence, 10th ed. p. 300; 3 Starkie on Evidence, 3rd ed. p. 824, n., H. L.

Annotations:—*Consd.* Gladow v. Atkin (1833), 1 Cr. & M. 410. *Expld.* Briggs v. Wilson (1854), 5 De G. M. & G. 12; *Edie v. Kingsford* (1854), 14 C. B. 759.

748. — — —.]—Where an endorsement on a promissory note of payment of interest, made by the authority of a deceased holder, appears to have been made after Stat. Limitations had run, it is not evidence to exclude the operation of the statute. —*BRIGGS v. WILSON* (1854), 5 De G. M. & G. 12; 2 Eq. Rep. 153; 23 L. T. O. S. 136; 43 E. R. 772, L. J.

Annotations:—*Consd.* Fuller v. Redman (No. 2) (1859), 26 Beav. 614; *Taylor v. Witham, Witham v. Taylor* (1876), 24 W. R. 877; *Newbould v. Smith* (1885), 29 Ch. D. 882. *Mentd.* Saunders v. Druce (1855), 3 Drew. 139; *Coope v. Cresswell* (1866), L. R. 2 Eq. 106; *Re Lacey, Howard v. Lightfoot* (1907), 76 L. J. Ch. 316.

749. — — —.]—*Semble:* declarations or entries by a deceased person, to be admissible in evidence, must appear to have been *ante litem motam*; entries of payment after Stat. Limitations has run would be inadmissible. —*EDIE v. KINGSFORD* (1854), 14 C. B. 759; 23 L. J. C. P. 123; 139 E. R. 311; *sub nom.* *EDYE v. KINGSFORD*, 2 C. L. R. 832.

750. — — —.]—The representative of a deceased mtgee. brought in 1884 a foreclosure action against mtgor., who pleaded Stat. Limitations. There was no evidence that any interest had been paid since 1866, except an entry in the books of mtgee. of £50 as paid in 1878 by mtgor. for rent & interest:—*Held:* though as an acknowledgment of money received it was against the interest of the person who made the entry, yet as it would prove the revival of a simple contract debt then barred, it was for his interest, & therefore could not be received as evidence on behalf

of his representatives. —*NEWBOULD v. SMITH* (1885), 29 Ch. D. 882; 53 L. T. 137; 33 W. R. 690; *affd.* on other grounds (1886), 33 Ch. D. 127, C. A.; (1889), 14 App. Cas. 423, H. L.

Annotation:—*Mentd.* Crichton v. Crichton (1895), 13 R. 770.

751. — — — Payment before debt barred.]—In an action by the exor. of the payee against the maker, upon a promissory note more than six years overdue, *pltf.*, in order to take the case out of Stat. Limitations, produced a book in which he had, in the years 1844 & 1847 respectively, at the request of testatrix, entered two payments as for interest due upon the note, which she told him she had received from *deft.*—*Held:* admissible evidence, as entries against the interest of the party making them. —*BRADLEY v. JAMES* (1853), 13 C. B. 822; 1 C. L. R. 449; 22 L. J. C. P. 193; 1 W. R. 388; 138 E. R. 1426.

Annotation:—*Reid.* Edye v. Kingsford (1854), 2 C. L. R. 832.

See, generally, LIMITATION OF ACTIONS.

(b) At Time of Making.

752. General rule.]—In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest. —*Re TOLLEMACHE, Ex p. EDWARDS* (1884), 14 Q. B. D. 415, C. A.; *previous proceedings, sub nom. Re TOLLEMACHE* (No. 1), *Ex p. REVELL*, 13 Q. B. D. 720, C. A.

Annotation:—*Reid.* Ward v. Pitt, [1913] 2 K. B. 130.

753. — Statement of intention to marry mother of illegitimate child.]—*LLOYD v. POWELL DUFFRYN STEAM COAL CO., LTD.*, No. 815, *post*.

754. Mere possibility of future liability—Statement by clerk that goods received.]—It was the duty of a confidential clerk, who managed a branch business of *pltf.*s, as general merchants, to keep them duly advised of all business transacted; in discharge of this duty, he wrote them a letter, stating that *deft.* had sent three cases to the office, & giving details of the transaction under which they were sent:—*Held:* this letter was not admissible in evidence against *deft.* after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act & make a record of it.

In the present case all the admission by [the clerk] that can be said to be against interest amounts to no more than an admission that he has the care of the three chests which have arrived at the office, & the possibility that the statement might make him liable in the case of their being lost is an interest of too remote a nature to make the statement admissible in evidence (*BLACKBURN, J.*). —*SMITH v. BLAKEY* (1867), L. R. 2 Q. B. 326; 8 B. & S. 157; 36 L. J. Q. B. 156; 15 W. R. 492.

Annotations:—*Consd.* Massey v. Allen (1879), 13 Ch. D. 558; *Mercer v. Denne*, [1905] 2 Ch. 538. *Reid.* Sturla v. Freecia (1880), 5 App. Cas. 623; *Newbould v. Smith* (1885), 29 Ch. D. 882; *White & Wontner v. Whitewood* (1897), 13 T. L. R. 409; *Assheton-Smith v. Owen* (1905), 75 L. J. Ch. 181; *Mellor v. Walmesley*, [1905] 2 Ch. 164;

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752 i. General rule.]—To make a declaration against proprietary interest in lands evidence after the death of the declarant, he must have been at the time in actual possession. —*LA TOUCHE v. HUTTON* (1875), 9 I. R. Eq. 166.—*IR.*

amount due to him to a balance which was struck & carried down:—*Held:* the discharging items were not so incorporated or connected with the charging entries as to render the former admissible as part of a statement against interest. —*WHALEY v. CARLISLE* (1867), 15 W. R. 1183.—*IR.*

e. Confession of forgery — Made in contemplation of death.]—Shortly before

his death, & in contemplation thereof, a person wrote a letter to his brother confessing that he had forged the latter's signature to a bill of exchange. In an action against the brother on the bill:—*Held:* the letter was not admissible as a declaration made against his pecuniary interest by a person now deceased. —*FREEDMAN & JACKS v. PENNY* (1911), W. L. D. 228.—*S. AF.*

Sect. 5.—Statements by deceased persons: Sub-sect. 2, E. (b) & F. (a) & (b).]

North Staffordshire Ry. v. Hanley Corpn. (1909), 73 J. P. 477; *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Tucker v. Oldbury U. C.*, [1912] 2 K. B. 317; *Ward v. Pitt*, [1913] 2 K. B. 130.

755. — Signature of accounts as correct by auditor.]—*VIVIAN v. MOAT*, No. 770, *post*.

756. Equal possibility of advantage & disadvantage—Entry in stockbroker's book of purchase of shares for client.]—During the trial of an action to establish pltf.'s right to be indemnified by the two defts., or one of them in respect of 200 shares transferred into pltf.'s name as trustee for defts. or one of them, pltf. desired to prove that the shares had been bought on the Stock Exchange for one of defts. through his brokers, Messrs. G. & D. G. was dead, & pltf. tendered in evidence an entry in the day book of the firm of a purchase of 200 shares by G., for the particular deft.; & having proved that the entry was in the handwriting of G., that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, & that the ledger of the firm was made up from the day book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; & secondly, because it had been made in the ordinary course of business:—*Held*: it was not admissible upon the first ground, because it might, according to the turn of the market, have been to the advantage of the deceased; nor upon the second ground, because it was not made in the performance of any duty.—*MASSEY v. ALLEN* (1879), 13 Ch. D. 558; 49 L. J. Ch. 76; 41 L. T. 788; 28 W. R. 212.

Annotations:—*Consd.* *Newbould v. Smith* (1885), 29 Ch. D. 882. *Refd.* *Tucker v. Oldbury U. C.*, [1912] 2 K. B. 317; *Ward v. Pitt*, [1913] 2 K. B. 130.

757. — Statement by workman as to cause of accident.]—*TUCKER v. OLDBURY URBAN COUNCIL*, No. 515, *ante*.

758. Admission after interest terminated.]—A party, having by a voluntary settlement after marriage conveyed away his interest in an estate, afterwards executed a mtge. of the same estate. Mtgee., representing himself as a *bonâ fide* purchaser for value, claimed to treat the prior settlement as void, under 27 Eliz. c. 4:—*Held*: declarations or admissions implied or express of mtgor. made after he had parted with his interest by the settlement, were not admissible evidence on behalf of mtgee., after the death of mtgor., to show that money had actually been advanced upon mtge.—*DOE d. SWEETLAND v. WEBBER* (1834), 1 Ad. & El. 733; 3 Nev. & M. K. B. 586; 3 L. J. K. B. 208; 110 E. R. 1387.

F. Interest must be Pecuniary or Proprietary.

(a) In General.

759. General rule.]—In trespass for taking pltf.'s goods, with a plea of not possessed, it was proposed to show that the goods were not his, by showing, *inter alia*, that he was not 21. To show this, it was proved, that, by the custom of the law of the Jews, children are circumcised on the eighth day from their birth, & that it was the duty of the Chief Rabbi to perform this rite, & make an entry of it in a book. It was proposed to give in

evidence the entry in this book of pltf.'s circumcision, the entry being in the handwriting of a Chief Rabbi, who was dead:—*Held*: (1) the entry was not receivable in evidence.

(2) Where a declaration of a third person is receivable in evidence, as being a declaration against his interest, that interest must be of a pecuniary nature.—*DAVIS v. LLOYD* (1844), 1 Car. & Kir. 275, N. P.

760. —.]—*SUSSEX PEERAGE CASE*, No. 725, *ante*.

761. Admission of crime.]—Confession of forgery by a dead witness may be admissible evidence.—*WRIGHT d. CLYMER v. LITTLER* (1761), 3 Burr. 1244; 1 Wm. Bl. 345; 97 E. R. 812.

Annotations:—*Consd.* *Aveson v. Kinnaird* (1805), 6 East, 188; *Doe d. Sutton v. Ridgway* (1820), 4 B. & Ald. 53. *N.F.* *Stobart v. Dryden* (1836), 1 M. & W. 615. *Refd.* *Durham (Bp.) v. Beaumont* (1808), 1 Camp. 207; *R. v. Mead* (1824), 2 B. & C. 605. *Mentd.* *Hawes v. Wyatt* (1790), 2 Cox, Eq. Cas. 263.

762. —.]—Covenant on a mtge. deed. Pleas, *non est factum*, & that the deed had been fraudulently altered after its execution, by A., one of the attesting witnesses. The execution of deft. appeared to be attested by two witnesses, A. & B. A. was dead. B., being called, denied all recollection of having attested the deed, & doubted the genuineness of his own & deft.'s signatures. The handwriting of A. & of deft. was then proved by other witnesses. It appeared that the sum secured was written over an erasure:—*Held*: deft. could not give evidence of declarations by A., tending to show that he had forged or fraudulently altered the deed.—*STOBART v. DRYDEN* (1836), 1 M. & W. 615; 2 Gale, 146; Tyr. & Gr. 899; 5 L. J. Ex. 218; 150 E. R. 581.

Annotation:—*Refd.* *Haines v. Guthrie* (1884), 13 Q. B. D. 818.

—.]—*SUSSEX PEERAGE CASE*, No. 725, *ante*.

(b) Declarations against Pecuniary Interest.

764. Statement by life tenant as to rent reserved.]—*ROE d. BRUNE v. RAWLINGS*, No. 693, *ante*.

765. Statement by workman as to cause of accident.]—*TUCKER v. OLDBURY URBAN COUNCIL*, No. 515, *ante*.

766. Entry showing payment of charges due to declarant—By midwife.]—*HIGHAM v. RIDGWAY*, No. 688, *ante*.

767. — By solicitor.]—*DOE, LESSEE OF REECE v. ROBSON*, No. 694, *ante*.

768. —.]—*WARD v. DURHAM (LORD)* (1838), cited in 7 C. B. at p. 481; 137 E. R. 192. *Annotation*:—*Refd.* *Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456.

769. —.]—An entry in the ledger of a deceased solr. in his handwriting admitting payment of his charges for drawing & attending the execution of a will:—*Held*: evidence of the execution of the will.—*In the Goods of THOMAS* (1871), 41 L. J. P. & M. 32; 25 L. T. 509; 35 J. P. 792; 20 W. R. 149.

770. — By landlord.]—(1) On a question relating to the rent paid for a particular property, a statement as to receipts from an agent signed by a deceased principal, is, as being against interest, equally admissible in evidence with a statement by a deceased agent as to receipts from a tenant. (2) But a rent-roll signed by a deceased solr. who was paid to audit the accounts by testing

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761 i. Admission of crime.]—The execution of a release of dower being

disputed, deft. proved the handwriting of P., the subscribing witness, who was dead. Demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left

the country because he had forged demandant's name:—*Held*: such evidence was rightly rejected.—*ROSE v. CUTLER* (1866), 27 U. C. R. 270.—*CAN.*

the arithmetic, but not by examining with vouchers the truth as to alleged payments, is not admissible in evidence, either on the ground of a pecuniary interest or on the ground of the audit having been made in the ordinary course of business.—*VIVIAN v. MOAT* (1881), 16 Ch. D. 730; *sub nom. VIVIAN v. MOAT, VIVIAN v. WALKER*, 50 L. J. Ch. 331; 44 L. T. 210; 29 W. R. 504.

771. — *By tradesman.*]—*ANON.* (1694), 1 Ld. Raym. 745; 91 E. R. 1399.

772. — *—*]—A deceased tradesman's bill for repairs, with his receipt thereon, is not evidence of the work having been done for the person charged, though the paper is found amongst the other papers of the person charged.—*DOE d. GALLOP v. VOWLES* (1833), 1 Mood. & R. 261, N. P.

Annotations:—Dtd. R. v. Lower Heyford (1840), 2 Sm. L. C. 12th ed. 313; *Taylor v. Witham, Witham v. Taylor* (1876), 3 Ch. D. 605; *Bradshaw v. Widdrington* (1902), 71 L. J. Ch. 627. *Reid. Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130.

773. — *By builder.*]—*R. v. HENDON (INHABITANTS)* (circa 1840), cited in 9 C. & P. at p. 255.

774. — *—*]—In ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman, of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible in evidence on the part of deft.—*DOE d. HADEN v. BURTON* (1840), 9 C. & P. 254.

775. — *—*]—*R. v. LOWER HEYFORD* (1840), 2 Smith, L. C. 12th ed. Notes, p. 313.

Annotations:—Apld. Taylor v. Witham, Witham v. Taylor (1876), 3 Ch. D. 605. *Reid. Re Fountaine, Re Dowler, Fountaine v. Amherst*, [1909] 2 Ch. 382; *Re Adams, Benton v. Powell* (1922), 38 T. L. R. 702.

776. *Entry charging declarant with receipt—Of document.*]—(1) If the duplicate of a will be written by the direction of testator, & sent by him to a stranger to keep it safely, & the stranger sends back a letter to testator, in which he makes mention, that he has received the will; after the death of the stranger such letter may be read as circumstantial evidence, to prove that such duplicate of the will was sent by testator to the stranger.

(2) If a man was sworn a witness at a former trial, & gave evidence, & died; the matter that he deposed at the former trial may be given in evidence at another trial, by any person who heard him swear it at the former trial.—*PYKE v. CROUCH* (1896), 1 Ld. Raym. 730; 91 E. R. 1387.

777. — *Of goods.*]—(1) A bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods.

(2) But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular, the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee.—*HADDOW v. PARRY* (1810), 3 Taunt. 303; 128 E. R. 120.

Annotations:—As to (1) Reid. Middleton v. Melton (1829), 10 B. & C. 317. *As to (2) Reid. The Ida* (1873), 29 L. T. 623, n.; *Tully v. Terry* (1873), 29 L. T. 36.

778. — *Money—By scrivener.*]—*ANON.* (1694), 1 Ld. Raym. 745; 91 E. R. 1399.

779. — *By college bursar.*]—*ANON.* (1694), 1 Ld. Raym. 745; 91 E. R. 1399.

780. — *By tax-collector.*]—*CHRIST'S*

HOSPITAL (GOVERNORS) CASE (circa 1820), cited in Ry. & M. at p. 63.

Annotation:—Reid. Doe d. Smith v. Cartwright (1824), Ry. & M. 62.

781. — *—*]—Entries made by a deceased collector of taxes in a public book, handed down to him by his predecessor in office, & afterwards delivered to his successor, are evidence against his surety, in an action on a bond conditioned for the due performance of the collector's duty, & the delivery up of the books kept by him in his office. *Qu.*: whether the receipts, signed by such collector, for moneys payable to him in his official capacity, are evidence against his surety in such case.—*GOSS v. WATLINGTON* (1821), 3 Brod. & Bing. 132; 6 Moore, C. P. 355; 129 E. R. 1233.

Annotations:—Apld. Whitnash v. George (1828), 8 B. & C. 556. *Consd. Middleton v. Melton* (1829), 10 B. & C. 317.

782. — *—*]—An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money:—*Held*: evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, & might have been called as witnesses, upon the general principle that the entry was to the prejudice of the party who made it.

An admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons (*PARKE, Mansfield v. MELTON* (1829), 10 B. & C. 317; 5 Man. & Ry. K. B. 264; 8 L. J. O. S. K. B. 243; 109 E. R. 467. *Annotations:—Consd. Gleadon v. Atkin* (1833), 1 Cr. & M. 100. *Reid. Mansfield v. Melton* (1829), 10 B. & C. 317.

Coal Co., [1913] 2 K. B. 130.

783. — *By parish overseer.*]—In tithe suit, by a vicar, old overseers' accounts, mentioning that a sum had been received from the vicar in respect of a modus payable to him, are

[75; 2 L. J. Ch. 22; 58 E. R. 410.

784. — *By executor.*]—Entries of receipt of rent by a deceased exor., under whom demandant claimed, were admissible evidence for demandant, the rent having been received & accounted for by deceased in his capacity of exor.—*SPIERS v. MORRIS* (1833), 9 Bing. 687; 2 L. J. C. P. 153; 131 E. R. 772; *sub nom. SPIERS v. MORRIS*, 3 Moo. & S. 118.

785. — *—*]—*BRADLEY v. JAMES*, No. 751, *ante*.

786. — *—*]—A deceased solr.'s books are evidence if he charges himself therein with receipts on his client's behalf, as being entries against his interests, whether or not the entries were made in the ordinary course of his business as a solr.

A third mtgee. in an action to enforce his charge, having obtained judgment, an inquiry was directed to ascertain the date when the first mtgee. entered into possession. The first mtgee. admitted that he had been in possession since 1892. The third mtgee. claimed that the first mtgee. must account as from the year 1881, when the transferor of the first mtgee. to the present first mtgee. became entitled. There was evidence to show that the transferor, who herself took a transfer of the mtgee., went into possession in 1881, & the only evidence to rebut it was contained in the books of an absconding solr. who had not been heard of since 1896. The books were in the possession of the official receiver, the solr. being a bkpt. :—*Held*:

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the books were admissible evidence, inasmuch as the entries, which it was sought to give in evidence, were against the interest of the solr., whose death must be presumed.—**WILLS v. PALMER** (1904), 53 W. R. 169; 49 Sol. Jo. 165.

787. — By agent.]—VIVIAN v. MOAT, No. 770, *ante*.

See, also, Nos. 347, 711, *ante*.

788. — By parish sexton.]—An entry in an old account of burial fees received by the sexton of a large parish, by which he charged himself with the receipt of a certain sum for the burial of one J. L., described as "in W. Street," admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in W. Street.—**LLOYD v. WAIT** (1842), 1 Ph. 61; 6 Jur. 45; 41 E. R. 554.

Annotation:—Mentd. *Lancashire v. Lancashire* (1847), 1 De G. & Sm. 288.

789. — By trustee.]—BRIGHT v. LEGERTON (No. 1), No. 861, *post*.

790. Entry showing payment in breach of trust.]—ORRETT v. CORSER, CORSER v. ORRETT, No. 741, *ante*.

791. Entry of sale of goods.]—Under a covenant, D., who was the account-keeper appointed by the persons who worked a colliery, but who was since dead, rendered to pltf. accounts of coals sold by him:—*Held*: these accounts were receivable in evidence against the lessee, (a) as being entries made by D., charging himself, & (b) as being admissions made by lessee's agent.—**EDWARDS v. REES** (1836), 7 C. & P. 340.

Accounts & account books generally.]—See Part IV., Sect. 13, sub-sect. 2, *post*.

(c) Declarations against Proprietary Interest.

792. Declaration that land occupied as tenant.]—HOLLOWAY v. RAKES (1772), cited in 2 Term Rep. at p. 55; 100 E. R. 31.

Annotations:—Apld. *Davies v. Pierce* (1787), 2 Term Rep. 53. *Consd.* *Garnons v. Barnard* (1793), 1 Anst. 296. *Apld.* *Doe d. Majoribanks v. Green* (1820), Gow, 227; *Carne v. Nicoll* (1835), 1 Bing. N. C. 430. *Refd.* *R. v. Erlswell* (1790), 3 Term Rep. 707.

793. —.]—Declarations by tenants are admissible evidence after their death to show that a certain piece of land is parcel of the estate which they occupied; & proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive.—**DAVIES v. PIERCE** (1787), 2 Term Rep. 53; 100 E. R. 30; *subsequent proceedings*, 2 Term Rep. 125.

Annotations:—Consd. *Garnons v. Barnard* (1793), 1 Anst. 296. *Refd.* *R. v. Erlswell* (1790), 3 Term Rep. 707; *Doe d. Majoribanks v. Green* (1820), Gow, 227; *Carne v. Nicoll* (1835), 4 L. J. C. P. 89. *Mentd.* *Jones v. Richards* (1837), 1 J. P. 264; *A. G. for New South Wales v. Murphy* (1869), 21 L. T. 598; *R. v. Murphy* (1869), L. R. 2 P. C. 535.

794. —.]—A memorandum signed by a person deceased who had been owner of a copyhold tenement, & had occupied a strip of garden ground adjoining, stating that no part of the garden ground belonged to the copyhold; but that he paid rent for the whole of it, is admissible evidence for the lessor of pltf. in an ejectment for this garden ground, to show that it is not a part of the copyhold tenement.—**DOE d. BAGGALLEY v. JONES** (1808), 1 Camp. 367.

795. —.]—The declarations of a deceased

occupier of land, of whom he held the land, are evidence of the seisin of that person. But it must first be shown that the land the deceased occupied was the land now in the tenant's possession.

Possession is *prima facie* evidence of seisin in fee simple. The declaration of the possessor that he is tenant to another makes most strongly, therefore, against his own interest (**LORD MANSFIELD, C.J.**).—**PEACEABLE d. UNCLE v. WATSON** (1811), 4 Taunt. 10; 123 E. R. 232.

Annotations:—Apld. *Carne v. Nicoll* (1835), 1 Bing. N. C. 430. *Consd.* *R. v. Birmingham Overseers* (1861), 1 B. & S. 763. *Refd.* *Papendick v. Bridgwater* (1855), 5 E. & B. 166; *Sly v. Sly* (1877), 2 P. D. 91.

796. —.]—The declarations of a deceased occupier of land, are admissible in evidence to show of whom he held it.—**DOE d. MAJORIBANKS v. GREEN** (1820), Gow, 227.

Annotation:—Refd. *Bewley v. Atkinson* (1879), 13 Ch. D. 283.

797. —.]—In a writ of right, declarations of a deceased occupier of the premises demanded, that he held them as tenant to the person under whom the demandant claims, are admissible, *valent quantum*, to show seisin in that person.—**CARNE v. NICOLL** (1835), 1 Bing. N. C. 430; 1 Scott, 466; 4 L. J. C. P. 89; 131 E. R. 1183.

798. —.]—Declarations by a deceased tenant that he held under A. are admissible as evidence that A. was seised in fee.—**DOE d. RUSHWORTH v. WILLIAMSON** (1845), 6 L. T. O. S. 100.

799. —.]—Declarations of a deceased tenant are admissible in evidence to show of whom he held the same premises.—**MOUNTNOY v. COLLIER** (1853), 1 E. & B. 630; 22 L. J. Q. B. 124; 17 J. P. 132; 17 Jur. 503; 1 W. R. 179; 118 E. R. 573.

Annotations:—Refd. *R. v. Birmingham Overseers* (1861), 1 B. & S. 763. *Mentd.* *Re Emery & Barnett* (1858), 4 C. B. N. S. 423; *Howorth v. Sutcliffe*, [1895] 2 Q. B. 358; *Serjeant v. Nash Field* (1903), 72 L. J. K. B. 630.

800. —.]—R. v. BIRMINGHAM OVERSEERS, No. 705, *ante*.

801. —.]—R. v. EXETER GUARDIANS, No. 275, *ante*.

802. Declaration that property held as trustee only.]—Parol evidence of the declarations of a devisee [deceased] admitted, to prove her being only a trustee.—**STRODE v. WINCHESTER** (1767), 1 Dick. 397; 21 E. R. 323.

803. Declaration showing that estate for life only.]—DOE d. HUMAN v. PETTETT, No. 504, *ante*.

804. —.]—Declarations made by the widow before the time of making her will, that A.'s son would have the estate after her death, are admissible as evidence that A.'s possession was in his own right; & the declarations in the will are inadmissible to show that the property had descended to testatrix.—**DOE d. ROFFEY v. HARBROW** (1833), 3 Ad. & El. 67; 1 Nev. & M. K. B. 422; 111 E. R. 338.

805. Admission that occupation was permissive.]—Lands in C. were devised to trustees for absolute sale, in trust to purchase other lands at A., & to permit W. to receive the rents of the so purchased lands for his life, with remainders over. W. granted an annuity, arising out of certain lands, C. amongst others, & in the annuity deed recited the above will, that the trustees had not sold the lands in C., & that the trustees had permitted him to receive the rents. In an ejectment brought by the trustee under the will, for the lands in C., W. having been shown to have been in

PART II. SECT. 5, SUB-SECT. 2.—
F. (c).

1. Declaration by landlord that land

*occupied by tenant.]—*A statement by a landlord, who is dead, that there was a tenant on the land is a statement against his proprietary interests &

admissible.—**ABDUL AZIZ MOLLA v. EBRAHIM MOLLA** (1904), 1 L. R. 31 Cal. 965.—**IND.**

receipt of the rents & profits during his lifetime :—*Held*: the annuity deed was admissible in evidence, as containing a declaration by W. that he did not hold in fee.—*DOE d. DANIEL v. COULTHRED* (1837), 7 Ad. & El. 235; 2 Nev. & P. K. B. 165; Will. Woll. & Dav. 477; 7 L. J. Q. B. 52; 112 E. R. 460.

806. Declaration qualifying rights to church pews.]—(1) Upon a trial, where the question was, whether the chapelry of H. was a legal parochial chapelry:—*Held*: the statement of a witness, that he had heard from a former incumbent of H. that the people of four townships & another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible.

(2) Where a case was stated by a former incumbent of H. for the opinion of a proctor, stating rights to pews, etc., in a qualified manner:—*Held*: admissible, on the same ground that the statement of a deceased occupier who qualified his estate, was admissible.

(3) The answer of the incumbent of H. & other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made:—*Held*: admissible, as being in the nature of an inquisition on a public matter.—*CARR v. MOSTYN* (1850), 5 Exch. 69; 19 L. J. Ex. 249; 14 L. T. O. S. 506; 14 J. P. 576; 155 E. R. 30.

Annotation:—*As to* (1) *Reid. Fowke v. Berlington*, [1914] 2 Ch. 308.

807. Declaration by tenant against right of common.]—Pltf. claimed a right of common by prescription, in respect of a que estate in land, & also by thirty & sixty years' enjoyment by the occupiers of the land. Deft. offered evidence that A., now deceased, while tenant of the land for years, had declared that he had no such right in respect of the land:—*Held*: the declaration was not admissible in evidence inasmuch as it was in derogation of the title of the reversioner.—*PAPENDICK v. BRIDGWATER* (1855), 5 E. & B. 166; 3 C. L. R. 1206; 24 L. J. Q. B. 289; 25 L. T. O. S. 144; 19 J. P. 790; 1 Jur. N. S. 657; 3 W. R. 490; 119 E. R. 443.

Annotations:—*Consd. Howe v. Malkin* (1878), 40 L. T. 196. *Distd. Blandy-Jenkins v. Dunraven*, [1899] 2 Ch. 121. *Mentd. Glover v. Coleman* (1874), 44 L. J. C. P. 66.

808. Declaration by deceased vendor that land was part of property sold.]—Statements of a deceased vendor, made at the time of sale to indicate the property sold, are, for the purpose of its identification, admissible in evidence.

Pltf. claimed, under a surrender of copyhold lands in 1845, to be in possession of a certain piece of waste land within the manor of M., purchased by him from B., the then tenant in possession, who was also pltf.'s predecessor in title, & the surrender under the deed of surrender. In order to identify the land claimed with a parcel of land described in the deed of surrender as "the common piece on M.," pltf. stated that at the time of the purchase, B., since deceased, went over the land with him, & pointed out to him "the common piece on M." On objection to this evidence:—*Held*: it was admissible, as a declaration accompanying & explaining an act.

As B. was dead, it might amount to a statement of a deceased person against his interest (LIND-

LEY, J.).—*PARROTT v. WATTS* (1877), 47 L. J. Q. B. 79; 37 L. T. 755.

Annotation:—*Apld. Foster v. Plumbers' Co.* (1900), 44 Sol. Jo. 211.

809. Declaration by deceased husband that wife's will not duly revoked—Husband entitled to lesser estate under will than under intestacy.]—In a probate suit it was alleged that testatrix destroyed her will at a time when she was not of sound mind, memory, or understanding. Under the will which had been destroyed her husband took a life interest in her estate, whereas under an ante-nuptial settlement he was, in the events that had happened, entitled absolutely to her estate:—*Held*: a statement by the husband, who had died before the suit was brought, that he did not think testatrix was of sound mind when she destroyed her will, was admissible in evidence as being in disparagement of his own title by limiting it to a life estate.—*FAWKE v. MILES* (1911), 27 T. L. R. 202.

810. Whether declarant must be in sole possession.]—A. had, 45 years ago, enclosed a piece of ground from the waste, & built a cottage on part of it; he died 29 years ago, &, after that, his widow & daughter lived on the premises till the death of the former, a month before the trial:—*Held*: the declarations of the mother were evidence for the lessor of pltf., although she was not in the sole occupation of the premises, & although she was not on the premises when such declarations were made.—*DOE d. PRITCHARD v. JAUNCEY* (1837), 8 C. & P. 99.

Annotation:—*Mentd. Asher v. Whitelock* (1865), 11 Jur. N. S. 925.

811. Whether declaration must be made on premises.]—*DOE d. PRITCHARD v. JAUNCEY*, No. 810, *ante*.

G. Whole Statement Receivable.
See, generally, Part I., Sect. 7, ante.

H. For what Purposes Admissible.

812. Not confined to proof of fact recorded.]—*DOE d. POWELL v. HILL* (prior to 1834), cited in 1 Cr. M. & R. at p. 355; 149 E. R. 1117.

Annotation:—*Refd. Chambers v. Bernasconi* (1834), 1 Cr. M. & R. 347.

813. —.]—By a promissory note, E. H., W. D., & J. H., jointly & severally promised to pay to J. E. £300 with interest. W. D. having afterward paid J. E. £280 on account of the note, J. E. made the following endorsement upon it:—"Received of W. D. the sum of £280, on account of the within note, the £300 having been originally advanced to E. H." In an action brought by W. D. [after the death of J. E.], who had paid the whole amount due against J. H., to recover contribution against him "as a co-surety":—*Held*: the endorsement was admissible in evidence, to prove not only the payment of the £280, but also that the money was originally advanced to E. H. as principal.—*DAVIES v. HUMPHREYS* (1840), 6 M. & W. 153; 9 L. J. Ex. 263; 4 Jur. 250; 151 E. R. 361.

Annotations:—*Consd. Doe d. Kinglake v. Bevliss* (1849), 7 C. B. 456; *Perclval v. Nanson* (1851), 7 Exch. 1. *Mentd. Pitt v. Pursford* (1841), 8 M. & W. 538; *Kemp v. Finden* (1844), 12 M. & W. 421; *Batard v. Hawes* (1853), 2 E. & B. 287; *Re Snowden, Ex p. Snowden* (1881), 17 Ch. D. 44; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Stirling v. Burdett*, [1911] 2 Ch. 418.

814. Evidence both for & against party putting declaration forward.]—A. B. & C. D. had dealings

received.—*ANDERSON v. ANDERSON* (1906), 37 N. B. R. 432; 1 E. L. R. 443.—*CAN.*

PART II. SECT. 5, SUB-SECT. 2.—H. g. For all purposes.]—Where an entry in the handwriting of a deceased

person is *prima facie* against interest, it is admissible for all purposes, irrespective of its effect or value when

Sect. 5.—Statements by deceased persons: Sub-sect. 2, H.; sub-sect. 3, A., B., C. & D. (a) & (b) i.]

& transactions together, in the course of which a bond for £4,000 was given by A. B. to C. D. Both of them afterwards died. E. F., the representative of C. D., obligee, filed a bill to enforce the bond. G. H., the representative of A. B., the obligor, filed a bill to have the accounts between A. B. & C. D. taken, & the bond made subject to such accounts, & proved an account in C. D.'s handwriting. A decree was made in both suits referring it to the master to take the accounts, & to inquire under what circumstances the bond was given, & in the decree the account in C. D.'s handwriting was entered as read:—*Held*: on exceptions to the master's report, this account was receivable by the master in evidence as well against as for G. H. the representative of A. B.—*DICKIN v. WARD, WARD v. DICKIN* (1851), 4 De G. & Sm. 266; 20 L. J. Ch. 211; 17 L. T. O. S. 57; 15 Jur. 834; 64 E. R. 820.

815. To prove state of mind.—Upon a claim for compensation under Workmen's Compensation Act, 1906 (c. 58), by a posthumous illegitimate child as a dependant of its putative father, who was killed by accident arising out of & in the course of his employment with respts., evidence of statements made by deceased to the effect that he acknowledged the paternity of the child & that he intended to marry the mother before the child was born is admissible both on the issue of paternity & on the issue of dependency, as evidence of the state of mind of deceased in relation to the child.—*LLOYD v. POWELL DUFFRYN STEAM COAL CO., LTD.*, [1914] A. C. 733; 83 L. J. K. B. 1054; 111 L. T. 338; 30 T. L. R. 456; 58 Sol. Jo. 514; 7 B. W. C. C. 330, H. L.; *revsq.* S. C. *sub nom.* *WARD v. PITT (H. S.) & Co., LLOYD v. POWELL DUFFRYN STEAM COAL CO.*, [1913] 2 K. B. 130, C. A.

Annotation:—*Reid. Re Wright, Hegan v. Bloor*, [1920] 1 Ch. 108.

SUB-SECT. 3.—DECLARATIONS IN DISCHARGE OF DUTY OR IN COURSE OF BUSINESS.

A. In General.

816. General principle of admissibility.—If a tradesman uniformly obliges his servants to subscribe in his books an account of the goods they deliver, proof of the subscription of a servant who is dead is evidence of the delivery of the goods contained in the account subscribed.—*PRICE v. TORRINGTON (EARL)* (1703), Holt, K. B. 300; 2 Ld. Raym. 873; 1 Salk. 285; 90 E. R. 1065.

Annotations:—*Consd. Chambers v. Bernasconi* (1834), 1 Cr. M. & R. 347; *Brain v. Preece* (1843), 11 M. & W. 773. *Apld. Rawlins v. Tuckards* (1860), 28 Beav. 370. *Consd. Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *The Henry Coxon* (1878), 3 P. D. 156; *Sturla v. Freccia* (1880), 6 App. Cas. 623; *Mercer v. Denno*, [1905] 2 Ch. 538. *Apld. Mellor v. Walmesley*, [1905] 2 Ch. 164. *Reid. Doe d. Patteshall v. Turford* (1832), 3 B. & Ad. 890; *Poole v. Dicas* (1835), 7 C. & P. 79; *Doe d. Kinglake v. Bevis* (1849), 7 C. B. 456; *Turner v. Hutchinson* (1861), 25 J. P. 149; *Haines v. Guthrie* (1884), 13 Q. B. D. 818; *Lyell v. Kennedy* (1887), [66 L. T. 647; *Wolsey v. Pethick* (1908), 1 B. W. C. C. 411; *Mills v. Mills* (1920), 36 T. L. R. 772; *Young v. Grierson, Oldham* (1924), 41 R. P. C. 348.

817. —[*DOE d. PATTESHALL v. TURFORD*, No. 874, *post*.

818. —[An entry of the dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry.—*POOLE v. DICAS* (1835), 1 Bing. N. C.

649; 7 C. & P. 79; 1 Hodg. 162; 1 Scott, 600; 4 L. J. C. P. 196; 131 E. R. 1267.

Annotations:—*Consd. Brain v. Preece* (1843), 11 M. & W. 773; *Smith v. Blakey* (1867), L. R. 2 Q. B. 326. *Reid. Marks v. Lahee* (1837), 3 Bing. N. C. 408; *Doe d. Welsh v. Langfield* (1847), 16 M. & W. 497; *Stapylton v. Clough* (1853), 23 L. J. Q. B. 5; *Polini v. Gray, Sturla v. Freccia* (1879), 12 Ch. D. 411.

819. —[To make an entry by a deceased person evidence of a fact, it must be, (a) an entry of a transaction effected by the person who makes the entry; (b) an entry made at the time of the transaction, or near to it; (c) an entry made in the usual course & routine of business by that person; (d) that the person making the entry had at that time no interest to misstate what had occurred (*BRETT, L.J.*).—*POLINI v. GRAY, STURLA v. FRECCIA* (1879), 12 Ch. D. 411; 49 L. J. Ch. 41; 40 L. T. 861; 28 W. R. 81, C. A.; *affd. sub nom. STURLA v. FRECCIA* (1880), 5 App. Cas. 623, H. L.

Annotations:—*Reid. Haines v. Guthrie* (1884), 13 Q. B. D. 818; *Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985; *Re Trufort, Traftord v. Blanc* (1887), 36 Ch. D. 600; *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241; *Mercer v. Denno*, [1905] 2 Ch. 538; *Amys v. Barton* (1911), 5 B. W. C. C. 117; *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Heyne v. Fischel* (1913), 110 L. T. 264; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130; *Bird v. Keep*, [1918] 2 K. B. 692; *Collis v. Amphlett*, [1918] 1 Ch. 232; *Finn v. Shelton Iron, Steel & Coal Co.* (1924), 131 L. T. 213.

820. —[(1) Written statements by a deceased person are not admissible as made in the course of duty unless it is shown that it was the duty of the deceased person to do the particular thing & to record the fact of having done it contemporaneously.

(2) Confidential plans or reports made to the War Office are not admissible as evidence of reputation if they were not intended as permanent records affecting the property or revenue of the Crown or any grant by the Crown.

(3) Evidence of particular facts cannot be admitted as evidence of reputation.—*MERCER v. DENNE*, [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293, C. A.

Annotations:—*As to* (1) *Consd. North Staffordshire Ry. v. Hanley Corp.* (1909), 73 J. P. 477. *Reid. Re Fontaine, Fontaine v. Amherst* (1909), 78 L. J. Ch. 648. *As to* (2) *Reid. Heyne v. Fischel* (1913), 110 L. T. 264; *Collis v. Amphlett*, [1918] 1 Ch. 232. *Generally. Mendt. Assheton-Smith v. Owen* (1905), 94 L. T. 42; *Ramsgate Corp. v. Debling* (1906), 70 J. P. 132; *Fitzhardinge v. Purcell* (1908), 77 L. J. Ch. 529; *Johnson v. Clark*, [1908] 1 Ch. 303; *Re Petition of Light*, [1915] 3 K. B. 649.

B. Form of Declaration.

821. May be written or oral.—A deceased person who was employed to serve notices to quit, & whose duty it was to inform his employer of their service, was sent with a notice to serve on R. C., & on his return he signed a memorandum, "Sept. 29, served R. C." It turned out that, in fact, he had served not R. C., but his father, W. C. It was then proposed to show that he stated this fact to his employer on his return, but that the memorandum having been prepared beforehand was not altered:—*Held*: this evidence was not admissible, as it was not made in the course of business or discharge of a duty.

Semble: there is no difference in the admissibility of a declaration made by a deceased person, in the course of business or discharge of duty, whether such declaration be in writing or by word of mouth.—*STAPYLTON v. CLOUGH* (1853), 2 E. & B. 933; 2 C. L. R. 266; 23 L. J. Q. B. 5; 22 L. T. O. S. 100; 18 Jur. 60; 2 W. R. 60; 118 E. R. 1016.

Annotation:—*Reid. Smith v. Blakey* (1867), L. R. 2 Q. B. 326.

822. Necessity for signature.]—It was the practice that the proceedings of the Provost & Fellows of King's College, Cambridge, should be entered in a book, & that the entries should be signed by the Registrar of the College, who was a notary public, & who signed the entries in that character. One or two of the entries were not so signed:—*Held*: an unsigned entry was not admissible in evidence, notwithstanding that it was proved to be in the handwriting of the person who usually made the entries at the time when it was made.—*FOX v. BEARBLOCK* (1881), 17 Ch. D. 429; 50 L. J. Ch. 489; 44 L. T. 508; 45 J. P. 648; 29 W. R. 661.

823. —.]—*LAUDERDALE PEERAGE*, No. 913, *post*.

C. Relation to Declarant's Own Acts.

824. General rule.]—In an action of ejectment to recover 22 acres of land, claimed as parcel of a certain manor, lessor of *pltf.*, who sought to trace his title through one Sir E. C. in order to prove a lease to one H. & assignments by him to P. & by P. to Sir E. C. & that the land in question was part of the manor, offered in evidence an old book found in the muniment room of the family to whom the manor belonged. This book, amongst other entries & receipts in the hand-writing of the then steward, contained an entry of the lease in question, & a minute to the effect that "H.'s widow hath assigned to Sir E. C. who claimeth ten years to come." An ineffectual search for the originals had been made, & notice had been given to *def.* to produce them:—*Held*: the book was not receivable in evidence, as containing an entry made by a person in the course of his business; & if it was admissible as evidence of reputation, it merely went to show the extent of the manor.

By an entry in the course of business I mean at a time contemporaneous with that duty; there must be some evidence to show that it was contemporaneous, & a matter which it was the steward's business to do; as, for example, suppose it were his business to enter the dates of leases which he granted, the entry of the dates of the leases might be admissible as matters done in the course of his business. This is not an entry of any thing done by the steward, but only what he has gathered by hearsay of a title which he has put

down in his book (*PARKE, B.*).—*DOE d. PADWICK v. SKINNER* (1848), 3 Exch. 84; 18 L. J. Ex. 107; 13 J. P. 200; 154 E. R. 766; *sub nom.* *PADWICK v. SKINNER*, 12 L. T. O. S. 131.

825. —.]—*THE HENRY COXON*, No. 882, *post*.

826. Entry made by clerk still living—On behalf of deceased illiterate.]—*BRAIN v. PREECE* (1843), 11 M. & W. 773; 1 L. T. O. S. 315; 152 E. R. 1016.

827. Entry by mate in log book—Of manoeuvres of other colliding ship.]—*THE HENRY COXON*, No. 882, *post*.

828. Entry in postage book of letter to be posted—Whether evidence of posting.]—Neither proof of an entry made by a deceased person in the ordinary course of business in a postage book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage.—*ROWLANDS v. DE VECCHI* (1882), 1 Cab. & El. 10.

D. Must be in Discharge of Duty or Course of Business.

(a) General Rule.

829. In discharge of duty.]—*PRICE v. TORRINGTON (EARL)*, No. 816, *ante*.

830. —.]—*MERCER v. DENNE*, No. 820, *ante*.

831. —.]—*CHAMBERS v. BERNASCONI*, No. 284, *ante*.

832. In course of business.]—*PRICE v. TORRINGTON (EARL)*, No. 816, *ante*.

833. —.]—*DOE d. PATTESHALL v. TURFORD*, No. 874, *post*.

834. —.]—*POOLE v. DICAS*, No. 818, *ante*.

835. —.]—*POLINI v. GRAY, STURLA v. FRECCIA*, No. 819, *ante*.

(b) What Declarations within Rule.

i. Declarations by Clerks or Servants.

836. Clerk accustomed to make entries—In tradesman's books.]—*PITMAN v. MADDOX* (1699), Holt, K. B. 298; 1 Ld. Raym. 732; 2 Salk. 690; 90 E. R. 1064, N. P.

Annotations.—*Expld.* *DOE d. PATTESHALL v. TURFORD* (1832), 3 B. & Ad. 890. *Refd.* *CAPE BRANDY SYNDICATE v. I. R. COMRS.* (1920), 90 L. J. K. 113.

837. —.]—*PRICE v. TORRINGTON (EARL)*, No. 816, *ante*.

838. —.]—Entry by servant or agent usually employed in such matters allowed as good evidence

entered into in 1903. *Pltf.* alleged an agreement for sale of vendor's entire interest & produced an incomplete agreement for sale supporting his contention. *Def.* produced a counter-part of said document, which showed that *pltf.* was to have only an undivided half interest. *Def.* also produced certain entries in a land sales book kept by deceased vendor which further supported his contention:—*Held*: the entries in the book were admissible as evidence.—*CLERGUE v. PLUMMER* (1916), 27 O. W. R. 259; 38 O. L. R. 54.—*CAN.*

832 iv. —.]—The service of a notice by deceased person was proved by a contemporaneous endorsement by him on the notice; but it was not proved to have been served in the ordinary course of his business:—*Held*: the endorsement was not admissible in evidence.—*ORR v. LITTLEWOOD* (1858), 8 I. Ch. R. 348.—*IR.*

PART II. SECT. 5, SUB-SECT. 3.— D. (b) i.

838 i. Clerk accustomed to make entries.]—In an action by *exors.* to recover the amount of two promissory notes with interest given in connection with a proposed purchaser of shares in

PART II. SECT. 5, SUB-SECT. 3.— D. (a).

829 i. In discharge of duty.]—Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters private & professional, were tendered in evidence to prove a boundary. Surveyors were not at that time under any obligation to make notes of surveys, & it was not proved that the entry was made contemporaneously with the transaction:—*Held*: the entry was not admissible as one made in the course of business, or in the performance of a quasi public duty.—*O'CONNOR v. DUNN* (1877), 2 A. R. 247.—*CAN.*

829 ii. —.]—To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor:—*Held*: the objection was good, & the evidence inadmissible.—*MCGREGOR v. KEILLER* (1883), 9 O. R. 677.—*CAN.*

829 iii. —.]—Entries made by deceased *exor.* in a private book kept by him were not admissible in evidence either for or against the other *exor.*—*CAMSUBA v. COIGDARRIBE* (1904), 11

B. C. R. 177.—*CAN.*

832 i. In course of business.]—In *replevin* for goods sold for taxes, *pltf.* having succeeded for want of evidence of any demand by the collector, *def.* moved for a new trial on affidavits showing the discovery, since the trial, in the collector's blank receipt book, opposite to the receipt intended to have been given for these taxes, of a minute made by the collector, "Wrote Jan. 21, 1864." The death of the collector was shown, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry:—*Held*: it would be insufficient to establish a demand, & a new trial was refused.—*BARTON v. DUNDAS CORPN.* (1865), 24 U. C. R. 273.—*CAN.*

832 ii. —.]—Entries in the hand-writing of a deceased person in his books of account, made in the ordinary course of his business, are admissible under C. S. N. B. 1903, c. 127, s. 38.—*ANDERSON v. ANDERSON* (1906), 37 N. B. R. 432; 1 E. L. R. 443.—*CAN.*

832 iii. —.]—In an action, brought in 1914, for specific performance of an agreement for sale of lands, it was admitted that some kind of an agreement in respect to said lands was

Sect. 5.—Statements by deceased persons: Sub-sect. 3, D. (b) i., ii., iii. & iv.]

upon proof of his death.—**LEFEBURE v. WORDEN** (1750), 2 Ves. Sen. 54; 28 E. R. 36, L. C.

839. ———.]—Entry made in a book by two porters, deceased, in the usual course of business:—**Held**: good evidence.—**ROWCROFT v. BASSETT** (1802), Peake, Add. Cas. 199, N. P.

840. ———.]—Entry in letter book.]—Where defts. had acknowledged they had received a letter of a particular date from pltf., which upon notice they did not produce at the trial:—**Held**: an entry by a deceased clerk of pltf. in a letter book, professing to be a copy of a letter of same date from pltf. to defts., was admissible evidence of the contents of the letter, on proof that according to pltf.'s course of business the letters which he wrote were copied by this clerk, & then sent off by the post, & that in other instances the copies so made by the clerk had been compared with the originals, & always found correct.—**PRITT v. FAIRCLOUGH** (1812), 3 Camp. 305, N. P.

Annotations:—**Expld.** Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890. **Refd.** Doe d. Padwick v. Skinner (1848), 3 Exch. 84.

841. ———.]—Entry of the deceased clerk of a merchant in the letter book, received in evidence, on proof that it was made in the usual course of business in the merchant's counting house.—**HAGEDORN v. REID** (1813), as reported in 3 Camp. 377, N. P.

Annotations:—**Expld.** Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890. **Refd.** Doe d. Padwick v. Skinner (1848), 3 Exch. 84. **Mentd.** Grigg v. Scott (1815), 4 Camp. 339; Lemcke v. Vaughan (1824), 1 Bing. 473.

842. Clerk employed to do similar acts — **Endorsement of service.**]—**JONES v. THOMAS** (1843), 1 L. T. O. S. 169.

843. Clerk to notary public.]—The entry of a clerk, deceased, in the book of a notary public, is evidence.—**SUTTON v. GREGORY** (1797), Peake, Add. Cas. 150, N. P.

844. Solicitor's clerk—**Endorsement of service.**]—A bill with an endorsement upon it, "Mar. 4, 1815, delivered a copy to C. D." which endorsement was proved to be in the handwriting of a deceased clerk of pltf.'s, whose duty it was to have delivered a copy of the bill, & proved to have existed at the time of the date, is evidence to prove the delivery of the bill.

It is not sufficient merely to prove that this endorsement is in the handwriting of the deceased clerk, without at least showing that the endorsement had an existence contemporary with the date (**LORD ELLENBOROUGH, C.J.**).—**CHAMPNEYS v. PECK** (1816), 1 Stark. 404, N. P.

Annotation:—**Refd.** Doe d. Patteshall v. Turford (1832), 3 B. & Ad. 890.

845. ———.]—**Semble**: proof of the endorsement of a deceased attorney's clerk on an order, stating that he had served it on a particular day, is evidence of such service, without proof of any other corroborating circumstances.—**R. v. COPE** (1835), 7 C. & P. 720, N. P.; *subsequent proceedings* (1837), 6 Ad. & El. 226.

846. ———.]—**In diary kept for purpose.**]—In order to prove the tender alleged in the replication to the

first plea, pltf's. offered in evidence two entries made by a deceased clerk of pltf.'s attorney's in a diary kept by him according to the course of business in the office, in which it was his duty to enter daily every transaction in which he was engaged. By the first of these entries the clerk acknowledged the receipt by him of £100 for the purpose of tendering it to the deft. This was received without objection. The second entry was as follows: "Attending Mr. L., tendering him £100 for each of the plates, etc., when he declined to let me have the same," etc.—**Held**: both these entries were properly admitted, both operating to charge the party by whom they were made, & appearing to have been made in the usual course of business, by a party having peculiar means of knowing the fact, & no interest in mis-stating it, & capable of being examined to the fact had he been living.—**MARKS v. LAHEE** (1837), 3 Bing. N. C. 408; 4 Scott, 137; 6 L. J. C. P. 69; 132 E. R. 467.

Annotation:—**Mentd.** Falcon v. Denne (1841), 5 Jur. 1156.

847. Clerk of rate collector—**Receipt of rates.**]—An entry of the receipt of rates by a deceased clerk of a collector, who was duly appointed, is evidence of payment of rates to satisfy Poor Law Amendment Act, 1834 (c. 76).—**R. v. ST. MARY, WARWICK (INHABITANTS)** (1853), 1 E. & B. 816; 1 C. L. R. 192; 22 L. J. M. C. 109; 21 L. T. O. S. 74; 17 J. P. 552; 17 Jur. 551; 1 W. R. 307; 118 E. R. 642.

Annotation:—**Mentd.** Sidebotham v. Holland, [1895] 1 Q. B. 378.

848. As to person on whose credit goods supplied.]—**POORE v. AMBLER** (1843), 1 L. T. O. S. 253.

ii. Declarations by Stewards or Agents.

849. Entry by steward—**Abstract of lease.**]—**DOE d. PADWICK v. SKINNER**, No. 824, *ante*.

850. ———.]—**PADWICK v. WITCOMB**, No. 743, *ante*.

851. Entry by parish overseer's assistant—**As to removal of pauper.**]—The examinations on which an order of removal was made stated that G. was employed by the overseers of resp. parish to remove the paupers to applt. parish, under a prior order of 1826, & that after he returned from removing them he signed this endorsement on the order: "Delivered to Mr. W., overseer of D., by T. G."; that G. was dead, & his handwriting was proved. On the trial of the appeal, it appeared that G. was not an overseer, but had been employed by the overseers to remove the paupers, & that they had been seen on the morning in question leaving resp. parish with G. & that they returned the same night with 4s. Appls. objected to the admissibility of the endorsement in evidence; & also contended that resps. were estopped by a prior order of removal in 1844, which was quashed without entering into the merits of the settlement, "by reason of the informality & insufficiency of the examinations":—**Held**: the examinations contained evidence of the removal under the prior order of 1826.

Semble: the endorsement was evidence, as being made by a person deceased, in the course

a fishing vessel which deceased was building:—**Held**: entries made by a deceased clerk in the ordinary course of his duties were receivable in evidence.—**KAULBACH v. BEGIN** (1915), 49 N. S. R. 66.—**CAN.**

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h. Entry by steward—In rent-book.]—An entry in a rent-book in the

handwriting of pltf.'s deceased mother, who had managed his affairs, admitting the receipt of rent by her, amounts to a recognition by her that certain entries of payments, recorded in the preceding part of the same page in the handwriting of a person since deceased, of rent which ought to have been received by her, represented receipts for which she was accountable, & were consequently admissible in evidence.—**RICHARDS v. GOGARTY** (1870), 1 R.

4 C. L. 300.—**IR.**

k. — In farm diary.]—Entries in a farm diary made in the ordinary course of business & in discharge of his duty by a manager since deceased, relating to facts within his own knowledge:—**Held**: admissible.—**NOLAN v. BARNARD** (1908), T. S. 142.—**S. AF.**

l. Letter written by agent—As to terms of contract.]—In a suit for specific performance, a contemporaneous letter

of duty.—*R. v. DUKINFELD (INHABITANTS) (1848)*, 11 Q. B. 678; 2 New Mag. Cas. 393; 3 New Sess. Cas. 126; 17 L. J. M. C. 113; 10 L. T. O. S. 522; 12 J. P. 230; 12 Jur. 674; 116 E. R. 627.

Annotation.—*Mentd. Cababé v. Walton-on-Thames U. C.*, [1914] A. C. 102.

852. Letter written by agent to principal—As to terms of agreement.—Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorised to make it, & that the principal never knew of nor ratified it. Although the alleged agreement was verbal only, & the agent afterwards, & after the writing of the letters, signed a written agreement confirming the verbal one, the letters are inadmissible to prove that the agent was not authorised to sign the written agreement. It makes no difference that the agent is dead, unless the letters were written at the time of the conversations detailed, & it was the agent's duty to communicate them to his principal at that time.—*TURNER v. HUTCHINSON (1861)*, 3 L. T. 815; 25 J. P. 149; *previous proceedings (1860)*, 2 F. & F. 185, N. P.

Annotation.—*Mentd. Re Pearson & I'Anson (1899)*, 81 L. T. 289.

853. — Report of transaction.—*SMITH v. BLAKEY, No. 754, ante.*

854. Entry by agent in diary—How far admissible.—An entry in a diary kept by a deceased agent is not admissible to prove a fact therein stated, unless it is shown that it was the duty of the agent to make the whole entry.—*TROTTER v. MACLEAN (1879)*, 13 Ch. D. 574; *sub nom. TROTTER v. MACLEAN, TROTTER v. VAUGHAN, TROTTER v. FLETCHER*, 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 244.

Annotations.—*Mentd. Rains v. Buxton (1880)*, 14 Ch. D. 537; *Joicey v. Dickinson (1881)*, 45 L. T. 643; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co. (1899)*, 68 L. J. Q. B. 252; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351.

iii. Declarations by Solicitors.

855. Endorsement of service—Duty of clerk temporarily done by principal.—*DOE d. PATTESHALL v. TURFORD, No. 874, post.*

856. In diary—As to business done.—Entries in a diary kept by a deceased attorney, are not evidence of business done by him.—*GALE v. PAKINGTON (1825)*, M'Cle. & Yo. 354; 148 E. R. 450.

857. — As to interview.—*DUNDONALD PEERAGE CASE (1863)*, Minutes of Proceedings in House of Lords, p. 111.

Annotations.—*Refd. Esch v. Nelson (1885)*, 1 T. L. R. 610; *Mercer v. Denne*, [1905] 2 Ch. 538.

858. — As to preparation of deed.—Entries in a deceased solr.'s books, in his handwriting, relating to a deed prepared by him & executed by a deceased client:—*Held*: good evidence.—*RAWLINS v. RICKARDS (1860)*, 28 Beav. 370; 54 E. R. 408.

Annotations.—*Refd. Wills v. Palmer (1904)*, 53 W. R. 169; *Mills v. Mills (1920)*, 36 T. L. R. 772.

of deceased agent, with whom the contract was made, was admitted in evidence to prove the terms of the contract, the tenant having relied on the acts of the agent to establish that he had authority to contract.—*MORTAL v. LYONS (1858)*, 8 I. Ch. R. 112.—*IR. m. Entry by agent in letter-book—Evidence of transmission.*—The letter—*J.*—VOL. XXII.

book of a deceased agent admitted to prove that a draft of a deed was transmitted to a party.—*CAMPBELL v. DAVIDSON, ETC. (1827)*, 4 Murr. 171.—*SCOT.*

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D. (b) iii.

n. In account books—Entry of

859. — — — — —]—HOPE v. HOPE, [1893] W. N. 20.

Annotations.—*Refd. Wills v. Palmer (1905)*, 49 Sol. Jo. 165; *Mills v. Mills (1920)*, 36 T. L. R. 772.

860. — — — — —]—At the trial of a probate suit the entries in a diary of a deceased solr. were admitted as evidence:—*Held*: (1) the evidence was properly admitted as being made in the usual course of business; (2) the fact of the entry being made in a diary was sufficient evidence that it was made contemporaneously.—*ESCH v. NELSON (1885)*, 1 T. L. R. 610.

861. In letter on client's behalf.—(1) A letter written nearly twenty years ago by a solr., since deceased, to one of the trustees, in which, professing to act as the solr. for the *cestui que trust*, he stated that he was authorised by him to say that he was willing to accept a certain sum of money in liquidation of what was due to him from the trustees, was received in evidence, the solr. being dead, against the *cestui que trust*, although the latter denied any knowledge of the solr., upon the ground that it was a letter written in the course of the business of the person writing it. (2) The value of such evidence is a question for the consideration of the jury, or of the ct., which has the province of a jury in considering any question of fact.

(3) A bill of costs & a cash account of deceased solr. of trustee were held admissible in evidence in a suit instituted by the *cestui que trust*, twenty years afterwards, to charge his trustees.

This bill of costs is also admissible in evidence because here a solr. is charging himself with various sums he had received & this makes it receivable in evidence, the entries being against the interest of the party making it (*ROMILLY, M.R.*).—*BRIGHT v. LEGERTON (No. 1) (1860)*, 29 Beav. 60; 29 L. J. Ch. 852; 3 L. T. 205; 24 J. P. 772; 6 Jur. N. S. 1179; 8 W. R. 678; 54 E. R. 548; *affd. on appeal (1861)*, 2 De G. F. & J. 606, L. C.

Annotations.—*As to (1) Refd. Smith v. Blakely (1867)*, L. R. 2 Q. B. 328. *As to (3) Consd. Massey v. Allen (1879)*, 13 Ch. D. 558. *Generally, Mentd. Carey v. Cuthbert (1873)*, 22 W. R. 249; *Re Cross, Harston v. Tenslon (1882)*, 20 Ch. D. 109; *Rochefoucauld v. Boustead (1897)* 1 Ch. 196.

862. On accounts audited by him.—*VIVIAN v. MOAT, No. 770, ante.*

Entries by solicitor's clerks.—*See Nos. 844–846, ante.*

iv. Declarations by Doctors.

863. Statement to patient.—Upon the trial of a petition by a husband for dissolution of marriage, the wife made counter-charges against him of cruelty & adultery. Evidence was tendered by the wife of a statement made to her by a doctor whom she consulted, but who died before the trial, as to the nature of her illness:—*Held*: the evidence was not admissible.—*DAWSON v. DAWSON & HEPPENSTALL (1905)*, 22 T. L. R. 52.

864. Entry in case book.—Entries made by a doctor in his case book as to the nature of the complaint for which he treated a patient are not, after the death of the doctor who made them, admissible in evidence as entries made in the course of business in pursuance of a duty, at all events where he was not in partnership & did not

debtor & creditor account.—Entries of a debtor & creditor account in the books of a deceased attorney are not to be admitted as evidence merely because there are items on the other side of the account that are admitted.—*WHALEY v. CARLISLE (1866)*, 17 I. C. L. R. 792.—*IR.*

Sect. 5.—Statements by deceased persons: Sub-sect. 3, D. (b) iv., v. & vi., E., F. & G.; sub-sect. 4, A.] make the entries in pursuance of any statutory rule or of any binding rule of the profession.—**MILLS v. MILLS** (1920), 36 T. L. R. 772.

See, generally, **MEDICINE & PHARMACY**.

v. Declarations by Surveyors.

865. Entries in field book.]—Field-book entries made by a deceased surveyor for the purpose of a survey on which he was professionally employed are admissible in evidence as being made in the discharge of professional duty within *Price v. Torrington* (No. 810, ante).—**MELLOR v. WALMESLEY**, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581, C. A.

Annotations.]—*Expld.* Assheton-Smith v. Owen (1905), 75 L. J. Ch. 181. *Distd.* Mercer v. Denne, [1905] 2 Ch. 538. *Apld.* *Re* Djambi (Sumatra) Rubber Estates (1912), 107 L. T. 631. *Mentd.* Eastwood v. Ashton (1913), 83 L. J. Ch. 263; Nesbitt v. Mablethorpe U. D. C., [1918] 2 K. B. 1; Watcham v. A.-G. of East Africa Protectorate, [1919] A. C. 533.

866. Report by government surveyor.]—**MERCER v. DENNE**, No. 820, ante.

867. Report by surveyor to road trustees.]—**NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN.** (1909), 73 J. P. 477; 26 T. L. R. 20; 8 L. G. R. 375, C. A.

vi. Other Declarations.

868. Entry by employer—Of terms of hiring.]—**R. v. WORTH** (INHABITANTS), No. 729, ante.

869. Entry by stockbroker in day book.]—**MASSEY v. ALLEN**, No. 756, ante.

870. Report by government committee—As to fitness for post—Statement as to age of candidate.]—**STURLA v. FRECCIA**, No. 288, ante.

871. Statement by injured workman—To fellow workman—As to cause of injury.]—A statement made by a deceased workman to a fellow workman as to the cause of his injury is not admissible, as there is no duty to make such a statement.—**WOLSEY v. PETHICK BROTHERS** (1908), 1 B. W. C. C. 411, C. A.

872. Estimate by ship's carpenter.]—**MURRIETTA v. OLDFIELD**, No. 286, ante.

E. Declaration must be Contemporaneous with Act.

873. General rule.]—**CHAMPNEYS v. PECK**, No. 844, ante.

874. —.]—(1) Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants & to endorse on duplicates of such notices the fact & time of service; & on one occasion, the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others

prepared at the same time & returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; & two of them were proved to have been delivered by him on that occasion:—*Held*: on the trial of an ejectment after the attorney's death, the endorsement so made by him was admissible evidence to prove the service of a third notice.

(2) A minute in writing, made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business corroborated by other circumstances, which render it probable that that fact occurred, is admissible in evidence (**TAUNTON, J.**).—**DOE d. PATTESHALL v. TURFORD** (1832), 3 B. & Ad. 890; 1 L. J. K. B. 262; 110 E. R. 327.

Annotations.]—*As to (1)* *Consd.* Chambers v. Bernasconi (1834), 1 Cr. M. & R. 347; Poole v. Dicas (1835), 1 Bing. N. C. 649; Marks v. Labee (1837), 3 Bing. N. C. 408; R. v. Cope (1837), 7 C. & P. 720; Brain v. Preece (1843), 11 M. & W. 773. *Distd.* R. v. Worth (1843), 4 Q. B. 132. *Consd.* R. v. Dukinfield (1848), 11 Q. B. 678. *Doed.* Kinglake v. Beviss (1849), 7 C. B. 456. *Stapylton v. Clough* (1853), 2 E. & B. 933. *Apld.* Rawlins v. Rickards (1860), 28 Beav. 370. *Expld.* Bright v. Legerton (1861), 3 De G. F. & J. 606. *Consd.* Smith v. Blakey (1867), 1 L. R. 2 Q. B. 326. *Expld.* & *Distd.* Massey v. Allen (1879), 13 Ch. D. 558. *Distd.* Polini v. Gray, Sturla v. Freccia (1879), 12 Ch. D. 411. *Apld.* *Re* Djambi (Sumatra) Rubber Estates (1912), 107 L. T. 631. *Consd.* Mills v. Mills (1920), 36 T. L. R. 772. *Refd.* Ray v. Jones (1836), 2 Gale, 220; Clark v. Wilnot (1841), 1 Y. & C. Ch. Cas. 53; Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; Sussex Peerage Case (1844), 11 Cl. & Fin. 85; Doe d. Padwick v. Skinner (1848), 3 Exch. 84; Doe d. Padwick v. Wittcomb (1851), 6 Exch. 601; R. v. St. Mary, Warwick (1853), 1 E. & B. 816; Edie v. Kingsford (1854), 14 C. B. 759; Sturla v. Freccia (1880), 5 App. Cas. 623; Mellor v. Walmesley, [1905] 2 Ch. 164; Mercer v. Denne, [1905] 2 Ch. 538. *As to (2)* *Consd.* R. v. (1837), 7 C. & P. 720. *Refd.* Ray v. Jones (1836), 2 220; Mills v. Mills (1920), 36 T. L. R. 772.

875. —.]—**POOLE v. DICAS**, No. 818, ante.

876. —.]—To make an entry in a banker's book, in the handwriting of a person deceased, evidence, it must be proved not only to have been made in the regular course of business, but to have been made at the time it bears date or immediately after.—**RAY v. JONES** (1836), 2 Gale, 220.

877. —.]—**DOE d. PADWICK v. SKINNER**, No. 824, ante.

878. —.]—**TURNER v. HUTCHINSON**, No. 852, ante.

879. —.]—**POLINI v. GRAY, STURLA v. FRECCIA**, No. 819, ante.

880. —.]—**MERCER v. DENNE**, No. 820, ante.

881. Entry not contemporaneous—Over a hundred years old.]—**LAUDERDALE PEERAGE**, No. 913, post.

882. Degree of contemporaneity—Entry in ship's log two days after collision.]—(1) Entries made in the ship's log by the mate of a vessel

PART II. SECT. 5, SUB-SECT. 3.— D. (b) v.

o. Admission of mistake by land surveyor.]—A land surveyor was called upon by the Surveyor-General to explain an overlapping in the diagrams of two farms which he had surveyed several years before. He thereupon admitted that he had made a mistake in his calculations. The surveyor being deceased:—*Held*: his admission was admissible in evidence as being a declaration by a deceased person in the discharge of his professional duty.—**MURRAY v. OPPERMAN** (1904), T. S. 963.—**S. AF.**

PART II. SECT. 5, SUB-SECT. 3.— D. (b) vi.

p. Entry by sheriff.]—A memorandum or entry in a book in the office

of a sheriff in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff & the then deputy sheriff being dead, & the existing deputy sheriff having proved the handwriting & the place from which the book was produced.—**WARDROPE v. CANADIAN PACIFIC RY. CO.** (1884), 7 O. R. 321.—**CAN.**

PART II. SECT. 5, SUB-SECT. 3.—E.

873 i. General rule.]—The father being dead contemporaneous statements & acts, & subsequent statements made by him against his interest are evidence to show what his real intention was in purchasing property in the names of his sons.—**LE LEUNG SHI v. LO LIM YEUK** (1912), 8 Hong Kong L. R. 66.—**HONG KONG.**

873 ii. —.]—Upon the question of the legitimacy of one E. H. an entry, dated in 1804, in the Roman Catholic registry of marriages & baptisms of a parish was offered in evidence of the baptism of the said E. H., in which she was described as the child of J. H. & H. his wife, signed by a clergyman who was proved to be deceased, & to have been the Roman Catholic curate of the parish. Evidence was also given that it was the duty of the clergyman, when baptising, to make an entry of the baptism, & to add a statement showing whether or not the child was born in lawful wedlock:—*Held*: the entry was inadmissible because it was not contemporaneous, & because there was no evidence to show that the curate officiated at, or had personal knowledge of, the marriage.—**RYAN v. RING, LANNEN, INTERVENIENT** (1889), 23 L. R. Ir. 184.—**IR.**

relative to a collision & signed by him & the captain nearly two days after the collision, cannot be used as evidence on behalf of the ship in which they were made, after the decease of the persons making & signing them. (2) Depositions made by persons on board a ship relative to a collision cannot, even after the decease of the deponents, be used as evidence on behalf of that ship at the trial.

(3) When such evidence as this, where the party who furnished it is dead, is admitted, it must be evidence which relates to an act done by himself & not by others. We all know, as a matter of common knowledge in these proceedings, that it is the duty of the mate to enter not only what manœuvres are executed on board his ship & the navigation of his vessel, but to state what the cause of the collision was, & whether it was in consequence of the manœuvres & navigation of the other ship (PHILLIMORE, J.).

(4) Neither do I think that the entry can be considered as contemporaneous; also it was in the interest of the party who made it; & the authorities point to this—that when such evidence is admitted it must relate to acts done by the person who makes the entry & not by others. But the mate must enter, not only manœuvres for his own ship, but also the consequences of the manœuvres & navigation of the other ship. These different sets of facts are so inextricably mixed up that it is very difficult, if not impossible, to separate them. I therefore for these reasons reject this evidence (PHILLIMORE, J.).—THE HENRY COXON (1878), 3 P. D. 156; 47 L. J. P. 83; 38 L. T. 819; 4 Asp. M. L. C. 18; *sub nom.* THE HARRY COXON, 27 W. R. 263.

Annotation:—As to (3) Refd. Ward v. Pitt, [1913] 2 K. B. 130.

— Report made a month after survey.]

—On a motion by a shareholder to rectify the register of members of a co. by removing the name of appct. therefrom on the ground of misrepresentations in the prospectus of the co., appct. tendered as evidence of untruths in the prospectus a report which had been made by an agent of the co. who was employed by the directors to inspect & report to them on the estates which had been acquired by the co. Objection was taken to the admissibility of the report as evidence because the same was made one month after the inspection had taken place, the agent having been lying half that time unconscious in a hospital. He had died shortly before the motion came on for hearing:—*Held*: a document could not be admitted as evidence after the death of the writer, even though made in the course of his duty, unless it was contemporaneous; & in the present case the report in question came within that well-established rule.—*Re DJAMBI (SUMATRA) RUBBER ESTATES, LTD.* (1912), 107 L. T. 631; 29 T. L. R. 28; 57 Sol. Jo. 43, C. A.

884. Presumption of contemporaneity.]—In an action for railway calls, *pltf.* proved that it was the course of business for C., a clerk, to fill up printed notices of the calls & direct them to the shareholders, & then to put the notices into a basket; & it was the practice for another clerk to post the letters which were in the basket, which he had done on this occasion. C. was dead, but a list of shareholders, containing the name of *deft.*, was produced in his handwriting, & endorsed

by him, “Letters sent out.” C. had received instructions to make out such list, & had been seen filling up & directing the notices, with such a list before him:—*Held*: the list so endorsed was admissible as evidence that notice of the call had been sent to *deft.*, notwithstanding it was not distinctly shown when the endorsement was made.—*EASTERN UNION RY. CO. v. SYMONDS* (1850), 5 Exch. 237; 6 Ry. & Can. Cas. 578; 19 L. J. Ex. 287; 15 L. T. O. S. 281; 155 E. R. 101.

885. — Entry in solicitor's diary.]—*ESCH v. NELSON*, No. 860, *ante*.

F. Interest in Misstatement.

886. General rule.]—*MARKS v. LAHEE*, No. 846, *ante*.

887. —.]—*POLINI v. GRAY, STURLA v. FRECCIA*, No. 819, *ante*.

888. Entry by mate in ship's log—Details of collision.]—*THE HENRY COXON*, No. 882, *ante*.

G. For What Purposes Receivable.

889. To charge strangers—Entry by clerk—Evidence against sureties.]—In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipts of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of the money.—*WHITNASH v. GEORGE* (1828), 8 B. & C. 556; 108 E. R. 1149; *sub nom.* *WHITMARSH v. GENDS*, Dan. & Ll. 171; 3 Man. & Ry. K. B. 42; 7 L. J. O. S. K. B. 57.

Annotation:—Consd. Middleton v. Melton (1829), 10 B. & C. 317.

890. As evidence of collateral facts—Certificate of Chief Rabbi as to circumcision—Whether evidence of date of birth.]—*DAVIS v. LLOYD*, No. 759, *ante*.

—*Stated in declaration.]*—*See* Nos. 284–286, 288, 726, 854, 882, *ante*.

SUB-SECT. 4.—AS TO PUBLIC OR GENERAL RIGHTS.

A. In General.

891. Whether receivable as evidence of reputation—If referring to public rights.]—Declarations by deceased parishioners, who were tithepayers, & therefore interested, are admissible as evidence of reputation in support of a parochial modus, set up in defence to an action by a rector for not setting out tithes. But the judge has a right to leave such evidence to the jury, with his own impressions on its weight.—*DEACLE v. HANCOCK* (1824), M'Cle. 85; 13 Price, 226; 148 E. R. 37.

Annotation:—Refd. Davies v. Morgan (1831), 1 Cr. & J. 587.

892. —.]—*LONSDALE v. HEATON*, No. 1003, *post*.

893. —.]—*FOWKE v. BERINGTON*, No. 995, *post*.

See, generally, Sub-sect. 5, post.

894. In respect of what rights—Rights claimed by prescription.]—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

895. — Right of common.]—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

896. — Extent of waste of manor—Declaration by lord of manor.]—*CREASE v. BARRETT*, No. 724, *ante*.

897. — Declaration by copyholders.]—

PART II, SECT. 5, SUB-SECT. 3.—G.

g. To prove amount of dower fixed

—Register of marriages kept by *Istahad*.]

—A register of marriages kept by the

Istahad, since deceased, who celebrated this marriage, in which register was entered the amount of the dower:—*Held*: admissible & relevant, as evidence of the sum fixed, being an entry

in a book kept in the discharge of duty within Evidence Act, 1872, s. 32 (2).—*ZAKERI BEGUM v. SAKINA BEGUM* (1892), L. R. 19 Ind. App. 157; 1 L. R. 19 Cal. 689.—*IND*.

Sect. 5.—Statements by deceased persons: Sub-sect. 4, A. & B.; sub-sect. 5, A.]

DUNRAVEN (LORD) v. LLEWELLYN, No. 1026, *post*.

998. — Right of free warren claimed by all copyholders.]—(1) Reputation is admissible evidence of a claim of free warren, by prescription, over an entire manor. Therefore, a private act for the inclosure of common lands within the manor, in which the interest of copyholders appeared by the recital, & which contained a proviso expressly saving the rights of the lord to free warren in the manor, in as ample a manner as the lord had theretofore enjoyed it, is admissible evidence to prove the right as against a copyholder.

(2) On the same ground, the declarations of deceased copyholders as to the existence of the franchise over all the copyholds, is admissible for the like purpose.—**CARNARVON (EARL) v. VILLEBOIS** (1844), 13 M. & W. 313; 14 L. J. Ex. 233; 153 E. R. 130.

Annotations:—As to (1) *Refd.* It. v. Bedfordshire (1855), 4 E. & B. 535. As to (2) *Refd.* Doe d. William IV. v. Roberts (1844), 13 M. & W. 520.

999. Case stated for opinion of counsel.]—**CARR v. MOSTYN**, No. 806, *ante*.

900. — Whether church parish church.]—**FOWKE v. BERINGTON**, No. 995, *post*.

— **Proof of boundaries.]—**See **BOUNDARIES**, Vol. VII., pp. 322, 323.

— **Proof of custom.]—**See **CUSTOM & USAGES**, Vol. XVII., p. 20, Nos. 206, 207.

901. Right must be claimed as public right—Highway.]—In an action of trespass *quare clausum fregit*, *deft.*, in order to prove that there was a public highway across the *locus in quo*, put in evidence a copy of a map made by order of a former lord of the manor of which the land in question formed part:—*Held*: the map was not admissible as amounting to a declaration by a deceased person as to public right; inasmuch as, first, the map, if a declaration at all, was a declaration only as to the matter in respect of which it had been used, viz., the defining of the copyholds; & secondly, the map itself did not describe the road as a highway.—**PIPE v. FULCHER** (1858), 1 E. & E. 111; 28 L. J. Q. B. 12; 32 L. T. O. S. 105; 5 Jur. N. S. 146; 7 W. R. 19; 120 E. R. 850.

Annotations:—*Distd.* Vyner v. Wirral R. D. C. (1909), 73 J. P. 242. *Consd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; *Fowke v. Berington*, [1914] 2 Ch. 308.

902. —]—On an appeal against an order of justices refusing to alter a provisional apportionment made under Private Street Works Act, 1892 (c. 57), quarter sessions refused to admit certain old maps which were tendered as evidence to show that the road in question was a highway repairable by the inhabitants at large:—*Held*: the maps were admissible if they tended to show that the road in question was a highway repairable by the inhabitants at large & if there was evidence that they were made by persons who had competent means of knowledge as to the facts.—**VYNER v. WIRRAL RURAL DISTRICT COUNCIL** (1909), 73 J. P. 242; 7 L. G. R. 628, D. C.

Annotations:—*Consd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. *Mentd.* Cababé v. Walton-upon-Thames U. D. C. (1912), 107 L. T. 159.

903. Competency of declarant—Justices—As to boundaries of hundred.]—In an action against the hundred of B., for the felonious demolition of Nottingham Castle by rioters, *pltf.* produced in evidence certain orders made by the justices at the quarter sessions for the county, in which the castle was described as being in that hundred. No proof was given that the justices who made those orders were residents in the county:—

Held: the orders were admissible as evidence of reputation, for that the justices, from the nature of their office, must be presumed cognisant of the subject.—**NEWCASTLE (DUKE) v. BROXTOWE HUNDRED** (1832), 4 B. & Ad. 273; 1 Nev. & M. K. B. 598; 1 Nev. & M. M. C. 507; 2 L. J. M. C. 47; 110 E. R. 458.

Annotations:—*Consd.* Mercer v. Denne, [1905] 2 Ch. 538. *Refd.* Crease v. Barrett (1835), 1 Cr. M. & R. 919; *Dunraven v. Llewellyn* (1850), 15 Q. B. 791; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *Evan v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578. *Mentd.* Hadley v. Baxendale (1854), 23 L. T. O. S. 69; *Yates v. Dunster* (1855), 11 Exch. 15; *Joyner v. Weeks*, [1891] 2 Q. B. 31; *Wedgebury Corpn. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78.

— **Copyholders—As to custom of manor.]—**See **COPYHOLDS**, Vol. XIII., p. 28, Nos. 248, 249.

— **Person making map or survey.]—**See Nos. 3230, 3231, *post*.

As to reputation.]—See Sect. 6, sub-sect. 1, *post*.

904. Effect of interest of declarant.]—A former owner of the demesne of a manor had made the following entry in a private manuscript volume, "About 1763, soon after I came to the estate, I called it at three or four churches that there was no road through the demesne but to the Hall, & the mill & the tenants above wall to church, which I hope will be remembered for the good of the family":—*Held*: this memorandum was not admissible in evidence on behalf of the present owner.

A person cannot by a declaration make evidence to be used for himself or for his successors after his decease. If this be a declaration at all, it was made by a person whose mind could not be free from bias; & I am not aware that any case is to be found in which the declaration of a deceased person, obviously for his own interest, has been received in evidence (*JOYCE, J.*).—**BROCKLEBANK v. THOMPSON**, [1903] 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209; 18 T. L. R. 285.

Annotation:—*Mentd.* Derry v. Sanders, [1910] 1 K. B. 223.

905. Must be ante litem motam.]—**BERKELEY PEERAGE CASE**, No. 447, *ante*.

906. — What constitutes litem mota.]—**SHEDDEN v. A.-G.**, No. 938, *post*.

907. — Whether declaration in former suit on different point—Different custom of same manor.]—In an action by a copyholder against the lord of a manor for a false return to a *mandamus*, in which *mandamus* a custom was set forth in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage, to be equal to two years' improved value, & not guilty pleaded, depositions made in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine to be set by the lord or his steward, & which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the now copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves, that they were such or were persons acquainted with the customs of the manor; & their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made *post litem motam*, because the same custom was not in controversy

in the former suit as in the present.—**FREEMAN v. PHILLIPPS** (1816), 4 M. & S. 436; 105 E. R. 914.

Annotations.—**Apld.** *Ward v. Pomfret* (1832), 5 Sim. 475. **Consd.** *Gee v. Ward* (1857), 7 E. & B. 509. **Refd.** *Evans v. Taylor* (1838), 7 Ad. & El. 617; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578.

Compare No. 447, *ante*; Nos. 966–972, *post*.

B. Evidence of Reputation.

See Sect. 6, sub-sect. 1, C., *post*.

SUB-SECT. 5.—DECLARATIONS AS TO PEDIGREE.

A. In General.

908. General rule.—**BERKELEY PEERAGE CASE**, No. 447, *ante*.

909.—*ISAAC v. GOMPERTZ* (1837), Hub-back on Evidence of Succession, p. 650.

910.—*J.*—Discussion of the principles upon which hearsay evidence is admissible in cases of pedigree.

Qu.: whether the reasons & grounds upon which births & times of births, marriages, deaths, legitimacy, consanguinity, etc., are allowed to be proved by hearsay, from proper quarters, in a controversy merely genealogical are not applicable to declarations made by a deceased person as to where his family came from, where he came from, or “of what place” his father was designated.

A general rule against allowing particular facts or single acts to be proved by hearsay, which is frequently applied in cases of public right, or custom, must be considered as extending, though probably in a less wide or less ample manner, or with more qualifications to cases of pedigree.

A birth, however, from a single woman, a birth from a married woman, a death, a marriage, is a particular fact or a single act, which, of course, is provable by hearsay, hearsay from a proper quarter, on a question of pedigree. & as I apprehended it to be settled that the time absolutely or relatively of a particular birth may be, so I am not aware that the time absolutely or relatively of a marriage or death may not be, thus proved upon a question of that nature; but for such a purpose is there a solid ground of distinction between time & place? There may be, but I do not distinctly perceive it (**KNIGHT BRUCE, V.-C.**).—**SHIELDS v. BOUCHER** (1847), 1 De G. & Sm. 40; 63 E. R. 962.

Annotations.—**Consd.** *Haines v. Guthrie* (1884), 13 Q. B. D. 818. **Refd.** *Bauer v. Mitford* (1859), 7 W. R. 570.

911.—*J.*—(1) Hearsay evidence is admissible in cases of pedigree, being statements of living witnesses as to that which they have heard persons now deceased say with respect to the pedigree of their family; they being proved *aliunde* to be members of that family by extrinsic evidence.

(2) Although the ct. will admit hearsay evidence in cases of pedigree, it looks at such evidence with great jealousy, the parties giving it being interested witnesses; but discrepancies may go to confirm the truth of such statements.—**BAUER v. MITFORD** (1859), 7 W. R. 570; *subsequent proceedings*, 29 L. J. Ch. 268.

912.—*J.*—The declaration of deceased members of a family, though admissible in cases of pedigree, as evidence to prove pedigree, are not

admissible to prove the facts which constitute a pedigree, such as birth, death, or marriage, where the case is not one of pedigree.

In an action for goods sold, an affidavit made by the deceased father of deft. in another action, to which pltf. was not a party, stating deft.'s age, was given in evidence to support the defence of infancy:—**Held**: the evidence was wrongly admitted.—**HAINES v. GUTHRIE** (1884), 13 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; 48 J. P. 756; 33 W. R. 99, C. A.

Annotations.—**Refd.** *Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985; *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*, [1916] 2 A. C. 575.

913.—**Admissible if not *prima facie* untrue or biased.**—(1) By the law of Scotland statements of a deceased person in relation to facts, which must presumably have been within his personal knowledge, & to which if alive, he could have been examined as a witness, may after his death be received as secondary evidence through the medium of writing, or through the medium of a living person who heard the statement. Where, therefore, a member of the family writes a note in a manuscript book to the effect that he has sent original letters to a certain person, & they cannot be found, the copies of such letters, the handwriting, & that the copies were from original letters being proved, the note, & the copies of the letters, are evidence of the truth of the statements within the writer's personal knowledge, & appearing to be so by the letters themselves. (2) So also a statement, whether oral or written, is not vitiated if made with a purpose, where the object was an obvious & legitimate one & one supporting & not discrediting the presumption of truth. But the statement of a deceased person is not admissible as evidence when its terms, or the circumstances in which it was made are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth or that it was a coloured or one-sided version of the truth; & this rule should be applied with greater strictness in criminal cases. (3) A minute of date of 1749, from an original unsigned minute book, produced from the proper custody & kept in accordance with a charter of a society, is admissible evidence.

(4) A memorandum in a register of a church by its deceased rector made about 108 years ago, though not a contemporaneous entry made in the regular course of the register is admissible as evidence, & goes to prove that the rector did the things stated in the memorandum.—**LAUDERDALE PEERAGE** (1885), 10 App. Cas. 692, H. L.

Annotations.—*As to* (2) **Refd.** *Lovat Peerage* (1885), 10 App. Cas. 763. **Generally.** **Mentd.** *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

914.—**Ordinary rule of evidence relaxed.**—The law has, in questions of pedigree, relaxed the rules of evidence applicable to the investigation of all other questions, & has admitted much looser evidence in such cases, such evidence as would be excluded in other instances (**DR. LUSHINGTON**).—**MAULE v. MOUNSEY** (1844), 1 Rob. Eccl. 40; 8 Jur. 850; 163 E. R. 958.

915. Application of rule—Proof of age.—*Semble*: in a pedigree case, statements contained in monumental inscriptions, & hearsay declarations made by a deceased relative, are competent

PART II. SECT. 5, SUB-SECT. 5.—A.

908 I. General rule.—Declarations by A., a deceased person, proved to belong to the family of B. as to B.'s relationship with X., are not admissible unless there is some evidence *aliunde* that A. is of the family of X.—*Re OSMAND*,

BENNETT v. BOOTY, [1907] V. L. R. 87.—**AUS.**

908 II.—*J.*—Hearsay evidence though to be received with caution is not inadmissible in questions of pedigree, & by the Mahomedan law is held to be good respecting death,

descent, & marriage.—**GHURREEH HOSSEIN CHOWDHRY v. USEEMONNISSA KHATOON** (1862), 1 Hay, 528.—**IND.**

915 I. Application of rule—Proof of age.—For the purpose of the decision of a question of limitation, it was necessary to prove the date of pltf.'s

Sect. 5.—Statements by deceased persons : Sub-sect. 5, A. & B.]

evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.—**KIDNEY v. COCKBURN** (1831), 2 Russ. & M. 167; 39 E. R. 358, L. C.

Annotations:—*Consd.* Haines v. Guthrie (1884), 13 Q. B. D. 818. *Refd.* Fligg v. Wedderburne (1841), 11 L. J. Q. B. 45; Shields v. Boucher (1847), 1 De G. & Sm. 40.

916. — Proof of relationship.]—KIDNEY v. COCKBURN, No. 915, *ante*.

917. — Fact of relationship with persons residing in particular place.]—In a question of pedigree, when it is important to show that the family had relatives living at a particular place, evidence may be given of declarations by a deceased member of the family, that "he was going to visit his relatives at that place."—**RISHTON v. NESBITT** (1844), 2 Mood. & R. 554, N. P. *Annotation:—**Refd.* Shields v. Boucher (1847), 1 De G. & Sm. 40.

918. — Proof of identity.]—HOOD v. BEAUCHAMP (LADY) (1836), Hubback on Evidence of Succession, p. 468.

*Annotation:—**Refd.* Shields v. Boucher (1847), 1 De G. & Sm. 40.

919. — —.]—Hearsay declarations on a question of pedigree are admissible to prove the identity of the party.—**R. v. ST. MILDRED'S, CANTERBURY** (1838), 2 Jur. 46.

920. — —.]—In pedigree, hearsay evidence of an ancestor's trade not receivable; hearsay evidence to identify the person meant may do, but a limit to hearsay evidence must be put somewhere.—**EGGLETON v. EGGLETON** (1843), 1 L. T. O. S. 529.

921. — Trade of ancestor.]—HOOD v. BEAUCHAMP (LADY) (1836), cited in Hubback's Evidence on Succession, at p. 468.

*Annotation:—**Refd.* Shields v. Boucher (1847), 1 De G. & Sm. 40.

922. — —.]—EGGLETON v. EGGLETON, No. 920, *ante*.

923. — Relationship of persons known to declarant.]—Demandant offered in evidence a Welsh pedigree. At the foot of the pedigree was the following memorandum: "Collected from parish registers, wills, monumental inscriptions, family records, & history, this account is now presented as correct & as confirming the tradition handed down from one generation to another to T. L., Esq., of C. G., this 4th July 1733 by his loving kinsman, etc. W. L." The signature was

proved to correspond with that to the will of W. L., one of the ancestors of demandant. On the back of the document was indorsed: "A true account of my family & origin, T. L. C. G." This document was found by the person who produced it, fifty years ago, amongst the papers of the C. G. family, in a drawer in the mansion-house of the C. G. estate, which had devolved upon him, & the witness proved the indorsement to be in the handwriting of T. L. of C. G.:—*Held*: the document was admissible to show the relationship of those persons who were described by the framer of the pedigree as living, & who might be presumed to be personally known to him.—**DAVIES v. LOWNDES** (1843), 6 Man. & G. 471; 7 Scott, N. R. 141; 12 L. J. Ex. 506; 134 E. R. 978, Ex. Ch.

Annotations:—*Refd.* Shields v. Boucher (1847), 1 De G. & Sm. 40; Hammond v. Bradstreet (1854), 10 Exch. 390. *Mentd.* Davies v. Lowndes (1844), 8 Scott, N. R. 539; Doe d. Cadwalader v. Price (1847), 16 M. & W. 603; Potez v. Glossop (1848), 2 Exch. 191.

924. — Declaration as to original domicile of family or parent.]—SHIELDS v. BOUCHER, No. 910, *ante*.

925. — Place of happening of event.]—SHIELDS v. BOUCHER, No. 910, *ante*.

926. — Proof of death.]—A. & B. were married in 1806, & C., their daughter, was born in 1811. A. & B. were dead, & there was evidence that, after the birth of C., B. had stated that she had had a son, who was older than C., & had died before the birth of the latter. The Christian name of the son could not be ascertained, & there was no other evidence of his birth or death:—*Held*: B.'s statements were admissible as a declaration by a deceased person on a question of pedigree.—*In the Goods of THOMPSON* (1887), 12 P. D. 100; 56 L. J. P. 46; 57 L. T. 373; 35 W. R. 384; 3 T. L. R. 278.

927. — Corroboration of declaration of illegitimacy.]—P. died intestate, & the Crown claimed his property on the ground that he was illegitimate. The evidence which it relied on to prove illegitimacy was declarations made & letters written by P. whilst alive asserting his own illegitimacy, absence of proof that the man whom P.'s next of kin asserted to be P.'s legitimate father was alive at the date of P.'s conception, & family tradition & admissions by the next of kin now claiming the property:—*Held*: family tradition was admissible to corroborate P.'s declaration as to his own illegitimacy.—*Re PERTON, PEARSON v. A.-G.* (1885), 53 L. T. 707; 1 T. L. R. 655.

birth. Pltf. & one of his witnesses each spoke to statements made to them by relatives of pltf., who were since deceased, relating to the date of pltf.'s birth:—*Held*: such statements were admissible in evidence under Evidence Act, s. 32 (5).—**RAM CHANDRA DUTT v. JAGESWAR NARAIN DEO** (1893), 1 L. R. 20 Calc. 758.—**IND.**

915 ii. — —.]—A statement as to pltf.'s age, made by his sister, was admissible in evidence after her decease, under Evidence Act, s. 32 (5), the date of birth being the commencement of a relationship by blood, & therefore relating to the existence of such relationship within sect.—**ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. v. NARASIMHA CHARI** (1901), 1 L. R. 25 Mad. 183.—**IND.**

916 i. — Proof of relationship.]—The declaration of a deceased mother is admissible evidence of the legitimacy of her child, where the inquiry is as to who are the next of kin to such child.—*Re FONSECA* (1903), 28 V. L. R. 728.—**AUS.**

916 ii. — —.]—Declarations made by deceased mother of pltf., in the hearing of pltf. & of pltf.'s son, as

to the marriage of pltf.'s parents, received in evidence to prove pltf.'s pedigree.—**WALKER v. MURRAY** (1884), 5 O. R. 638.—**CAN.**

916 iii. — —.]—In proof of the celebration of a marriage evidence was given that the husband, who had gone from this province to British Columbia, had gone through the ceremony of marriage according to the Indian custom with an Indian woman, he paying \$20 to her father; & that after the marriage they cohabited & lived together as man & wife, & were recognised by the Indians as such up to the time of the wife's death, prior to 1879, the giving of presents & cohabitation being regarded by the tribe as constituting a marriage. The issue of the union were two children, a daughter & another child who died. About 1879, the husband returned to this province bringing the daughter with him. Evidence was also given of declarations made by the husband on his return that he had been legally married in the same manner as he would have been had the marriage taken place here, & that the daughter was his legitimate child; & that he

had brought her up as such:—*Held*: apart from the Indian marriage, there was evidence from which a legal marriage according to the recognised form amongst Christians could be presumed, & the daughter was his legitimate child & "legal heir."—**ROBB v. ROBB** (1891), 20 O. R. 591.—**CAN.**

916 iv. — —.]—Evidence Act, 1872, s. 32 (5), does not apply to statements made by interested parties in denial, in the course of litigation, of pedigrees set up by their opponents.—**NARAIN KUAR v. CHANDI DIN** (1886), 1 L. R. 9 All. 467.—**IND.**

916 v. — —.]—A genealogical table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for the purposes of a former suit:—*Held*: inadmissible in evidence, having been made without the personal knowledge & belief which must be found or presumed in any admissible statement by a deceased person.—**JAGATPAL SINGH v. JAGESHAR BAKHSH SINGH** (1902), 1 L. R. 25 All. 143; L. R. 30 Ind. App. 27; 7 C. W. N. 209.—**IND.**

928. — Whether admissible to prove facts of pedigree in other matters—General rule.]—Evidence of the declaration of a deceased parent as to the place of birth, or place of baptism, of the child, is inadmissible.

This case was not within the exception to the general rule of evidence. It was not a question of pedigree, but of general identity, & that too with reference to a copateral fact in the cause (PARKE, J.).—*RIDER v. MALBON* (1830), 8 L. J. O. S. M. C. 127.

929. — — — — —.]—HAINES v. GUTHRIE, No. 912, *ante*.

930. — — — — — Place of birth.—Question of settlement.]—(1) Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child is not admissible to prove the birth-settlement of such child.

(2) The controversy was not as in a case of pedigree from what parents the child has derived its birth, but in what place an undisputed birth, derived from known & acknowledged parents has happened (LORD ELLENBOROUGH, C.J.).—*R. v. ERITH (INHABITANTS)* (1807), 8 East, 539; 2 Bott. 6th ed. 789; 103 E. R. 450.

*Annotations:—*As to (1) *Consd. R. v. Rishworth* (1842), 2 Q. B. 476. *Distd. Shields v. Boucher* (1847), 1 De G. & Sm. 40. *Refd. Chambers v. Bernasconi* (1834), 4 Tyr. 531. As to (2) *Consd. Haines v. Guthrie* (1884), 13 Q. B. D. 818. *Refd. Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *R. v. St. Mildred's Canterbury* (1838), 2 Jur. 46; *Doe d. Jenkins v. Davies* (1847), 16 L. J. Q. B. 218. *Generally, Mentd. Northard v. Pepper* (1864), 10 Jur. N. S. 1077.

931. — — — — — Or baptism.]—RIDER v. MALBON, No. 928, *ante*.

932. — — — — — Fact of death—Of cestui que vie.]—In an action for use & occupation by the reversioner, against a person who had been tenant for years, determinable on three lives; a register of burials of a Wesleyan chapel, is not admissible to prove the death of one of the *cestuis que vie*; nor is the evidence of a witness who heard in the family that another of the *cestuis que vie* was dead.—*WHITTUCK v. WATERS* (1830), 4 C. & P. 375, N. P. *Annotations:—**Refd. Haines v. Guthrie* (1884), 13 Q. B. D. 818; *Re Woodward, Kenway v. Kidd* (1913), 82 L. J. Ch. 230.

933. — — — — — Age—Plea of infancy.]—*Qu.*: whether, to support a plea of infancy, declarations by deft.'s father, since deceased, as to his son's age, are admissible in evidence.—*FIGG v. WEDDERBURN* (1841), 11 L. J. Q. B. 45; 6 Jur. 218.

*Annotation:—**Consd. Haines v. Guthrie* (1884), 13 Q. B. D. 818.

933 i. — — — — — Whether admissible to prove facts of pedigree in other matters—Age—Plea of infancy.]—In a suit on a promissory note, to which the only defence was minority, a statement made by deft.'s father, who died before proceedings by way of suit had been contemplated, to a witness as to the age of his son:—*Held*: inadmissible as evidence of the age of deft. in support of his defence.—*BIPIN BEHARY DAW v. SREEDAM CHUNDER DEY* (1886), 11 L. R. 13 Cal. 42.—*IND.*

PART II. SECT. 5, SUB-SECT. 5.—B.

936 i. General rule.—Whether relationship necessary.]—In India, in cases of pedigree, the declaration of illegitimate members of the family & also of persons who, though not related by blood or marriage to the family, are intimately acquainted with its members & state, is admissible in evidence after the death of the declarant, in the same manner & to the same extent as those of deceased members of the family.—*GEURMEH HOSSAIN CHOWDHRY v. USEEMONISSA KHATOON* (1862), 1 Hay, 528.—*IND.*

—.]—Evidence of com-

934. Dying declaration.]—In the proof of a pedigree, the dying declarations of A., as to the relationship of the lessor of pltf. to the person last seized, are not receivable in evidence.—*DOE d. SUTTON v. RIDGWAY* (1820), 4 B. & Ald. 53; 106 E. R. 858.

*Annotation:—**Refd. Stobart v. Dryden* (1836), 1 M. & W. 615.

Evidence in peerage cases.]—See PEERAGES & DIGNITIES.

B. Competency of Declarant and Witness.

935. General rule.]—Qualification as to evidence of tradition, even upon pedigree. It must be from persons, having such a connection with the party, that it is natural & likely, from their domestic habits, that they are speaking the truth, & could not be mistaken. Upon that principle descriptions in wills, monuments, bibles, etc., are admitted.—*WHITELOCKE v. BAKER* (1807), 13 Ves. 510; 33 E. R. 385, L. O.

*Annotations:—**Consd. Berkeley Peerage Case* (1811), 4 Camp. 401; *Johnson v. Lawson* (1824), 2 Bing. 86. *Refd. Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *Slaney v. Wade* (1836), 7 Sim. 595; *Shields v. Boucher* (1846), 1 De G. & Sm. 40; *Haines v. Guthrie* (1884), 13 Q. B. D. 818.

936. — — — — — Whether relationship necessary.]—(1) Declarations, in pedigree cases, can only be received when made by persons related to the family.

(2) Traditional evidence by Roman Catholic priests in Ireland, as to legitimacy of parties, rejected.—*CASEY v. O'SHAUNESSY* (1843), 7 Jur. 1140.

937. — — — — —.]—T., being already married to W., married another woman, by whom he had children, one of whom was deft. Deft. was called to prove declarations by the deceased T. with respect to the first marriage, for the purpose of showing that it was invalid. No proof independent of the declaration itself was given of relationship between T. & deft.:—*Held*: the declaration was therefore inadmissible, & perhaps the evidence would be inadmissible on the ground that the declaration was by a person whose mind would not be free from bias, it being manifestly for the interest of the deceased to disavow his first marriage.—*PLANT v. TAYLOR* (1861), 7 H. & N. 211; 31 L. J. Ex. 289; 5 L. T. 318; 8 Jur. N. S. 140; 158 E. R. 453.

*Annotations:—**Consd. Haines v. Guthrie* (1884), 13 Q. B. D. 818. *Refd. Brookelbank v. Thompson*, [1903] 2 Ch. 344. *Mentd. Owen v. Owen* (1864), 11 L. T. 137.

938. Question of competency for judge—Though

petent witnesses as to their having heard the names of the ancestors recited by members of pltf.'s family on ceremonial & other occasions:—*Held*: admissible evidence in support of the pedigree on which pltf. based his claim. Such evidence is not open to criticism merely on the ground that the witnesses are relatives. The relationship of a class of witnesses should be considered only with the ordinary caution with which testimony is sifted where sympathy with one side is to be taken as making them interested or unreliable witnesses. The fact that one of such persons besides being a relative was assisting pltf. in the case, & that the other witnesses were connected with this person by blood or service, is not necessarily sufficient ground for discrediting their evidence.—*DEBI PERSHAD CHOWDHRY v. RADHA CHOWDHRY* (1905), 1 L. R. 32 Cal. 84; L. R. 31 Ind. App. 160; 9 C. W. N. 164.—*IND.*

936 iii. — — — — —.]—A document, ancient & genuine, purporting to be a family pedigree, was produced in evidence in a mutation case by J.

The record was brought before the civil ct. in a suit in which pltf.'s relationship to H., the last male owner of certain property, was in question. J. stated that he had received the pedigree from his grandfather. It was not proved who had prepared the pedigree:—*Held*: it was not necessary to show who had made the statements mentioned in the pedigree, & it was admissible in evidence under Evidence Act, s. 32 (6).—*JAHANGIR v. SHIKRAJ SINGH* (1915), 1 L. R. 37 All. 600.—*IND.*

936 iv. — — — — —.]—Upon the trial of a question of legitimacy, the certificate of a clergyman, deceased, as to the marriage of the parents, cannot be received in evidence, nor can it be considered in the nature of a declaration in a question of pedigree, the clergyman not being a member of the family.—*FARRELL v. MAGUIRE* (1841), 2 Jebb & S. 539.—*IR.*

936 v. — — — — —.]—A witness who deposes to declarations on the subject of pedigree need not be himself a member of the family.—*ESSEX (EARL) v. HODGSON* (1867), 15 W. R. 960.—*IR.*

Sect. 5.—Statements by deceased persons: Sub-sect. 5, B., C., D. & E.]

competency turns on point in issue—Witness alleged to be illegitimate.]—DOE d. JENKINS v. DAVIES, No. 80, *ante*.

939. Relations—Relations by marriage—Husband.]—(1) In the case of pedigree hearsay evidence of declarations by the husband as to his wife's legitimacy, admissible, as well as those of relations by blood.

(2) So (upon questions of pedigree) engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it (LORD ERSKINE, C.).—VOWLES v. YOUNG (1806), 13 Ves. 140; 33 E. R. 247, L. C.

Annotations:—As to (1) Consd. Johnson v. Lawson (1824), 2 Bing. 86; Doe d. Futter v. Randall (1828), 2 Moo. & P. 20. Refd. Haines v. Guthrie (1884), 13 Q. B. D. 818. As to (2) Refd. Doe d. Futter v. Randall (1828), 2 Moo. & P. 20.

940. ———.]—To prove a pedigree, the declarations of the husband of one of the family are admissible, though he was not otherwise related to the family.—DOE d. NORTHEY v. HARVEY (1825), Ry. & M. 297, N. P.

Annotations:—Consd. Doe d. Futter v. Randall (1828), 2 Moo. & P. 20. Refd. Shrewsbury Peerage (1858), 7 H. L. Cas. 1.

941. ——— Wife.]—In a question of pedigree, declarations of a party connected by marriage are receivable in evidence. Therefore, in an action of ejectment, declarations by a woman, that her first husband used to say that the estate would go to F., & after his death, to his heir, under whom the lessor of pltf. claimed:—*Held*: admissible in evidence to show the relationship & affinity of F. to the lessor of pltf.—DOE d. FUTTER v. RANDALL (1828), 2 Moo. & P. 20; 6 L. J. O. S. C. P. 196.

Annotation:—Refd. Shrewsbury Peerage (1858), 7 H. L. Cas. 1.

942. ———.]—The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility does not extend to statements made by the wife's father.—SHREWSBURY PEERAGE (1858), 7 H. L. Cas. 1; 11 E. R. 1, H. L.

Annotations:—Mentd. Berkeley Peerage (1861), 8 H. L. Cas. 21; Frend v. Buckley (1870), 10 B. & S. 973; Sturla v. Freccia (1880), 50 L. J. Ch. 86; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437.

943. ——— Wife's father.]—SHREWSBURY PEERAGE, No. 942, *ante*.

944. ——— Relation of one party where relationship in issue.]—Where, in a pedigree case, the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.—MONKTON v. A.-G. (1831), 2 Russ. & M. 147; 39 E. R. 250, L. C.; *affd. sub nom.* ROBSON v. A.-G. (1843), 10 Cl. & Fin. 471, H. L.

Annotations:—Refd. Slaney v. Wade (1836), 7 Sim. 595; Davies v. Lowndes (1843), 6 Man. & G. 471; Rishton v. Nesbitt (1844), 2 Mood. & R. 554. Mentd. Nye v. Maule (1839), 3 Jur. 669; Lord Advocate v. Douglas (1842), 9 Cl. & Fin. 173; A.-G. v. Robson (1848), 11 L. T. O. S. 217; Mushadeo Mahomed Czum Sherazee v. Meerza Ally Mahomed Shoostry (1851), 7 Moo. P. C. C. 382.

946 i. Illegitimate member of family.]—CHURREEH HOSSEIN CHOWDHRY v. USEEMONNISSA KHATOON (1862), 1 Hay, 528.—IND.

952 i. Persons not related—Servant.]—A judgment, on a question as to the existence of a relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person, since deceased, who was employed therein as *muktear* by certain

members of the family:—*Held*: the statement was inadmissible, as it appeared that his only means of knowledge were from his being instructed as such *muktear*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns.—SANGRAM SINGH v. RAJAN BAHU (1885), L. R. 12 Ind. App. 183; 1 L. R. 12 Calc. 219.—IND.

945. ——— Remote relation.]—The Committee of Privileges of the House of Lords admitted as evidence of a claimant's pedigree statements made by his relations, both near & remote.—LINDSAY PEERAGE CASE (1877), Minutes of Evidence of proceedings before Committee for Privileges.

946. Illegitimate member of family.]—COOKE v. LLOYD (1803), Peake's Law of Evidence App. xxviii.

Annotation:—Consd. Re Perton, Pearson v. A.-G. (1885), 53 L. T. 707.

See, generally, BASTARDY, Vol. III., p. 368, Nos. 95–97.

947. ——— Legitimacy of witness point in issue.]—DOE d. JENKINS v. DAVIES, No. 80, *ante*.

948. Persons not related—Solicitor.]—In an ejectment between pltf. & deft. S. who was attorney in the cause, was admitted to prove what W. told him he knew & had heard in regard to the pedigree of the family, W. happening to die before the trial.—ATHOL (DUKE) v. ASHBURNHAM (LORD) (1744), Bull. N. P. 295.

Annotations:—Consd. Johnson v. Lawson (1824), 2 Bing. 86. Refd. Monkton v. A.-G. (1831), 2 Russ. & M. 147.

949. ———.]—Re PALMES, PALMES v. R., [1901] W. N. 146.

950. ——— Physician.]—BROWN v. SHELLEY (1770), 9 Moore, C. P. 187, n.; 2 L. J. O. S. C. P. 136, n.

Annotations:—Dtd. Johnson v. Lawson (1824), 9 Moore, C. P. 183. It would be not only out of all rule, but would be double hearsay, or declarations upon declarations, which have never yet been received as evidence, although made by members of a family (Best, C.J.). Refd. R. v. Erliswell (1790), 3 Term Rep. 707.

951. ———.]—Declarations of relations evidence of pedigree, but inconclusive without showing on what occasion, what led to them, etc. *Qu.*: whether a physician or servant, who attended the family, can be admitted as one of the family.—WALKER v. WINGFIELD (1812), 18 Ves. 443; 34 E. R. 384, L. C.

952. ——— Servant.]—ROE d. BUSHELL v. GORE (1763), cited in 2 Bing. at p. 88; 2 L. J. O. S. C. P. 136, n.; 130 E. R. 238.

Annotation:—Dtd. Johnson v. Lawson (1824), 2 Bing. 86. That decision probably conducted to mislead BULLER, J. (Best, C.J.).

953. ———.]—WALKER v. WINGFIELD, No. 951, *ante*.

954. ———.]—Declarations of servants & intimate acquaintances are not admissible evidence in questions of pedigree.—JOHNSON v. LAWSON (1824), 2 Bing. 86; 9 Moore, C. P. 183; 2 L. J. O. S. C. P. 136; 130 E. R. 237.

Annotation:—Refd. Crease v. Barrett (1835), 1 Cr. M. & R. 919.

955. ——— Acquaintance.]—ROE d. BUSHELL v. GORE (1763), cited in 2 Bing. at p. 88; 2 L. J. O. S. C. P. 136, n.; 130 E. R. 238.

Annotation:—Dtd. Johnson v. Lawson (1824), 2 Bing. 86.

956. ——— Intimate acquaintance.]—JOHNSON v. LAWSON, No. 954, *ante*.

957. ——— Neighbours & acquaintances—To prove Scottish marriage.]—HILL v. HIBBIT, No. 970, *post*.

See, generally, HUSBAND & WIFE.

958. ——— Roman Catholic priest in Ireland.]—CASEY v. O'SHAUNESSY, No. 936, *ante*.

956 i. ——— Intimate acquaintance.]—CHURREEH HOSSEIN CHOWDHRY v. USEEMONNISSA KHATOON (1862), 1 Hay, 528.—IND.

r. ——— Family priest.]—Evidence of statements made by a deceased family priest as to the relationship of the members of the family may be given under Evidence Act, s. 32 (5).—SHAM LALL SINGH v. RADHA BIBEE (1879), 4 C. L. R. 173.—IND.

C. Proof of Death of Declarant.

959. General rule.]—(1) A conversation between a connexion of a family & some of the members of the family on the subject of a marriage supposed to have taken place in that family, cannot be given in evidence without previous proof that the persons with whom the conversation took place are dead.

(2) A controversy in a family, though not at that moment the subject of a suit, constitutes a *lis* sufficient to render inadmissible in evidence a letter written on that subject by one of the members of the family, & addressed to another member of it.—*BUTLER v. MOUNTGARRET* (1859), 7 H. L. Cas. 633; 11 E. R. 252, H. L.

Annotations:—*Consd. Essex v. Hodgson* (1867), 15 W. R. 960. *Mentd. It. v. Fanning* (1866), 10 Cox, C. C. 411.

D. Form of Declaration.

Inscriptions on tombstones & monuments.]—*See* Part IV., Sect. 14, *post*.

960. Inscription on ring.]—*VOWLES v. YOUNG*, No. 939, *ante*.

961. Description in wills.]—*WHITELOCKE v. BAKER*, No. 935, *ante*.

962. — Though will cancelled.]—A certain paper being found along with other papers relating to the private concerns of the person last seized, after his death, in a drawer in his house, which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, & no evidence was given of its having ever been acted upon, or probate of it taken out, is yet evidence of its recognition by the party last seized, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of showing that that ancestor acknowledged a brother of the name of Thomas to be older than another brother of the name of William, assuming the jury to be satisfied of the fact, that the paper so found was kept there by the person last seized, with a knowledge of its contents, & that

no imposition was practised.—*DOE d. JOHNSON v. PEMBROKE (EARL)* (1809), 11 East, 504; 103 E. R. 1098.

Annotations:—*Refd. Pipe v. Fulcher* (1858), 1 E. & E. 111. *Mentd. Slaney v. Wade* (1836), 7 Sim. 594.

963. — How proved—Whether by probate.]—The probate of a will is not admissible to prove declarations of testator as reputation in a question of pedigree.—*DOE d. WILD v. ORMEROD* (1835), 1 Mood. & R. 466, N. P.

See, now, Court of Probate Act, 1857 (c. 77), ss. 62, 64; & generally, EXECUTORS.

964. — Draft will not executed—In testator's handwriting.]—Where a question of pedigree arises, the circumstance that a document, containing a relevant declaration by a deceased person is not complete for its primary purpose, does not affect the admissibility of the declaration. Consequently, where the question was one as to the marriage of A. & B., both deceased:—*Held:* a declaration by A. that B. passed as his wife, contained in a document in A.'s handwriting which purported to be a draft will, was admissible, although such draft will had never been executed by A.—*Re LAMBERT* (1886), 56 L. J. Ch. 122; 56 L. T. 15; 3 T. L. R. 216.

Entries in family bibles.]—*See* Part IV., Sect. 13, sub-sect. 5, *post*.

Family letters.]—*See* Part IV., Sect. 13, sub-sect. 5, *post*.

E. Declaration ante litem motam.

965. General rule.]—*BERKELEY PEERAGE CASE*, No. 447, *ante*.

966. —.]—In questions of pedigree, declarations tending to show the person making them entitled to a remainder upon failure of issue of the then possessor of an estate:—*Held:* admissible for plff. claiming under that person, if made *ante litem motam*.—*DOE d. TILMAN v. TARVER* (1824), Ry. & M. 141, N. P.

Annotations:—*Consd. Monkton v. A.-G.* (1831), 2 Russ. & M. 147. *Refd. Gee v. Ward* (1857), 7 E. & R. 509. *Mentd. Doe d. Maud v. Suokemore* (1836), 5 Ad. & El. 703; Fitzwalter Peerage (1843), 10 Cl. & Fin. 193.

PART II. SECT. 5, SUB-SECT. 5.—C.

959 i. General rule.]—Before a stranger can give evidence of declarations as to the pedigree, made by a relation of the family, there must be shown the death of that relation & the fact of his relationship to the family, which fact cannot be proved by his own assertion.—*DOE d. DUNOP v. SERVOS* (1848), 5 U. C. R. 284.—*CAN.*

959 ii. —.]—In a suit to recover possession of immovable property, plff. tendered in evidence a horoscope which he said had been given to him by his mother, & had been seen by members of his family & used on the occasion of his marriage. He was unable to say by whom the horoscope, or an indorsement on it, which purported to state what his name was, had been written:—*Held:* the horoscope was not admissible under Evidence Act, s. 32 (6), because plff. did not know who wrote the horoscope, or the indorsement on it, & therefore could not say whether the writer was dead, or not to be found, or had become incapable of giving evidence.—*RAMNARAIN KALLIA v. MONEE BIBE* (1883), 1 L. R. 9 Calc. 613.—*IND.*

959 iii. —.]—Indian Evidence Act, s. 32, which makes statements in a pedigree relevant, only applies when the statements are made by persons who cannot be produced as witnesses. Accordingly a pedigree is inadmissible in the absence of evidence to that effect.—*SURJAN SINGH v. SARDAR SINGH* (1900), L. R. 27 Ind. App. 183.—*IND.*

959 iv. —.]—A statement relating to the existence of any relationship

contained in a document signed by several persons, some only of whom are dead, is admissible in evidence under Evidence Act, s. 32 (5).—*CHANDRA NATH ROY v. NILMADHAB BHUTTA-CHARJEE* (1898), 1 L. R. 26 Calc. 236; 3 C. W. N. 88.—*IND.*

PART II. SECT. 5, SUB-SECT. 5.—D.

961 i. Description in wills.]—Registration Act, 1877, s. 17 (b), does not render a passage in a will inadmissible in evidence if the words of it do not purport or operate to extinguish an interest in the present or in future, but state only past facts. Such a statement would, if proved, be admissible also under Indian Evidence Act, 1872, s. 32 (6).—*CHAMANBU v. MULTANCHAND* (1895), 1 L. R. 20 Bom. 562.—*IND.*

961 ii. —.]—A recital in a testator's father's will mentioning the age of the testator is admissible to prove the age of testator.—*KRISHNANAMACHARIAR v. KRISHNANAMACHARIAR* (1913), 1 L. R. 38 Mad. 166.—*IND.*

s. Verification of plaint in former suit.]—Case in which the plaint in a former suit verified by a deceased member of the family, & as such having special means of knowledge:—*Held:* admissible under Evidence Act, 1872, s. 32 (5), to prove the order in which certain persons were born & their ages.—*DHANMULL v. RAM CHUNDER GHOSE* (1890), 1 L. R. 24 Calc. 265; 1 C. W. N. 270.—*IND.*

PART II. SECT. 5, SUB-SECT. 5.—E.

965 i. General rule.]—Declarations of deceased relatives as to the legitimacy

of plff.'s wife, who claimed to be heiress to the land in question, was admitted. A verdict was given for plff.:—*Held:* the traditional evidence was properly admitted, there being no *lis mota*.—*BRANDON v. BOUELL* (1872), 3 Q. S. C. R. 12.—*AUS.*

965 ii. —.]—*Qu.*: whether declarations in letters written *ante litem motam*, between D., a son of A., & G., a son of C., in which D. recognised C.'s relationship to him, were admissible in D.'s lifetime; but, *semble*, where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible.—*JOHNSTON v. HAZEN* (1905), 26 C. L. T. 317; 3 N. B. Eq. Rep. 147.—*CAN.*

965 iii. —.]—A pedigree was one signed by a deceased member of plff.'s family, in the handwriting of such deceased member's son, & was stated to have been obtained from his father as a statement of the family descent for the purpose of being given in evidence in certain criminal proceedings:—*Held:* it had been adopted by such deceased member of the family, & not being shown to be *post litem motam*, it was admissible in evidence.—*KALKA PRASAD v. MATHURA PRASAD* (1908), 1 L. R. 30 All. 510.—*IND.*

965 iv. —.]—*Qu.*: are the declarations of the mother in a case evidence as to the legitimacy of her child, or should they be rejected as made *post litem motam*?—*FARRELL v. MAQUIRE* (1841), 3 I. L. R. 187.—*IR.*

Sect. b.—Statements by deceased persons: Sub-sect. 5, E., F., G. & H.; sub-sects. 6 & 7. Sect. 6: Sub-sect. 1, A.]

967. —.]—In pedigree cases, it is a rule of evidence, that the declarations of deceased members of the family, *post litem motam*, are inadmissible; & anterior declarations are little to be regarded, unless corroborated by other circumstances.—CROUCH v. HOOPER (1852), 16 Beav. 182; 1 W. R. 10; 51 E. R. 747.

968. —.]—(1) The admissibility of declarations by members of the family terminates with the commencement of the controversy, & the termination of this admissibility is not affected by any knowledge or ignorance on the part of the declarant of the existence of that controversy; nor is it affected by its being shown that such proceedings were fraudulently commenced with a view to exclude the possibility of any such declaration.

(2) The commencement of the controversy, & not of the institution from which it springs, is the commencement of the *lis mota*, & terminates the admissibility of family declarations. (3) A declaration made expressly with a view to a probable future contest is admissible *quantum valeat*. Not so, however, when made in a prior cause on the same subject-matter. (4) A prior cause carried on between the same parties will not be a *lis* so as to exclude declarations, unless the very point subsequently in dispute upon which it is sought to bring such declaration to bar was then in litigation.—SHEDDEN v. A.-G. (1860), 2 Sw. & Tr. 170; 30 L. J. P. M. & A. 217; 3 L. T. 592; 6 Jur. N. S. 1163; 9 W. R. 285; 164 E. R. 958; *affd. sub nom.* SHEDDEN v. PATRICK & A.-G. (1869), L. R. 1 Sc. & Div. 470, H. L.

Annotations:—Generally, Mentd. H.M.S. Hawke (1912), 28 T. L. R. 319; Nash v. Rochford R. D. C., [1917] 1 K. B. 384; Young v. Grierson, Oldham (1924), 41 R. P. C. 548.

969. —.]—Family declarations, during the progress of seventy years' litigation in various courts, were properly rejected, as made *post litem motam*, the subject-matter of controversy having been the same throughout, though the ground on which the controversy was originally placed was changed during the litigation.—SHEDDEN v. PATRICK & A.-G. (1869), L. R. 1 Sc. & Div. 470; 22 L. T. 631, H. L.

Annotations:—Mentd. H.M.S. Hawke (1912), 28 T. L. R. 319; Nash v. Rochford R. D. C., [1917] 1 K. B. 384.

970. —.]—(1) The evidence of neighbours & mere acquaintances of habit & repute must extend through a long series of years to raise the presumption of an agreement on both sides to live together as husband & wife, but if the consensus be once proved, lapse of time is unimportant.

(2) Family memorials, to be admissible as evidence of pedigree, must be spontaneous & have originated before any question has been raised (JAMES, V.-C.).—HILL v. HIBBIT (1870), 25 L. T. 183; 19 W. R. 250, L. C.

971. —.]—(1) B. married C. *in facie ecclesiae* in 1851, & died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851 that A. was his wife & not C.:—*Held*: such evidence was not admissible.

(2) The rule if we had been dealing with the law of England here would not have admitted what was stated after the year 1851 by [B.]; for though

he was a relative, & the relative of all others who perhaps knew most about it, it was clear that his statement was made *post litem motam*, after the time he had married another wife (LORD BLACKBURN).

(3) In an attempt on the part of A. to set up an irregular marriage according to the law of Scotland between herself & B., statements prepared by D., *pltf.* in an action against B. as the alleged husband of A. for A.'s board & lodgings; which statements were signed & in one case corrected by interlineations—by deceased persons who, if alive, would have been competent witnesses, were sought to be used as evidence:—*Held*: they were not admissible.

(4) There must always be a good deal of caution & consideration about whether the evidence of a deceased man was proving a fact, or whether it was some general, rambling, vague statement. It is only facts which lay within his own knowledge that could be proved in that way; but the dead man's statement of what he could have proved if called as a witness would as a general rule be, *valeat quantum*, admissible (LORD BLACKBURN).—DYSART PEERAGE CASE (1881), 6 App. Cas. 489, H. L.

Annotation:—As to (2) Foll. Lovat Peerage (1885), 10 App. Cas. 763.

972. —.]—When a person leaves his native place & goes to another place to pursue a claim to an estate or title of nobility & on his return tells certain persons what was said to him by persons connected with the family while so pursuing his inquiries, these statements are not admissible evidence.

In English law it seems quite clear that you may receive the evidence of tradition in the family from any of the family, provided the statement was made before a controversy had arisen, that is to say, *ante litem motam* (LORD BLACKBURN).—LOVAT PEERAGE (1885), 10 App. Cas. 763, H. L.

See, also, No. 1607, post.

973. What constitutes *lis mota*—Litigation upon same issue.—In respect of different property.]—BERKELEY PEERAGE CASE, No. 447, *ante*.

974. —.]—Though ground of controversy changed during litigation.]—SHEDDEN v. PATRICK & A.-G., No. 969, *ante*.

975. —.]—Previous litigation upon different issue.]—In 1806 it was referred to the master in Chancery to report who was the proper person to be committee of G., a lunatic, & to certify who was her next of kin & heir-at-law, to whom it was directed that notice was to be given. S., maternal grandmother of G., the lunatic, made a deposition before the master, in which she stated the connections of the family. In 1854 G. died. In an ejectment in which the question was who was heir-at-law *ex parte paternâ* of G., the deposition of S., at that time deceased, was tendered in evidence as a declaration of a deceased relative on a matter of pedigree. No evidence was given either way as to whether, in 1806, there was any real dispute as to who was the heir of G. The evidence was objected to as being *post litem motam*, but received. On a rule for a new trial:—*Held*: the evidence was properly received; the inquiry as to who was heir-at-law before the master not being in itself a controversy or *lis pendens* within the rule, & it being no objection that the

976 i. What constitutes *lis mota*—Previous litigation upon different issue.]—A pedigree dated in 1882 was held to be inadmissible in evidence as having been made *post litem motam*, although the controversy, which originated in

1891, did not relate to the question in issue, but referred to an entirely different matter:—*Held*: it was wrongly rejected as evidence. To make a statement inadmissible on the ground

that it was made *post litem motam* the same thing must be in controversy before & after the statement is made.—KALKA PRASAD v. MATHURA PRASAD (1908), 1 L. R. 30 All. 510.—IND.

declaration was upon oath.—*GEE v. WARD* (1857), 7 E. & B. 509; 3 Jur. N. S. 692; 5 W. R. 579; 119 E. R. 1335; *sub nom.* *GEE v. GOOD*, 29 L. T. O. S. 123.

976. ———.]—*SHEDDEN v. A.-G.*, No. 968, *ante*.

977. ——— **Whether state of facts—Without controversy.**—A., in the year 1798, died possessed of property, which, many years afterwards, B. commenced a suit to recover. In the year 1799, a relation of B. made a declaration, the effect of which was to show that B. was the heir & next of kin of A.:—*Held*: this declaration was not receivable in evidence, as the *ius mota* or commencement of the controversy must be taken to be the arising of that state of facts on which the claim is founded, without anything more.—*WALKER v. BEAUCHAMP* (COUNTES) (1834), 8 C. & P. 552, N. P. *Annotations*:—*Consd.* *Slaney v. Wade* (1836), 7 Sim. 595; *Shedden v. A.-G.* (1860), 30 L. J. P. M. & A. 217. *Refd.* *Davies v. Lowndes* (1843), 6 Man. & G. 471.

978. ———.]—*SHEDDEN v. A.-G.*, No. 968, *ante*.

979. ——— **Commencement of controversy.**—*SHEDDEN v. A.-G.*, No. 968, *ante*.

980. ——— **Controversy without litigation.**—*BUTLER v. MOUNTGARRET*, No. 959, *ante*.

981. ———.]—The question in litigation was whether A., a man, & B., a woman, were lawfully married in 1773. A letter was put in evidence, written by D. to E., the brother of A., informing him of C.'s claim, & adding, "with regard to myself, the estate in question I cannot give up, as it is entailed on my children":—*Held*: these letters written in 1800 constituted the beginning of a controversy upon the question of the validity of the marriage of A. & B., although no step was taken to litigate that question until 1873; & all declarations by members of both families made subsequent to 1800 were *post litem motam*, & therefore inadmissible in evidence.—*FREDERICK v. A.-G.* (1874), L. R. 3 P. & D. 270; 44 L. J. P. & M. 1; 32 L. T. 39.

Annotations:—*Mentd.* *Mansel v. A.-G.* (1879), 48 L. J. P. 42; *Bain v. A.-G.* (1892) P. 261.

982. ——— **Commencement of inquiries with a view to claim.**—*LOVAT PEERAGE*, No. 972, *ante*. Compare Nos. 447, 907, 966-972, *ante*.

F. Effect of Interest of Declarant or Declarant's Relations.

983. **Statements in declarant's interest.**—*DOE d. TILMAN v. TARVER*, No. 966, *ante*.

984. ———.]—*PLANT v. TAYLOR*, No. 937, *ante*.

985. **Statements by declarant interested in establishing relationship.**—*DOE d. JENKINS v. DAVIES*, No. 80, *ante*.

986. **Statements in relation's interest—Post litem motam.**—Handwriting of a relation deceased rejected as evidence of pedigree.—*EDWARDS v. HARVEY* (1809), Coop. G. 39; 35 E. R. 469.

987. **Statement made with definite purpose—Where purpose not improper.**—*LAUDERDALE PEERAGE*, No. 913, *ante*.

G. Declarations of Illegitimacy.

Declaration as to own illegitimacy.—See *BASTARDY*, Vol. III., p. 368, Nos. 96, 97.

See, generally, *BASTARDY*, Vol. III., pp. 367, 368, Nos. 87-95.

Birth before marriage of parents.—See *BASTARDY*, Vol. III., p. 367, Nos. 83-85.

H. In Peerage Cases before Committee of Privileges.

See *PEERAGES & DIGNITIES*.

SUB-SECT. 6.—DYING DECLARATIONS.

988. **In pedigree cases.**—*DOE d. SUTTON v. RIDGWAY*, No. 934, *ante*.

In criminal cases.—See *CRIMINAL LAW*, Vol. XV., pp. 804 *et seq.*

SUB-SECT. 7.—DECLARATIONS BY TESTATORS.

See *EXECUTORS; WILLS*.

SECT. 6.—REPUTATION.

SUB-SECT. 1.—AS TO MATTERS OF PUBLIC AND GENERAL INTEREST.

A. Distinguished from Evidence of Particular Facts.

989. **General rule.**—Traditionary reputation is evidence of boundary between two parishes & manors; & this though the old persons deceased making the declarations claimed rights of common on the respective wastes, which might be enlarged by such evidence; there being no litigation pending or in contemplation at the time which could induce a belief that they had in view to make evidence for themselves, though the boundary had long before been & afterwards continued to be *veratio questio*.—*NICHOLLS v. PARKER* (1805), 14 East, 331; 104 E. R. 629. *Annotations*:—*Refd.* *Davies v. Morgan* (1831), 1 Cr. & J. 587; *Barracough v. Johnson* (1838), 8 Ad. & El. 99.

990. ———.]—(1) It is no objection to evidence of reputation of a modus, that the deceased person from whom it came was liable to pay tithes.

(2) The essence of reputation is, that if you prove a fact, as, for instance, payment of a sum of money, it must be accompanied with this, that it was so paid in consequence of a reputation (MACDONALD, C.B.).—*HARWOOD v. SIMS* (1810), Wight. 112; 145 E. R. 1194.

Annotations:—*N.F.* *Moseley v. Davies* (1822), 11 Price, 162. *Refd.* *Davies v. Morgan* (1831), 1 Cr. & J. 587. *Mentd.* *Leonard v. Franklyn* (1817), Dan. 34; *Tucker v. Wilkins* (1831), 4 Sim. 241.

991. ———.]—(1) Composition real by grant of land in lieu of tithe, not proved by reputation of the fact of such an agreement having existed & being the origin of the exemption claimed, although corroborated by evidence of non-payment of tithe for the district, claiming the exemption unless a deed or evidence of one having once existed be put in proof.

Now this is not a modus in discharge of the whole parish, but of A. only, a tract of land lying within the parish (THOMSON, C.B.).

(2) Tradition is only admissible in generalities, & not to show particular facts (GRAHAM, B.).—*CHATFIELD v. FRYER* (1815), 1 Price, 253; 145 E. R. 1394.

Annotation:—As to (1) *Refd.* *Ledard v. Anstie* (1830), 3 Y. & J. 548.

992. ———.]—*COOKE v. BANKS*, No. 728, *ante*.

993. ———.]—*CREASE v. BARRETT*, No. 724, *ante*.

994. ———.]—*MERCER v. DENNE*, No. 820, *ante*.

995. ———.]—When a matter of history which is not of general importance is in issue, a statement bearing on the point in issue made by a particular person, since deceased, under no duty to make it is not admissible unless the statement purported to be made from reputation. As to whether or not a church is a parish church is not a matter of general importance.—*POWKE v. BERINGTON*, [1914] 2 Ch. 308; 83 L. J. Ch. 820; 111 L. T. 440; 58 Sol. Jo. 379.

Sect. 6.—Reputation: Sub-sect. 1, A., B. & C.]

996. Application of rule—Former existence of houses at particular spot.]—The question being whether a turnpike stood within the limits of a town, *CHAMBRE, J.*, admitted evidence of reputation that the town extended to a certain point, & allowed it to be proved that old people, since dead, had declared that to be the boundary, but not that these people had said that there formerly were houses where none any longer stood; observing that that was evidence of a particular fact, & not of reputation.—*IRELAND v. POWELL* (1802), cited 7 Ad. & El. 555; 112 E. R. 579.

Annotations:—Distd. R. v. Antrobus (1835), 2 Ad. & El. 788. *Folld. R. v. Bliss* (1837), 7 Ad. & El. 550; *Mercer v. Denne*, [1904] 2 Ch. 534. *Relfd. Chatfield v. Fryer* (1815), 1 Price, 253.

997. — Composition in lieu of title—Particular land in parish.]—*CHATFIELD v. FRYER*, No. 991, *ante*.

998. — — — —.]—On an issue to try whether a farm modus of £2 19s. 8d. was payable for a certain farm, a former occupier of the farm cannot be asked what he has heard his deceased father say respecting this modus, although his father had also occupied the farm, because this would be evidence of reputation of a fact.—*WELLS v. JESUS COLLEGE, OXFORD* (1836), 7 C. & P. 284, N. P.

See, also, Nos. 1003, 1006, 1007, *post*.

999. — Enclosure of particular lands.]—Evidence of reputation of certain lands having been inclosed in pursuance of an agreement is not admissible.—*LEATHES v. NEWITT* (1817), 4 Price, 355; 3 Eas. & Y. 841; 146 E. R. 489; *subsequent proceedings* (1820), 8 Price, 562, Ex. Ch.

Annotations:—Mentd. Layng v. Yarborough (1817), 4 Price, 383; *Markham v. Smyth* (1822), 11 Price, 126; *Mounsey v. Burnham* (1841), 1 Hare, 15; *Salkeld v. Johnstone* (1842), 1 Hare, 196; *Major v. Aukland* (1843), 3 Hare, 77.

1000. — Tree planted on boundary.]—The question in a cause being, whether a particular road, admitted to exist, was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy.—*Held*: such declaration was not evidence, either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest.—*R. v. BLISS* (1837), 7 Ad. & El. 550; 2 Nev. & P. K. B. 464; *Will. Woll. & Dav.* 624; 7 L. J. Q. B. 4; 1 Jur. 959; 112 E. R. 577.

Annotations:—Apld. Mercer v. Denne, [1905] 2 Ch. 538. *Relfd. Papondlok v. Bridgewater* (1855), 5 E. & B. 166; *R. v. Berger*, [1894] 1 Q. B. 823.

1001. — Record of lease by steward of manor.]—*PADWICK v. WITCOMB*, No. 743, *ante*.

1002. — Publicity of path.]—Evidence of reputation as to the publicity of a path must be general; hearsay evidence of particular facts which, if properly proved, would go far to establish the public right is inadmissible.—*RADCLIFFE v. MARSDEN URBAN DISTRICT COUNCIL* (1908), 72 J. P. 475; 6 L. G. R. 1186.

See, generally, HIGHWAYS.

B. In respect of What Matters.

1003. General rule—Confined to matters of public interest.]—Evidence of reputation, as to the payment of a farm modus, is inadmissible, on the ground that hearsay evidence is not admissible on a question of private right; & therefore, &

in obedience to this rule, the evidence of old persons, who deposed to having heard their parents & relations, & other persons, since dead, state that a certain farm modus was payable in respect of a particular farm, was rejected.—*LONSDALE v. HEATON* (1830), 1 You. 58; 159 E. R. 905.

1004. Application of rule—Ownership of estate.]—Where testator, between fifty & sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of pltf. in tail; between which latter & deft., the devisee in fee of the son, the question was, whether the land in dispute which had been occupied by the son in the lifetime of testator, was part of the entailed estate, or had been acquired by his own purchase.—*Held*: evidence of reputation that the land had belonged to S., & was purchased of him by first testator, was not admissible, though coupled with corroborative parol evidence that the land had belonged to S. before the occupation of it by the son, & also by a deed of conveyance of another farm in the same place from first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, amongst other lands, by testator of S.—*DOE d. DIDSBURY v. THOMAS* (1811), 14 East, 323; 104 E. R. 625.

1005. — Right to profit à prendre—Claimed by tenants of particular estate.]—Where by agreement dated 1656, between the lord & certain tenants of customary tenements within a manor, the tenants covenanted that they, their heirs or assigns, would not cut down, sell or dispose of any wood standing or growing, or hereafter to stand or grow, without the licence of the lord, & the lord covenanted to set out yearly, upon request of the tenants sufficient for the repairing of their houses, etc., & other necessary uses in & about the tenements, & that in case any of the tenants, their heirs, or assigns, should plant any wood upon the tenements it should be lawful for them to cut down, use, & dispose of all or any such wood for repairing their houses, etc., or for any other necessary uses without disturbance of the lord.—*Held*: (1) evidence that the tenants of deft.'s estate for thirty years & upwards had publicly, & without interruption from the lord, & with his knowledge, cut & sold the planted wood on the estate in large quantities, was admissible; (2) evidence of reputation that the tenants of deft.'s estate had the right of cutting & selling planted wood was not admissible.

Reputation is certainly out of the question, because the tenants' right could only arise by some grant or deed (*LORD ELLENBOROUGH, C.J.*).—*BLACKETT v. LOWES* (1814), 2 M. & S. 494; 105 E. R. 465.

See, further, EASEMENTS, Vol. XIX., p. 203, Nos. 1548, 1549.

1006. — Tithe modus—Parochial modus.]—On an issue directed to ascertain whether a modus was payable in respect of a certain part of a farm, a verdict was found for deft. in equity. A new trial being moved for:—*Held*: (1) the rejection of evidence of a lease in 1704 was immaterial, as it only carried back some few years farther the fact of payments, which had been established for a period sufficiently long by other evidence. *Semble*: reputation in this case was not evidence, & the lease was not, it being in effect the declaration of the lessor of his own right; (2) the validity of a farm modus is not to be tried by a comparison of value with the whole tithe at any remote period; (3) ancient documents cannot prevail

against all proof of usage, unless they were consistent with each other, & excluded, not the probability but the possibility of the modus; (4) reputation is admissible in each case of private right, where a class or district of persons was concerned, & is evidence as to a parochial modus but not as to a farm modus, or to support a prescriptive right, except as to a right of way; (5) proof of a fixed payment for a farm during a long period, even without mention of a modus, is evidence of a modus.—*WHITE v. LISLE* (1819), 4 Madd. 214; 56 E. R. 685; *subsequent proceedings*, 3 Swan. 342, L. C.

Annotation :—As to (1) & (3) *Refd. Raine v. Cairns* (1841), 4 Hare, 327.

1007. — — — — —.] — On a question of parochial modus, referred to a trial at law, testimony, offered as evidence of reputation, in proof of the custom on which the right to the advantage of the modus decimandi was founded, that the money payments constituting the alleged modus had been uniformly made, beyond living memory, & that the witness had heard old persons who at that time occupied lands in the parish, & were long since dead, say that it had always been the custom to make such payments, was held to be admissible evidence of reputation on that subject, against an objection taken of interest in making such a declaration on the part of the deceased persons on whose information the evidence was founded.—*MOSELEY v. DAVIES* (1822), 11 Price, 162; 147 E. R. 434; *subsequent proceedings*, *sub nom. DAVIES v. MOSELEY* (1824), M'Cle. 143.

Annotations :—*Refd. Deacle v. Hancock* (1824), M'Cle. 85; *Davies v. Morgan* (1831), 1 Cr. & J. 587.

1008. — — — — — *Farm modus.*] — *WHITE v. LISLE*, No. 1006, *ante*.

1009. — — — — —.] — *LONSDALE v. HEATON*, No. 1003, *ante*.

See, also, Nos. 991, 993, *an'e*.

1010. — — — — — *Public landing-place.*] — On an issue joined, whether a certain place situate on the bank of a river is a public landing-place for all the King's subjects, evidence may be given of reputation that it is not a public landing-place.—*DRINKWATER v. PORTER* (1835), 7 C. & P. 181.

Annotation :—*Expld. R. v. Bedfordshire* (1855), 4 E. & B. 535.

1011. — — — — — *Duties of sheriffs of particular county.*] — On a question whether, by custom, a sheriff of the county is exempt from the duty of executing criminals in his county, & whether, by custom, the sheriffs of a city are bound to do it, evidence of reputation is not receivable.—*R. v. ANTROBUS* (1835), 2 Ad. & El. 783; 6 C. & P. 784; 1 Har. & W. 96; 4 Nev. & M. K. B. 565; 4 L. J. K. B. 91; 111 E. R. 304.

Annotations :—*Distd. Pritchard v. Powell* (1845), 15 L. J. Q. B. 166. *Consd. R. v. Bedfordshire* (1855), 4 E. & B. 535. *Refd. R. v. Bourdon* (1847), 2 Car. & Kir. 366.

1012. — — — — — *Whether church a parish church.*] — *FOWKE v. BERRINGTON*, No. 995, *ante*.

1013. — — — — — *Private right depending on public right—Private boundary coinciding with public boundary.*] — Where on an issue as to the boundary of a tenement, evidence has been given that the boundary in question is the same with the boundary of a certain hamlet, evidence of reputation as to the boundary of that hamlet is then receivable as proof of a fact relevant to the issue.—*THOMAS v. JENKINS* (1837), 6 Ad. & El. 525; 1 Nev. & P. K. B. 587; Will. Woll. & Dav. 205; 6 L. J. K. B. 163; 1 J. P. 211; 1 Jur. 261; 112 E. R. 201.

Annotations :—*Consd. Mercer v. Denne*, [1905] 2 Ch. 538. *Refd. Brisco v. Lomax* (1838), 3 Nev. & P. K. B. 308.

1014. — — — — — *Private liability depending on public*

liability—Disputed liability to repair bridge ratiōne tenuræ.] — Presentment against the inhabitants of a county for not repairing a bridge. Plea: that A. was liable to repair it *ratiōne tenuræ*. Issue on A.'s liability:—*Held*: evidence of reputation was admissible to prove A.'s liability.

Although a private interest should be involved with a matter of public interest, the reputation respecting rights & liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing (LORD CAMPBELL, C.J.).—*R. v. BEDFORDSHIRE (INHABITANTS)* (1855), 4 E. & B. 535; 3 C. L. R. 442; 24 L. J. Q. B. 81; 24 L. T. O. S. 268; 19 J. P. 324; 1 Jur. N. S. 208; 3 W. R. 205; 6 Cox, C. C. 505; 119 E. R. 196.

Annotation :—*Mentd. R. v. Stephens* (1866), 7 B. & S. 710.

As to boundaries.] — *See* BOUNDARIES, Vol. VII., pp. 312 *et seq.*

As to common rights.] — *See* COMMONS, Vol. XI., p. 36, Nos. 491–494.

Common of vicinage.] — *See* COMMONS, Vol. XI., p. 13, No. 127.

As to existence or extent of manor.] — *See* COPYHOLDS, Vol. XIII., p. 11, Nos. 12, 19, 20.

As to custom of manor.] — *See* COPYHOLDS, Vol. XIII., p. 20.

As to right of free warren.] — *See* COMMONS, Vol. XI., p. 26, No. 325.

As to profit à prendre.] — *See* EASEMENTS, Vol. XIX., p. 203, Nos. 1548, 1549.

As to publicity of path or highway.] — *See* HIGHWAYS.

As to liability to repair bridges.] — *See* HIGHWAYS.

C. Evidence of Reputation.

1015. *Copies of tables of tolls—Received from lessee.*] — *BRETT v. FISHER* (1827), cited in Mood. & M., p. 419, N. P.

Annotation :—*Distd. Brett v. Beales* (1829), Mood. & M. 416.

1016. *Ancient leases—As reputation of situation of parcels.*] — Where in trespass, the question was, whether certain land was in the parish of A. or parish B., the land in B. being tithe-free:—*Held*: ancient leases granted by the ancestor of pltf.'s landlord in which the land was described as being in parish B. were admissible as evidence of reputation that the land was in that parish.—*PLAXTON v. DARE* (1829), 10 B. & C. 17; 5 Man. & Ry. K. B. 1; 8 L. J. O. S. K. B. 98; 100 E. R. 357.

Annotations :—*Refd. Mercer v. Denne* (1905), 74 L. J. Ch. 723. *Mentd. Hall v. Ball* (1841), 3 Man. & G. 242; *Doe d. Shrewsbury v. Keeling* (1848), 11 Q. B. 884.

1017. *Deed regulating tolls—Made between parties claiming & parties liable.*] — An old deed between a public body claiming tolls & others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls.

In an action for tolls claimed by a corpn., an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, & by the lessee to the collectors, by which they have actually collected, is admissible, in evidence for the Corporation.

Contra, when the copies in the hands of the lessee are not shown to have been delivered to him from the corpn., although they correspond accurately with the old schedule.—*BRETT v. BEALES* (1829), Mood. & M. 416, N. P.; *subsequent proceedings* (1830), 10 B. & C. 508.

Annotations :—*Refd. Pim v. Curell* (1840), 6 M. & W. 234; *Beaufort v. Smith* (1849), 4 Exch. 450. *Mentd. Beaumont v. Mountain* (1834), 10 Bing. 404; *York & North Midland Ry. v. R.* (1853), 22 L. J. Q. B. 225.

Sect. 8.—Reputation: Sub-sect. 1, C., D. & E.; sub-sect. 2. Sect. 7: Sub-sect. 1.]

1018. Arbitrator's award.]—On an issue respecting the boundary of a parish & county, an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, & a verdict was entered according to his direction is not admissible as evidence of such boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.—**EVANS v. REES** (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 113 E. R. 58; *subsequent proceedings* (1840), 12 Ad. & El. 167.

Annotations:—*Ald.* Wenman v. Mackenzie (1855), 5 E. & B. 447. *Mend.* Andrew v. Motley (1862), 12 C. B. N. S. 614.

1019. —.]—In an action for injuring pltf.'s reversionary interest in a several fishery in an estuary of the sea, & in the soil of the bottom of the sea, both in the possession of F. as her tenant, issues were taken on pltf.'s right to the fishery & ownership of the soil. The controversy was, whether the soil belonged to pltf. or to G. Pltf. gave in evidence the proceedings in an action by F. against G. One count in that action was for injuring F.'s fishery by tearing up soil, described as being the soil of the now pltf., & thereby destroying the fish. To this there was a plea of Not guilty. The amount of damages was referred; & the arbitrator awarded nominal damages. It was proved that the act complained of in that action was committed in a part of the same estuary, & that the soil there was claimed by the same title as the soil which was the subject of the present action, & that deft. in the present action became tenant to G. subsequently to the award. The proceedings were admitted; & pltf. had a verdict:—**Held:** they were improperly admitted, the award not being evidence of reputation; & the proceedings not being admissible for pltf., who was not a party or shown to be a privy to F., though deft. was privy to G.—**WENMAN (LADY) v. MACKENZIE** (1855), 5 E. & B. 447; 3 C. L. R. 1307; 25 L. J. Q. B. 44; 25 L. T. O. S. 267; 1 Jur. N. S. 1015; 3 W. R. 626; 119 E. R. 547.

1020. Verdict of jury.]—**EVANS v. REES**, No. 1018, *ante*.

1021. Entry by steward of manor.]—**DOE d. PADWICK v. SKINNER**, No. 824, *ante*.

1022. Survey containing alleged presentment by jury—Presentment unsigned.]—In support of a customary payment of 4d. per wey for all coal gotten within a certain manor & seignory & exported to sea, the plaintiff tendered in evidence a book, purporting to be a survey taken in the year 1650, after the manor & seignory had been granted to Oliver Cromwell by Parliament, & purporting to be taken by virtue of a commission to certain persons named in the survey given by Oliver Cromwell, Lord-General of the Parliamentary Forces. After specifying certain rents, it stated, that the jury present (*inter alia*) there is 4d. due unto the lord for every wey of coals that is transported out of the lordship. The document was not signed by the jury, nor was any commission proved:—**Held:** this survey was inadmissible either as a public document, or as evidence of reputation.—**BEAUFORT (DUKE) v. SMITH** (1849), 4 Exch. 450; 19 L. J. Ex. 97; 154 E. R. 1290.

Annotations:—*Refd.* Bird v. Keop, [1918] 2 K. B. 692. *M.* Bremner v. Hull (1866), L. R. 1 C. P. 748; *Mills* Lichester Corp'n. (1867), 36 L. J. C. P. 210.

1023. Usage extending over many years—Parish rated to relief of poor as one parish.]—The parish of M. has for all secular purposes since the 43

Eliz. (c. 2) been treated as one parish. In fact it consists of two distinct rectories & advowsons, & for all ecclesiastical purposes it constitutes two distinct parishes:—**Held:** a rate for the relief of the poor of Mablethorpe treating it as one parish is good, such long usage being conclusive as to M. being before & at the passing of the 43 Eliz. c. 2, one parish by reputation.—**R. v. MABLETHORPE** (1854), 2 W. R. 533.

See, generally, CUSTOM & USAGES, Vol. XVII., pp. 37, 38, Nos. 418 *et seq.*

1024. Tithe map & award.]—A tithe map & award produced from the proper custody & acted upon, the deposited plans of a proposed railway, though subsequently abandoned, are admissible as evidence of reputation on a question whether there was or was not a public road across two fields appearing on such documents.—**A.-G. v. ANTROBUS**, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 49 Sol. Jo. 459; 3 L. G. R. 1071.

Annotations:—*Consd.* Fuller v. Chippenham R. D. C. (1914), 79 J. P. 4. *Refd.* A.-G. & Croydon R. D. C. v. Moorson-Roberts (1907), 72 J. P. 123; North Staffordshire Ry. v. Hanley Corp'n. (1909), 8 L. G. R. 375; Trafford v. St. Faith's R. D. C. (1910), 74 J. P. 297; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; Collis v. Amplett, [1918] 1 Ch. 232. *Mend.* Whitehouse v. Hugh, [1906] 1 Ch. 253; Robinson v. Smith (1908), 24 T. L. R. 573; A.-G. v. Sewell (1918), 88 L. J. K. B. 425.

Declarations of deceased persons.]—*See, generally,* Sect. 4, sub-sect. 4, *ante*.

D. Competency of Witnesses.

1025. General rule.]—Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the County Palatine, & within that of the city, of Chester; a document from the remembrancer's office of the Ct. of Exch. was produced, purporting to be a decree made, after hearing of a complaint against the citizens of Chester, & their answer, by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, & the Chief Baron, with the advice & assent of a Queen's Serjeant, & the Queen's Attorney & Solicitor General, & others of the same ct.:—**Held:** (1) this document was not admissible in evidence as a decree, because it was not a decree of the Ct. of Exch. nor of any ct. known to the law at the time when it purported to have been made; (2) nor as an award, because there appeared no voluntary submission of parties; (3) nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceeding.—**ROGERS v. WOOD** (1831), 2 B. & Ad. 245; 109 E. R. 1134.

Annotations:—*As to* (3) *Refd.* Crease v. Barrett (1835), 1 Cr. M. & R. 919; Evans v. Rees (1839), 10 Ad. & El. 152.

1026. —.]—On a question between the lord of the manor of O. & the owner of a freehold estate within the manor, whether a certain close was part of the lord's waste or part of the adjoining estate of deft., after proof having been given that there were very many lands & tenements held of the manor, the tenants whereof in respect of those lands had always exercised rights of common for all their commonable cattle on the waste of the manor, evidence was offered, on the part of the lord, of declarations *ante litem motam* of deceased persons who had been such tenants & had exercised such rights, that the close was parcel of the waste. Similar declarations made by deceased residents within the manor not being tenants were also tendered. No evidence was given of any exercise

of any rights of common on the close:—*Held*: the want of evidence of acts of enjoyment would not affect the admissibility of evidence of reputation; & declarations by residents within a manor were as receivable as declarations by tenants of the manor; but these declarations were not admissible in evidence, since there is no common law right for all tenants of a manor to have common on the waste of the manor, but each tenant who has the right of common appendant, has it as an incident by law attached to his particular grant, & the numerous private rights of common of the several tenants do not compose one public right so as to render evidence of reputation as to the boundary of the waste admissible.

If evidence of reputation be admissible on the ground of publicity, it would seem to follow that *prima facie* the evidence of any deceased person would be admissible. But the cts. have qualified the generality of this view by requiring that such deceased person should be in some way connected with the subject of inquiry (PARKE, B.).—DUNRAVEN (LORD) v. LLEWELLYN (1850), 15 Q. B. 791; 19 L. J. Q. B. 388; 15 L. T. O. S. 543; 14 Jur. 1089; 117 E. R. 657, Ex. Ch.

Annotations:—*Consd. Evans v. Merthyr Tydfil U. C.* (1809) 1 Ch. 241. *Reid. R. v. Bedfordshire* (1855), 4 E. & B. 535; *Heath v. Deane*, (1905) 2 Ch. 86. *Mentd. Dendy v. Simpson* (1856), 18 C. B. 831; *Warrick v. Queen's College, Oxford* (1871), 6 Ch. App. 716; *Broome v. Wenham* (1893), 68 L. T. 651.

1027. Who are competent—Justices—Declaration as to boundaries of hundred.—NEWCASTLE (DUKE) v. BROXTOWE HUNDRED, No. 903, *ante*.

Declarations as to boundaries.—*See, generally, BOUNDARIES, Vol. VII., p. 315.*

Compare Sect. 5, sub-sect. 4, A., sub-sect. 5, B., ante.

E. Declaration ante litem motam.

1028. General rule.—Pltf. in trespass was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, & claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain; *deft.*, in order to show that pltf. had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lay within the lordship as was claimed by B. to belong to his tenement called Tyr Adam, upon their oaths said that they had considered the claim & the evidence, & presented that all the land within the boundaries were part & parcel of the common called K., & that neither B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any further or greater right than such as the other freehold tenants of the lordship had for their commonable cattle:—*Held*: this instrument was not admissible in evidence either as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested, nor as an award, because there was no mutual submission, nor as evidence of reputation, because it was the declaration of the homage *post litem motam*.—RICHARDS v. BASSETT (1830), 10 B. & C. 657; 8 L. J. O. S. K. B. 289; 109 E. R. 594.

Annotation:—*Distd. Brisco v. Lomax* (1838), 3 Nev. & P. K. B. 308.

1029. What constitutes lis mota—Whether ancient dispute as to boundaries—Though no litigation pending.—NICHOLLS v. PARKER, No. 989, *ante*.

1030. — Whether issue of commission.—In 1637 a commission issued out of the Duchy Ct. of Lancaster, reciting that the lords of the manors of A. & C. had petitioned the Crown, showing that the boundaries between their two manors were uncertain, & that suits were likely to grow there-out, for prevention whereof it directed the comrs. to repair to the spot & impanel a jury for the purpose of setting out the boundaries. The return stated that the comrs. had inquired into the matter, being attended by the parties interested, & that a jury of the body of the county had been sworn to inquire & true verdict give concerning the boundary, & thereupon the comrs. set out the boundary by marks & stones:—*Held*: this was a proceeding in the nature of a verdict before a ct. of competent jurisdiction, & therefore admissible in a question of manorial boundary where reputation was admissible, & it was not to be excluded on the ground that it had taken place *post litem motam*, or because it did not appear that any decree had been made.

This, however, was not a case in which there were any suits or *lis mota*. It appears from the commission that it issued in order to prevent anything of the kind occurring (LITTLEDALE, J.).—BRISCO v. LOMAX (1838), 8 Ad. & El. 198; 3 Nev. & P. K. B. 308; 1 Will. Woll. & H. 235; 7 L. J. Q. B. 148; 2 Jur. 682; 112 E. R. 812.

Compare Sect. 5, sub-sect. 4, A., sub-sect. 5, D., ante.

SUB-SECT. 2.—AS TO OTHER MATTERS.

As proof of marriage.—*See Sect. 5, sub-sect. 5, ante, & generally, HUSBAND & WIFE.*

As evidence of objection to voter.—*See ELECTIONS, Vol. XX., p. 39, No. 241.*

As evidence of notice—Of insanity of contracting party.—*See LUNATICS.*

As evidence of right to title of newspaper.—*See PRESS & PRINTING.*

As evidence of connection of trade name with particular goods.—*See TRADE MARKS.*

As proof of age—Identity of person named in birth certificate.—*See CRIMINAL LAW, Vol. XV., p. 847, Nos. 9311, 9312.*

To identify subject of libel.—*See LIBEL & SLANDER.*

To identify person named in will.—*See WILLS.*

To identify property devised.—*See WILLS.*

As to character—As defence to action for breach of promise.—*See HUSBAND & WIFE.*

As justification in libel action.—*See LIBEL & SLANDER.*

As defence to action for misrepresentation as to credit.—*See MISREPRESENTATION & FRAUD.*

As ground for affidavit on application for quo warranto.—*See CRIMINAL PRACTICE, Vol. XVI., p. 367, Nos. 1999, 2002.*

SECT. 7.—OPINION AND BELIEF.

SUB-SECT. 1.—IN GENERAL.

1031. General rule.—ADAMS v. CANON (1621), 1 Dyer, 53 b, n.; Ley, 68; 73 E. R. 117.

PART II. SECT. 7, SUB-SECT. 1.
1031. General rule.—On the trial of an indictment for burning a barn,

witness for the prosecution stated that he had examined foot tracks in the snow leading from the barn to prisoner's house; that they were double tracks,

& appeared as if the person had gone and returned on the same track. On cross-examination he stated that it appeared to be a double track going &

Sect. 7.—Opinion and belief: Sub-sects. 1, 2 & 3.]

1032. —.]—THE SOLWAY, No. 639, *ante*.

1033. —.]—Propositions must be proved in a ct. of law by proof of evidence, & that is not satisfied by surmise, conjecture or guess (LORD HALSBURY).—BARNABAS v. BERSHAM COLLIERY CO. (1910), as reported in 103 L. T. 513, H. L.

*Annotations:—*Consd. Hawkins v. Powells Tillery Steam Coal Co., [1911] 1 K. B. 988; Chandler v. G. W. Ry. (1912), 106 L. T. 479; Lewis v. Port of London Authority (1914), 111 L. T. 776; Kemp v. Clyde Shipping Co. (1918), 87 L. J. K. B. 861. *Reid*. Euman v. Dalziel (1912), 6 B. W. C. C. 900. *Mentd.* Fennah v. Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440; Trodden v. McLennard (1911), 4 B. W. C. C. 190; Woods v. Wilson (1913), 29 T. L. R. 726; Travers v. Cooper, [1915] 1 K. B. 73; Maxwell v. Itabon Coal & Coke Co. (1916), 86 L. J. K. B. 428; Lancaster v. Blackwell Colliery Co. (1918), 120 L. T. 3; Andrews v. Highley Mining Co. (1922), 15 B. W. C. C. 192.

1034. —.]—It is not competent in any action for witnesses to express their opinion upon any of the issues, whether of law or fact, which the ct. or a jury has to determine (NEVILLE, J.).—CROSFIELD (JOSEPH) & SONS, LTD. v. TECHNO-CHEMICAL LABORATORIES, LTD. (1913), 29 T. L. R. 378; 30 R. P. C. 297.

1035. *Opinion of expert.*—The ct., when assisted by Trinity Masters, will not allow of any opinions on the nautical points involved in issue to be offered in evidence.—THE ANN & MARY (1843), 2 Wm. Rob. 189; 2 L. T. O. S. 107; 7 Jur. 999; 166 E. R. 725.

*Annotation:—*Apld. The Sir Robert Peel (1880), 43 L. T. 364.

See ADMIRALTY, Vol. I., p. 201, Nos. 1201, 1202, &, generally, Part VI., *post*.

coming, but he could not state positively as the snow was merely in the bottom, & he could not see distinctly; & on re-examination he said he believed the tracks each way were the same tracks:—*Held*: the statement of the witness' belief did not make his evidence on this point admissible, but the effect of it was properly left to the jury.—R. v. FOLEY (1873), (1825-1897), N. B. Dig. 360.—CAN.

1031 ii. —.]—In an action to recover the value of buildings destroyed by fire, started, as was alleged, by sparks which escaped from the defective smokestack of a steamboat, opinative evidence that having regard to the force & direction of the wind on the day in question sparks of large size, if they escaped, might have been carried to the building in question, is too conjectural & speculative.—PEACOCK v. COOPER (1900), 27 A. R. 125.—CAN.

1031 iii. —.]—62 Vict. c. 15, s. 1, relieving trustees from the consequences of technical breaches of trust who have acted "honestly & reasonably," does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take. The general rule of evidence still applies, that mere personal belief or opinion is not evidence.—SMITH v. MASON (1901), 21 C. L. T. 260; 1 O. L. R. 594.—CAN.

1031 iv. —.]—In a civil action, any fact which tends to affect the amount of damages is relevant & admissible; but the opinion of a witness as to what would have happened but for delay is not admissible.—BROWN v. HOPE (1912), 20 W. L. R. 907; 2 D. L. R. 615; 17 B. C. R. 220.—CAN.

1031 v. —.]—A witness's opinion of the duty of a foreman is not admissible as evidence.—FORY v. STRATFORD MILL BUILDING CO. (1913), 5 O. W. N. 611; 30 O. L. R. 271.—CAN.

1031 vi. —.]—The conclusion of a witness is not admissible in evidence to prove title: the ct. itself has to pass upon the title.—TUCKER v. JONES (1915), 33 W. L. R. 1; 9 W. W. R. 620; 25 D. L. R. 278; 8 Sask. L. R. 387.—CAN.

1031 vii. —.]—A statement resting on information & belief is not legal evidence in a case of criminal contempt of ct.—LEGAL REMEMBRANCE v. MATIAL GHOSSE (1913), 1 L. R. 41 Calc. 173.—IND.

1031 viii. —.]—It is incompetent to ask a witness to state what impression was made on his mind by facts to which he had deposed; it being the duty of the ct. or jury to draw the conclusion from the facts, while that of a witness is confined merely to relating them.—A. v. B. (1848), 11 Duml. (Ct. of Sess.) 289; 21 Sc. Jur. 75.—SCOT.

1031 ix. —.]—A valuation committee are not entitled to proceed upon facts not admitted or proved, but stated by them to be within their personal knowledge, unless these facts are public matters or matters of common knowledge.—MOYES v. PERTH ASSESSOR, REID v. PERTH ASSESSOR, ROBERTSON v. PERTH ASSESSOR, [1912] S. C. 761.—SCOT.

1035 i. *Opinion of expert.*—The opinion of engravers as to handwriting was not entitled to much consideration, except as pointing out to the jury particulars to be examined & judged of by themselves.—M'DOWALL v. CAMPBELL (1838), Macfarlane, 100.—SCOT.

PART II. SECT. 7, SUB-SECT. 3.

t. Mental derangement of witness.—A will was made in 1866, but testator had made a previous will in 1863, & an attorney & barrister, who had prepared & witnessed the will in 1863, gave evidence, in which he stated, subject to objection, that when testator made that will, he was, in his opinion, of sound disposing mind,

SUB-SECT. 2.—EXPERT WITNESSES.

See Part VI., *post*.

SUB-SECT. 3.—NON-EXPERT WITNESSES.

1036. *Mental derangement of witness—As defence to judgment by consent.*—Decree *pro confesso* not opened without a strong ground: therefore not upon a general affidavit of derangement by the party himself; evidence more satisfactory & extending to the whole period, being required.—KNIGHT v. YOUNG (1813), 2 Ves. & B. 184; 35 E. R. 289.

*Annotations:—*Mentd. Walker v. Bell (1816), 2 Madd. 21; Goldsmith v. Goldsmith (1846), 5 Hare, 123.

1037. *Consent of deceased person.*—Two persons were indicted on 6 Geo. 3, c. 36, for lopping & topping an ash timber-tree, without the consent of the owner. The owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion. The offence was committed at 11 o'clock at night, & the prisoners, when detected, ran away. The land-steward of the owner proved, that he had not given any consent, & did not believe that his master had:—*Held*: this was evidence from which the jury might infer, that no consent had been given by the owner.—R. v. HAZY (1826), 2 C. & P. 458.

1038. *Purpose or intention of another.*—A question to the party under examination as to his belief of the purpose or intention of another person, is not a proper question; unless his belief should appear, from the other parts of the examination, to be important with reference to the person,

memory & understanding:—*Held*: the evidence was improperly admitted.—DOE d. SIMONDS v. GILBERT (1833), 22 N. B. R. 576.—CAN.

a. —.]—On the trial of an issue evidence was given as to the mental capacity of testator by persons acquainted with him. The judge being of opinion that the witnesses examined were not of a class qualified to give scientific evidence as experts withdrew the case from the jury. On appeal:—*Held*: the case should have gone to the jury; the opinions of such witnesses were clearly admissible, being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury.—REGAN v. WATERS (1884), 10 A. R. 85.—CAN.

1038 i. *Purpose or intention of another.*—*Held*: evidence of the belief of plff.'s counsel, who took part in a settlement when a bond was given, as to the genuineness of plff.'s claim in an action on a note, was improperly received.—HALIFAX BANKING CO. v. SMITH (1890), 29 N. B. R. 462; *revid.*, 18 S. C. R. 710.—CAN.

b. *As evidence of negligence.*—Action for negligence in driving a sleigh & horses against pltf. A witness, who was near at the time, said he thought if more care had been used in coming up, the accident would not have happened. The jury having found for pltf., a new trial was granted.—ROBINSON v. BLETCHER (1857), 15 U. C. R. 159.—CAN.

c. —.]—Def., having charge of pltf.'s coat, took it to a blacksmith's shop to be shod for the first time, & having tied it there went out. The coat pulling back threw itself, & received injuries of which it died. Pltf. sued def. for negligence in so tying the coat instead of having it held while being shod; & several witnesses were of opinion that what def. had done was improper, while

trade, dealings or estate of bkpt.—*Ex p. BAXTER* (1828), 7 B. & C. 673; 6 L. J. O. S. K. B. 124; 108 E. R. 875.

1039. With whom contract made—Sale of goods.]—To an action for goods sold, deft. pleaded in abatement, that the debt became due from him jointly with S.

It appeared at the trial, that the business of deft.'s house was carried on, with the knowledge of pltf., under the name of "Bush & Co.," & that the invoice of the goods in question was made out to "Bush & Co.," & also that the real partnership was between deft. & S.:—*Held*: with a view to prove deft.'s sole liability, the witness who proved the giving of the order could not be asked the question, "With whom did you deal," but that the proper inquiry was as to the acts done.—*BONFIELD v. SMITH* (1844), 12 M. & W. 405; 13 L. J. Ex. 105; 2 L. T. O. S. 312.

Annotation:—*Mentd.* *Baker v. Gent* (1892), 9 T. L. R. 159.

1040. Meaning of words—Conversation.]—A witness who has heard a conversation cannot be asked "What did you understand by that?" without previously laying a foundation for such a question by showing that something had previously occurred, in consequence of which the words would convey a meaning different to their ordinary meaning: having done so, the witness may then be asked, "What did you understand," etc.

There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. A bystander may perceive that what is uttered is uttered in an ironical sense, & therefore it may mean directly the reverse of that which it professes to be. Something may have passed before which gives a peculiar character & meaning to some expression; & some word which is ordinarily used, or popularly, may, from something that has gone before, be restricted & confined to a particular sense, or may mean something different from that which it does mean; & the proper course for the counsel who proposes so to get to the plain & obvious meaning of words used by a pltf. or deft. is to ask, not "What did you understand by those words?" but "Was there anything to prevent those words from conveying the meaning which, ordinarily, they would convey?" because, if there was, evidence of that may be given, & then the question may be put, when you have laid the foundation for it, "What did you understand?" Something occurred by which the witness might understand the words in a sense different from their ordinary meaning; & generally no question ought to be put in such a form as possibly to lead to an illegal answer. The understanding of a person who hears an expression is not a legal mode by which it is to be explained. If words are uttered, or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker, or the person who uses them; but a foundation may be laid by giving something else that had occurred; some other matter may be introduced, & then when that is introduced the witness may be asked, with reference to that other matter, what was the sense in which he understood it with reference to that; but the question, "What did you understand?" without reference to any other matter is not the

correct mode of putting a question (*POLLOCK, C.B.*).—*DAINES v. HARTLEY* (1818), 3 Exch. 200; 18 L. J. Ex. 81; 12 Jur. 1093; *sub nom.* *DANES v. HARTLEY*, 12 L. T. O. S. 271.

Annotations:—*Consd.* *Barnett v. Allen* (1858), 3 H. & N. 376; *Simmons v. Mitchell* (1880), 6 App. Cas. 156.

Defamatory statement.]—*See* **LIBEL**

SLANDER.

1041. As evidence of negligence—Dangerous state of station platform.]—A railway co. had a platform extending from their station to their steamboat pier, on the river H., 4 ft. 3 in. in width. On one side the platform was protected by railings, but on the side next the railway, which ran parallel with it for some distance, there was a guard of wood 9 inches high. In an action against the company under Fatal Accidents Act, 1846 (c. 93), two witnesses stated they considered it a dangerous platform:—*Held*: this was merely an expression of opinion, & there was no evidence of negligence to go to the jury.—*Rigg v. MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO.* (1866), 12 Jur. N. S. 525; 14 W. R. 834.

1042. Probable course of action—In hypothetical circumstances.]—(1) Pltfs., house agents, were instructed by defts. to offer a leasehold house for sale, for which they were to receive a commission of 2½ per cent. on the amount of premium if they found a purchaser, but one guinea only for their trouble if the premises were sold "without their intervention." The particulars were entered on pltfs.' books, & they gave a few cards to view. U. who had observed on passing that the house was to be disposed of, but who had not then seen over it, called at pltfs.' office & obtained a card to view the premises in question, amongst others, the terms being written by pltfs.' clerk on the back of the card. U. went to the house a few days afterwards, but thought the price asked, £2,200, too high, & he went away. U. had no further communication with pltfs.; but he subsequently renewed his negotiation with a friend of deft.'s, & ultimately became the purchaser of the lease for £1,700:—*Held*: there was evidence for a jury that U. had become the purchaser of the premises "through pltfs.' intervention," & pltfs. were entitled to the stipulated commission.

(2) At the trial the judge put the following question to U.: "Would you, if you had not gone to pltfs.' office & got the card, have purchased the house?" &, overruling an objection by deft.'s counsel, received his answer, which was, "I should think not." *Seem*: the answer was properly received.—*MANSELL v. CLEMENTS* (1874), L. R. 9 C. P. 139.

Annotation:—*Generally, Mentd.* *Bayley v. Chadwick* (1877), 36 L. T. 740.

1043. Resemblance—Picture & alleged copy.]—In an action claiming damages under Art Copyright Act, 1862 (c. 68), s. 11, for the infringement of copyright in a picture, pltf. did not produce the original picture, but gave evidence that he had seen it, & that a photograph sold by defts., which he produced, was directly taken from an engraving which was an exact copy of the original picture, & he produced the engraving:—*Held*: this evidence was admissible to prove the infringement, & was evidence for the jury that the photograph sold by defts. was a copy of the original picture.

others thought he had adopted the proper plan:—*Held*: not a case in which there should be a nonsuit on the ground that the evidence was consistent either with the existence or non-existence of negligence, but the question was for the jury.—*HENDERSON v. BARNES* (1871), 32 U. C. R. 76.—**CAN.**

d. —.]—In an action for negligent driving, deft. was asked by his counsel whether anything more could have been done than was done to prevent the collision which occurred:—*Held*: improper as being the point which the jury had to decide; deft. should have stated the facts, without giving his opinion, & left it to the jury

to determine whether he could have done anything more than he did to avoid the collision.—*COURTNER v. KIRKBRIDE* (1883), 23 N. B. R. 404.—**CAN.**

e. —.]—In an action on the case for injuries done to pltf.'s house, by reason of the negligence of deft. in removing the adjoining buildings, a

*Sect. 7.—Opinion and belief: Sub-sects. 3 & 4.
8, 9 & 10: Sub-sect. 1.]*

Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence (LORD ESHER, M.R.).—*LUCAS v. WILLIAMS & SONS*, [1892] 2 Q. B. 113; 61 L. J. Q. B. 595; *sub nom. LUCAS v. WILLIAMS & SON, MENDOZA v. WILLIAMS & SON, BERLIN PHOTOGRAPHIC CO. v. WILLIAMS & SON*, 66 L. T. 706; 8 T. L. R. 575, C. A.

Annotation:—Mentd. Hanstaengle v. Baines (1894), 42 W. R. 681.

See, generally, COPYRIGHT, Vol. XIII., p. 226, Nos. 660-662.

1044. Opinion induced—By use of Royal Arms by tradesman.—Where the question was put to a witness in examination, "What was the conclusion in your mind arising from the fact that defts. exhibited the Royal Arms on their business premises?"—*Held*: it was admissible by analogy to the question permitted in passing-off cases, "Did you believe that defts.'s goods were pltf.'s?"—*ROYAL WARRANT HOLDERS' ASSOCN. v. DEANE (EDWARD) & BEAL, LTD.*, [1912] 1 Ch. 10; 81 L. J. Ch. 67; 105 L. T. 623; 28 T. L. R. 6; 56 Sol. Jo. 12.

— *By get-up of goods sold—Passing off.*—*See TRADE MARKS.*

— *By representation.*—*See, generally, MISREPRESENTATION & FRAUD.*

— *Criminal proceedings for obtaining by false pretences.*—*See CRIMINAL LAW, Vol. XV., pp. 984 et seq.*

1045. As to value.—The opinion of a person not an expert on the value of a thing may be given in evidence.—*R. v. BECKETT* (1913), 29 T. L. R. 332; 8 Cr. App. Rep. 204, C. C. A.

Identity.—*In criminal proceedings.*—*See CRIMINAL LAW, Vol. XIV., pp. 358 et seq.*

— *In divorce proceedings.*—*See HUSBAND & WIFE.*

Of person libelled.—*See LIBEL & SLANDER.*

As to age of children.—*In criminal proceedings.*—*See CRIMINAL LAW, Vol. XV., pp. 846, 848, 857, 860, Nos. 9308-9313, 9323, 9408, 9458.*

SUB-SECT. 4.—AFFIDAVITS AS TO INFORMATION AND BELIEF.

See Part VII., Sect. 11, sub-sect. 7, post.

witness cannot be asked whether a foundation was properly sunk.—*O'NEILL v. GRIER* (1846), Bl. D. & Osb. 72.—*IR.*

1045 i. As to value.—A statement of pltf. that she should judge that a case of goods contained from \$400 to \$500 worth of goods from her knowledge of buying & selling like goods.—*Held*: improperly admitted.—*SMITH v. LUNT* (1873), 15 N. B. R. (2 Pug.) 64.—*CAN.*

1045 ii.—Evidence of persons who, having seen & inspected property, give their opinion as to its value is opinion evidence within Alberta Evidence Act, s. 10, enacting that only three of such persons can testify on either side.—*CANADIAN NORTHERN WESTERN RY. CO. v. MOORE* (1915), 30 W. L. R. 676; 7 W. W. R. 1327; 8 Alta. L. R. 379.—*CAN.*

1. Relationship.—Evidence of a witness that he is a member of a firm of bankers who had acted as agents for a family & had had business relations

with it for over fifty years, that he personally knew the pltf., & from the knowledge & belief derived from such knowledge of the family, he believes pltf. to be a daughter & the only surviving child of such family is proper proof of the relationship.—*SIMPSON v. MALCOLM* (1914), 43 N. B. R. 79.—*CAN.*

g. Probable cost of materials.—The testimony of other men engaged in the same kind of business as to the probable cost of materials & supplies is admissible for what it is worth.—*ANTONIOU v. ARNETT* (No. 2), [1922] 1 W. W. R. 609; 65 D. L. R. 661; 17 Alta. L. R. 41.—*CAN.*

h. Quarrelsome disposition.—Incompetent to prove by the opinion of a witness that a pursuer is of a quarrelsome disposition.—*M'FARLANE v. YOUNG* (1824), 3 Murr. 408.—*SCOT.*

k. Object of syndicate.—A witness in a preliminary examination, stated that as secretary of a certain syndicate

SECT. 8.—JUDGMENTS.

Whether conclusive.—*See ESTOPPEL, Vol. XXI., pp. 159 et seq., 236 et seq.*

Previous convictions.—*See CRIMINAL LAW, Vol. XIV., p. 471.*

Autrefois acquit & autrefois convict.—*See CRIMINAL LAW, Vol. XIV., pp. 336 et seq.*

Probate in common form—On whom binding.—*See EXECUTORS.*

Foreign judgments.—*See CONFLICT OF LAWS, Vol. XI., pp. 444 et seq.*

Judicial proceedings generally.—*See Part IV., Sect. 11, post.*

SECT. 9.—DOCUMENTARY EVIDENCE.

See, generally, Part IV., post.

SECT. 10.—EVIDENCE GIVEN IN FORMER PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

1046. Failure of witness to appear—Witness subpoenaed by plaintiff—Presumption that kept away by defendant.—*GREEN v. GATEWICK* (1672), Bull. N. P. 7th ed. p. 239, N. P.

1047. After death of witness—Witness to a right.—Where a witness, who had been examined as to a fact respecting a right, is deceased, what he swore at that trial may be proved by a witness who heard him give his evidence, & it is admissible.—*STRUETT v. BOVINGDON* (1803), 5 Esp. 56, N. P.

Annotations:—Distd. Morgan v. Nicholl (1866), 36 L. J. C. P. 86. *Refd. Wenman v. Mackenzie* (1855), 25 L. J. Q. B. 44.

1048.—What a dead witness has sworn on a former trial between the same parties, is evidence in the cause, & may either be read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it.—*DONCASTER CORPN. v. DAY* (1810), 3 Taunt. 262; 128 E. R. 104.

1049.—A witness examined on the trial of an issue out of Ch. died; a new trial was granted, & on the new trial parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial.—*TOD v. WINCHELSEA (EARL)* (1828), 3 C. & P. 387, N. P.

1050.—Where a new trial had been

he destroyed the cheques & books of the syndicate, because he thought the object of the syndicate had been fulfilled. He was then asked: "What was the object of the syndicate?"—*Held*: the question put was not equivalent to asking a mere opinion, or belief, of the witness, but was a question as to his conception of the object of the syndicate with which he had declared himself to be acquainted, & such a conception was admissible as evidence to prove the illegality of the object of the syndicate.—*THE STATE v. SCHUMACHER* (1896), 3 O. R. 11.—*S. AF.*

PART II. SECT. 10, SUB-SECT. 1.

1048i. After death of witness.—The testimony of a witness, since deceased, taken on a former trial, was rejected by the judge at the trial herein.—*Held*: it was improperly rejected.—*VILLAGE*

directed & the terms of the issue had been somewhat varied, though substantially the same as before:—*Held*: the evidence of a witness on the former trial, who had since died, might be read as evidence on the new trial.—*JONES v. POWELL* (1833), 2 L. J. Ch. 56.

1051. —[—]—The tenant for life, in possession of the real estate, was also tenant for life of certain personal estates under the same will, & was the heir-at-law of the surviving trustee of the real estate, but was not a trustee of the personal estate. Two suits were instituted against him. One was instituted by the tenant for life in remainder of the real estate, complaining of mismanagement of that estate, & praying consequential relief, & particularly the removal of the tenant for life in possession from being trustee; the other suit was instituted by the first tenant in tail in remainder, for the same objects as regarded the real estate, but praying also relief in respect of the personal estate:—*Held*: evidence taken in the former suit was not admissible in the latter, it not appearing that the witnesses were dead, or incapable of being examined.—*BLAGRAVE v. BLAGRAVE* (1847), 1 De G. & Sm. 252; 16 L. J. Ch. 346; 9 L. T. O. S. 168; 11 Jur. 744; 63 E. R. 1056.

Annotations:—*Mentd.* Powys v. Blagrave (1854), 2 Eq. Rep. 395; Huddelsey v. Adams (1856), 22 Beav. 266.

1052. —[—]—Where, upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might use against the other, that evidence may be used between the same parties in any subsequent proceedings on the same issue.—*LAWRENCE v. MAULE* (1859), 4 Drew. 472; 28 L. J. Ch. 681; 34 L. T. O. S. 3; 7 W. R. 314; 62 E. R. 182.

Annotation:—*Consd.* Elias v. Griffith (1877), 46 L. J. Ch. 806.

1053. —[—]—In an action of ejectment A. pltf. proposed to cross-examine a shorthand writer as to the evidence given in a former action by a witness who had since died. The former action was ejectment by A.'s son, who claimed as A.'s heir-at-law, under the supposition that A. was dead, to recover the same premises from deft.'s father:—*Held*: there was no privity of estate between A. & his son, & the evidence not being admissible against A., was not admissible for him.—*MORGAN v. NICHOLL* (1866), L. R. 2 C. P. 117; 36 L. J. C. P. 86; 15 L. T. 181; 12 Jur. N. S. 963; 15 W. R. 110.

Annotation:—*Refd.* Barnett v. Cohen, [1921] 2 K. B. 461.

1054. —[—]—At the trial of a cause with *viva voce* evidence, the ct. admitted in evidence an affidavit filed upon an interlocutory motion which had been ordered to stand over to the hearing, although the deponent was since deceased, & had not been cross-examined.—*ELIAS v. GRIFFITH* (1877), as reported in 46 L. J. Ch. 806; 38 L. T. 871; *subsequent proceedings* (1878), 8 Ch. D. 521, C. A.; *sub nom.* ELIAS v. SNOWDON SLATE QUARRIES CO. (1879), 4 App. Cas. 454, H. L.

Annotations:—*Mentd.* Dashwood v. Magniac, [1891] 3 Ch. 306; *It* Maynard's S. E., [1899] 2 Ch. 347; Chaytor v. Trotter (1902), 87 L. T. 33.

1061 i. *In what proceedings—Proceedings in other cause—Previous criminal proceedings.*—In a suit in which applt.'s success depended on her establishing her mother's divorce from a former husband, E., & subsequent marriage to another man A., in whose service she had been for some years & to whose property applt. claimed to succeed as his daughter & heir, resps. produced a deposition made after the birth of applt. by her mother in a criminal case. The heading of the document was "G., wife of E., caste

S., aged 40 years, from D., on solemn affirmation." & in it the witness stated, "I have lived with A. these 12 or 14 years. I lived with him before his wife died, two years before that event"—*Held*: the heading was only descriptive of the witness & formed no part of the evidence given by her on solemn affirmation; it might well be, & probably was, a wrong description of her; & her statement in the deposition was not necessarily or even probably an admission of immorality. Even if admissible, therefore, the

1055. *Where witness unavailable—Ex parte examination of pauper as to settlement.*—An *ex p.* examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal & the trial of it before the quarter sessions; although resps. had used due diligence, but without effect, to procure the attendance of the pauper as a witness, he not having been heard of from the time of his absconding.—*R. v. NUNEHAM COURTNEY (INHABITANTS)* (1801), 1 East, 373; 102 E. R. 141.

Annotation:—*Refd.* R. v. Ferry Frytone (1801), 2 East, 51.

1056. —[—]—*BLAGRAVE v. BLAGRAVE*, No. 1051, *ante*.

1057. —[—]—In a suit for revocation of probate on the grounds of undue execution, & incapacity, where it appeared that every effort had been made to find one of the attesting witnesses but without success:—*Held*: the affidavit made by him eight years before, at the time of proving the will at the district registry, might be admitted as evidence of execution & capacity.—*GORNALL v. MASON* (1887), 12 P. D. 142; 56 L. J. P. 86; 57 L. T. 601; 51 J. P. 663; 35 W. R. 672.

1058. —[—]—*Witness engaged in other proceedings.*—In a probate suit the ct. allowed an affidavit, used on a motion formerly made in the suit, & sworn by a witness who had been subpoenaed but was unable to attend, owing to his being, at the time of the hearing, engaged as a witness elsewhere, to be put in evidence.—*DREWITT v. DREWITT* (1888), 58 L. T. 684; 52 J. P. 232.

1059. —[—]—*Though within jurisdiction.*—It was suggested that when a person had given evidence before a duly constituted authority in the same cause between the same parties, & the party proved that he could not get the witness, his deposition on the former trial could be read, even though the witness was within the jurisdiction. It was not necessary to determine whether that were a correct proposition of law. But even if so, the party must prove that he used his best endeavours to find the witness & bring him to the ct. & was not able to see or hear of him (*LORD ESHER, M.R.*).—*WIEDEMANN v. WALPOLE* (1891), as reported in 7 T. L. R. 722, C. A.

Annotations:—*Mentd.* Quirk v. Thomas, [1916] 1 K. B. 516; Thomas v. Jones, [1921] 1 K. B. 22.

1060. —[—]—In a suit for probate in solemn form, where it appeared that after every effort to trace the attesting witnesses neither of them could be found, the ct. admitted, as secondary evidence of execution, an affidavit of one of them, sworn to support an application for probate in common form.—*HAYES v. WILLIS* (1906), 75 L. J. P. 86.

1061. *In what proceedings—Proceedings in other cause—Previous criminal proceedings.*—An information taken before a justice cannot be read in evidence after the death of the party who gave it on a prosecution for a misdemeanor.—*R. v.*

deposition was not entitled to any weight.—*MAQBULAN v. AHMAD HUSAIN* (1904), 1 L. R. 26 All. 108; 8 C. W. N. 241; L. R. 31 Ind. App. 38.—*IND.*

1061 ii. —[—]—In an action for malicious prosecution the evidence given by deft. at the prosecution of pltf. is admissible in evidence against deft. as an admission by him. The whole of the evidence given at the prosecution can be put in by pltf. to prove his case & to show that deft. was not warranted in commencing the

1078. ——— On substantially same issue.]—*JONES v. POWELL*, No. 1050, *ante*.

——— Admissions for purposes or former trial.]—See Nos. 647, 648, *ante*.

——— In criminal proceedings.]—See *CRIMINAL LAW*, Vol. XIV., pp. 309, 310, Nos. 325 *et seq.*

1079. Evidence made admissible as condition of granting new trial—Direction of court—Evidence of infirm or aged witness.]—The ct. will in its discretion make it a term of a new trial that the evidence of any infirm witness or witness of an advanced age who may die in the interim shall be read from the judge's notes of the former trial.—*ANON.* (1843), 1 Dow. & L. 725 ; 7 Jur. 1038.

SUB-SECT. 2.—HOW PROVED.

1080. Necessity for production of record.]—*ANON.* (1701), 12 Mod. Rep. 565 ; 88 E. R. 1523. See, further, Part IV., Sect. 11, *post*.

1081. By party present & hearing evidence given.]—*GREEN v. GATEWICK* (1672), Bull. N. P. 7th ed. p. 239, N. P.

1082. ———.]—*PYKE v. CROUCH*, No. 776, *ante*.

1083. ———.]—*STRUTT v. BOVINGDON*, No. 1047, *ante*.

———.]—*DONCASTER CORPN. v. DAY*, No. 1048, *ante*.

1085. By reading judge's notes.]—*DONCASTER CORPN. v. DAY*, No. 1048, *ante*.

1086. ——— By consent.]—*HAWTAYNE v. BOURNE* (1841), as reported in 8 M. & W. 265, n. ; 151 E. R. 1038.

Annotations :—*Mentd.* Pott v. Bevan (1844), 1 Car. & Kir. 335 ; Pott v. Eytton (1846), 3 C. B. 32 ; Ricketts v. Bennett (1847), 4 C. B. 686 ; Brettell v. Williams (1849), 3 Exch. 623 ; Cox v. Midland Counties Ry. (1849), 3 Exch. 268 ; *Re* German Mining Co., *Ex p.* Chippendale (1854), 4 De G. M. & G. 19 ; Oakley v. Ood-Deen (1860), 2 L. T. 432 ; Yorkshire Ry. Wagon Co. v. Maclure (1881), 19 Ch. D. 478 ; *Re* Cunningham, Simpson's Claim (1887), 36 Ch. D. 532 ; Gwilliam v. Twist, [1895] 2 Q. B. 84 ; Jacobs v. Morris, [1902] 1 Ch. 816 ; Prager v. Blatspiel, Stamp & Heacock, [1924] 1 K. B. 566.

1087. ——— As condition of granting new trial.]—*ANON.* (1843), No. 1079, *ante*.

SECT. 11.—EXTRINSIC EVIDENCE.

See Part IV., Sect. 6, *post*.

Part III.—Modes of Proof and Weight of Evidence.

SECT. 1.—IN GENERAL.

1088. Inference distinguished from surmise.]—(1) A workman employed in fairly light work in a colliery was taken ill. He went home & died the same day from *angina pectoris*. The man's heart was found to be in a bad condition of long standing. The medical evidence was that *angina pectoris* might be brought on by several causes, & might be due to circumstances which could hardly be called an accident at all :—*Held* : though as a matter of conjecture it was probable, it was not proved as a matter of legitimate inference from the facts, that the death was due to an accident arising out of & in the course of the employment.

(2) No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence of facts as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence, or by inference from facts. But the matter must not be left to rest in surmise, conjecture, or guess (*BUCKLEY, L.J.*).—*HAWKINS v. POWELLS TILLERY STEAM COAL CO., LTD.*, [1911] 1 K. B. 988 ; 80 L. J. K. B. 769 ; 104 L. T. 365 ; 55 Sol. Jo. 329 ; 4 B. W. C. C. 178 ; *sub nom.* *POWELLS TILLERY STEAM COAL CO., LTD. v. HAWKINS*, 27 T. L. R. 282, C. A.

Annotations :—*As to* (1) *Cnsd.* Fennah v. Mid. & G. W. Ry. of Ireland (1911), 4 B. W. C. C. 440 ; Beaumont v. Underground Electric Rys. of London (1912), 5 B. W. C. C. 247 ; Stapleton v. Dinnington Main Coal Co. (1912), 107 L. T. 247. *Reid.* Chandler v. G. W. Ry. (1912), 106 L. T. 479 ; Euman v. Dalziel (1912), 6 B. W. C. C. 900 ; Kerr (or Lendrum) v. Ayr Steam Shipping Co., [1915] A. C. 217.

PART II. SECT. 10, SUB-SECT. 2.

1085i. By reading Judge's notes.]—The judge's notes of the testimony of a witness since deceased are evidence in a subsequent trial of the same cause to prove that witness's testimony, though the second trial is before a different judge.—*DOE d. LONCHETER v. MURRAY* (1848), 1 All. 216.—*CAN.*

o. Commissioner's notes—Taken at preliminary inquiry.]—On the trial of an action to set aside a bill of sale :—*Scndle* : as the Collection Act requires the comr. to file the evidence taken before him, such evidence must be taken in writing, & is the best evidence

as to what was said during the inquiry.—*EARLINGER v. THOMPSON* (1905), 37 N. S. R. 513.—*CAN.*

p. By witnesses—Actual words must be sworn to.]—Where pltf. has been examined as a witness on a former trial respecting the same subject, it is necessary, in order to prove his testimony, that the witnesses should swear to the words used by him, & not merely to the effect of them.—*FRASER v. BLACK* (1851), 2 All. 312.—*CAN.*

q. Counsel's notes—How verified.]—Counsel moving on his own notes of

SECT. 2.—ADMISSIONS.

SUB-SECT. 1.—ADMISSIBILITY AS EVIDENCE.

See Part II., Sect. 4, sub-sect. 2, *ante*.

SUB-SECT. 2.—NATURE OF ADMISSION.

1089. May be express or implied.]—*HEANE v. ROGERS*, No. 1110, *post*.

1090. Affidavit not denied.]—A claim for the specific performance of an agreement stated the agreement. An affidavit was made on behalf of pltf., that the agreement had been made, & that the attesting witness to it was a clerk of deft., & that deft. had refused to allow his clerk to prove the agreement. An affidavit was made by deft. in which an allusion was made to "the agreement in pltf.'s claim set forth." Deft. did not deny that the agreement had been made. No other proof was given of the agreement :—*Held* : under the circumstances, the agreement was sufficiently proved, & pltf. was entitled to a decree.—*TYNTE v. BULLER* (1854), 23 L. J. Ch. 504 ; 2 W. R. 309.

Admissions by conduct.]—See Sub-sect. 5, *post*.

SUB-SECT. 3.—VALUE AS EVIDENCE.

A. In General.

1091. Extra judicial declarations—Compared with sworn evidence of same witness.]—Greater

trial, in the absence of the minutes, must verify them by affidavit.—*STEVENSON v. DULHANTY* (1854), James, 339.—*CAN.*

PART III. SECT. 2, SUB-SECT. 3.—A.

r. Sufficiency.]—In a suit by a creditor to set aside a deed on the ground that it was made to deft. on a secret trust for grantor & to defeat his creditors :—*Held* : grantor's statements after the conveyance that it was a real transaction, were admissible evidence for deft., but were not entitled to much weight.—*WOOD v. IRWIN* (1869), 16 Gr. 398.—*CAN.*

et. 3. A., B. & C.]

regard should be had to the evidence of a witness on oath, than to his extra-judicial declarations.—*DYER v. CALWELL* (1755), 2 Lee, 120.

1092. Sufficiency—Dependent on party making admission.]—Evidence which would not be sufficient to prove a fact for a party when given by his own witnesses, may be so when given by his adversary's.—*ANON.* (1698), 1 *Ld. Raym.* 732; 91 E. R. 1389.

1093. — Compared with finding by jury.]—Admission by a party concerned in matters of fact is stronger than if it had been determined by a jury, & facts are as properly concluded by admission, as by trial.—*SHEFFIELD v. BUCKINGHAMSHIRE (DUCHESS)* (1739), 1 *Atk.* 628; 26 E. R. 395, L. C.

1094. — Subsequent denial in pleadings.]—On evidence of an agreement's being confessed by deft., decreed to be carried into execution, though the agreement was proved by one witness only, & positively denied by deft.'s answer.—*ONLY v. WALKER* (1746), 3 *Atk.* 407; 26 E. R. 1035.

1095. — As a bar to relief.]—(1) Admission of a debt obtained by fraud or force not set aside on motion, but may be a ground for a new bill although the former still depending.

(2) The general complexion of a case is not sufficient to overturn the rules of evidence, yet it is a reason for sifting into the circumstances as far as is consistent with the rules of the ct. (*LORD HARDWICKE, C.*).

(3) If a man will create evidence against himself by admission, it is better that he should suffer than rules of ct. be overturned (*LORD HARDWICKE, C.*).—*TOWNSEND v. LOWFIELD* (1747), 1 *Ves. Sen.* 35; 27 E. R. 874, L. C.

1096. —.]—It is said that there is a thing which was intended to be a deed, & which contains a direct recital & a statement which amounts to an admission by deft. That admission, like every other admission made by a deft., or made by his agents in course of business, is admissible as evidence against him; but it is always for the ct. to consider what weight, if any, is to be given to an admission, or any other evidence; it is not conclusive merely because it is legally admissible (*JAMES, L.J.*).—*BULLEY v. BULLEY* (1874), 9 Ch. App. 730; 44 L. J. Ch. 79; 30 L. T. 848; 22 W. R. 779, L. J.

1097. — Admission of contributory negligence—Made in ignorance of true cause of accident.]—*BYTHESSE v. PALACE & BURLINGTON HOTELS CO., LTD.* (1892), 8 T. L. R. 710, C. A.

1098. Question for jury.]—*CRAY v. HALLS* (1824), cited in Ry. & M. at p. 258, N. P.

*Annotation:—**Reid. Smith v. Blandy* (1825), Ry. & M. 257.

1099. —.]—The whole of what a party says at the same time, must be given in evidence, & what he says in his favour must not be taken as true, but must be left, under all the circumstances, for the jury to say whether they believe it or not (*BEST, C.J.*).—*SMITH v. BLANDY* (1825), Ry. & M. 257, N. P.

1100. —.]—*NEWTON v. BELCHER*, No. 1106, *post*.

1101. —.]—Whatever a party admits may be used as evidence against him, although the jury are to be the judges of its value (*PARKE, B.*).—*TOLL v. LEE* (1849), 4 Exch. 230; 18 L. J. Ex. 264; 13 L. T. O. S. 325; 13 Jur. 614; 154 E. R. 1195.

*Annotation:—**Reid. Watson v. Spratley* (1854), 10 Exch. 222.

1102. Cannot operate to excuse illegality.]—Pltf.'s counsel have admitted, that the officers of excise were not bound to produce the public books. Indeed it would be highly inconvenient if they were liable to be called upon by every individual for that purpose. Now that goes the whole length of determining this case; for if the wager be such that the best evidence by which it must be proved is improper to be admitted, that circumstance shows that the wager is in itself illegal; & if so, no admission of the party that he has lost the wager can make that legal which is in its nature illegal (*ASHHURST, J.*).—*ATHERFOLD v. BEARD* (1788), 2 Term Rep. 610; 100 E. R. 328.

*Annotations:—**Reid. Shirley v. Sankey* (1800), 2 Bos. & P. 130. *Mentd. Good v. Elliott* (1790), 3 Term Rep. 693; *Itanlohl Thackoorseydass v. Soojumnull Dhondnull* (1848), 6 Moo. P. C. C. 300; *Fitch v. Jones* (1855), 5 E. & B. 238.

1103. Question for judge.]—*BULLEY v. BULLEY*, No. 1096, *ante*.

1104. In party's own favour—Discharge of bankrupt.]—In an action by the payee of a bill of exchange accepted by deft. for a valuable consideration, evidence that pltf. had been discharged as an insolvent debtor after the bill became due & had given in a blank schedule is not enough to show that the bill had been satisfied.—*HART v. NEWMAN* (1811), 3 Camp. 13, N. P.

1105. — Reasons for breach of agreement.]—*REMMIE v. HALL* (1819), Manning's Digest of Nisi Prius Cases 376, N. P.

*Annotations:—**Reid. Smith v. Blandy* (1825), Ry. & M. 257; *Goss v. Quinton* (1842), 12 L. J. C. P. 173.

Admission operating by way of estoppel.]—*See ESTOPPEL*, Vol. XXI., pp. 310 *et seq.*

— **Money had & received.]**—*See CONTRACT*, Vol. XII., pp. 545, 546.

B. Circumstances in which made.

1106. Matter for consideration of jury.]—Where an admission is relied upon against a party, the jury, in estimating the effect due to it, are justified in considering the circumstances under which it was made, & whether deft. made it under an erroneous notion as to his legal liability.

A provisional committeeman of a railway was sued for work done by pltf., on behalf of the co., in 1845, for a portion only of which he had given any authority to pledge his credit. In 1846 the committee circulated a letter which operated as an admission of the whole of pltf.'s claim against the co.:—*Held*: the judge was right in directing the jury to consider the circumstances under which the admission was made, & the mistaken view which was at that time entertained of the liability of members of provisional committees, & to qualify the effect of the admission accordingly.—*NEWTON v. BELCHER* (1848), 12 Q. B. 921; 6 Ry. & Can. Cas. 38; 116 E. R. 1115; *sub nom.* *NEWTON v. BELCHER, SAME v. LIDDARD*, 18 L. J. Q. B. 53; 12 L. T. O. S. 213; 13 Jur. 253.

*Annotation:—**Reid. Newton v. Liddard* (1848), 12 Q. B. 925.

1107. Admission made under erroneous view of law.]—A party to a cause who is proved to have made admissions may defeat their effect by showing that they were made under a mistake of law: provided that no person has been induced by them to alter his condition.—*NEWTON v. LIDDARD* (1848), 12 Q. B. 925; 6 Ry. & Can. Cas. 42; 116 E. R. 1117; *sub nom.* *NEWTON v. BELCHER, SAME v. LIDDARD*, 18 L. J. Q. B. 53, 55; 12 L. T. O. S. 213; 13 Jur. 253.

1108. —.]—Deft. had been asked by letter to become a member of a provisional committee. He gave a written consent. A few days after he

attended a meeting of the committee, & signed a consent to act & take shares. At the same meeting, a managing committee was appointed, with instructions to pursue the most energetic measures for advancing the objects of the co. Orders were afterwards given by the secretary, without consulting deft. The first order in this case was on the 11th, & the meeting which deft. attended was on the 16th:—*Held*: (1) deft. would be liable for any orders of the managing co., in pursuance of the authority conferred upon them by the resolution of the meeting.

Deft. had subsequently promised to pay his quota if another member of the committee would do so; (2) not to be an admission of his liability, as it was made under an erroneous impression as to the law, & the jury should consider such an offer in reference to his knowledge of the law, as it was understood at the time.

(3) An admission founded on a mistake of the law is not binding.—*BARKER v. WHITWORTH* (1850), 14 L. T. O. S. 550.

1109. — Submitting to distress.—Payment of rent under a distress is not a conclusive admission of title in the distrainor, but may be rebutted by showing that he never had any title. Pltf. claimed as extrix. & devisee of the administratrix of one of three lessors, & showed that rent had been paid by deft., the lessee, to her testatrix & to herself, on two occasions, after distress:—*Held*: this *prima facie* case was answered by showing that one of the other lessors was still living.

The evidence given on the part of deft. did not show absolutely that the title was out of pltf. & in some one else; but it showed a reason why he paid the rent. Payment of rent, even under a distress, is not a conclusive admission of title (*JERVIS, C.J.*).—*KNIGHT v. COX* (1846), 18 C. B. 645; 27 L. T. O. S. 187; 20 J. P. 744; 139 E. R. 1523; *sub nom.* *COX v. KNIGHT*, 25 L. J. C. P. 314. *Annotation*:—*Refd.* *Carlton v. Bowcock* (1884), 51 L. T. 659.

1110. Admission made by mistake—Where third party not prejudiced.—The express admission of a party to the suit, or an admission implied from his conduct, is evidence, & strong evidence, against him; but he is at liberty to show that any such admission was misunderstood or untrue, & he is not estopped or concluded by it, unless it has had the effect of altering the condition of some third person (*BAYLEY, J.*).—*HEANE v. ROGERS* (1829), 9 B. & C. 577; 4 Man. & Ry. K. B. 480; 7 L. J. O. S. K. B. 285; 109 E. R. 215.

Annotations:—*Consd.* *Newton v. Liddard* (1848), 12 Q. B. 925; *Re Dover & Deal Ry., Cinque Ports, Thanet & Coast Junction Co., Lonsborough's Case* (1854), 4 De G. M. & G. 411; *Maloney v. Pink* (1923), 130 L. T. 500. *Refd.* *Stratford & Moreton Ry. v. Stratton* (1831), 2 B. & Ad. 518; *Graves v. Key* (1832), 3 B. & Ad. 313; *Re Chambers, Ex p. Chambers* (1835), 1 Deac. 197; *Pickard v. Sears* (1837), 6 Ad. & El. 469; *Freeman v. Cooke* (1848), 2 Exch. 654; *Richards v. Johnston* (1859), 4 H. & N. 660. *Mentd.* *Dickinson v. Valpy* (1829), 5 Man. & Ry. K. B. 126; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Simpson v. Accidental Death Insec.* (1857), 2 C. B. N. S. 257.

See *ESTOPPEL*, Vol. XXI., pp. 302 *et seq.*

— **Effect of long acquiescence.**—See *ESTOPPEL*, Vol. XXI., pp. 333 *et seq.*

PART III. SECT. 2. SUB-SECT. 3.—C.

a. Conditions of reception.—Deceased, while working on a building as an independent contractor, was struck & instantly killed by the falling of the boom of a derrick that had been erected on the building by defts., who were the building contractors. The machine was of the best type & in good repair, & was operated by a competent man, who was not guilty of any negligence or misconduct.

Pltfs. alleged that there was a defect in the machine. The only evidence of knowledge of the alleged defect by defts. was that of two witnesses, one of them stating that the operator of the hoist told him, after the accident, that the machine was defective & that he had notified defts. of the defect prior to the accident, & that this statement was made by the operator 15 or 20 feet from deft. W., one of the members of deft. firm, who did not contradict the statement. The other

witness, who stood beside W. at the time the statement was made, testified that he heard what the operator said:—*Held*: the evidence that W. heard the statement was of the vaguest character; & the remark was not addressed to him; but the allegation was not that he, but the firm, of which he was a member, had been notified, as to which he may have had no knowledge, so that even if he heard what the operator said, he may not have been in a position to contradict it. This

1111. Admission made under compulsion—Attempted extortion—In form of legal proceedings.]

—Allegations & admissions, used for the purpose of defence against attempted extortion, under the form of legal proceedings, or for the purpose of obtaining justice irregularly when regularly it could not be had, ought not to be used as evidence of the rights of the parties:—*Held*: allegations & admissions, made in the course of arbitrary proceedings against parties in the Star Chamber, & in a treaty for compromise which arose out of the sentence, & in the proceedings which took place before the House of Commons in an attempt to obtain relief from the oppression of that ct., could not in any way influence the judgment of this ct.—*SKINNERS' CO. v. IRISH SOCIETY* (1838), 7 Beav. 593; 49 E. R. 1196; *affd.* (1845), 12 Cl. & Fin. 425, H. L.

Annotation:—*Mentd.* *A.-G. v. London Corpn.* (1850), 2 H. & Tw. 1.

— **In judicial or quasi judicial proceedings.**—See No. 517, *ante*; No. 2653, *post*.

C. Statements in Party's Presence.

1112. General rule.—A party who is present may be just as much bound by the statement of a third person as if he spoke himself (*LORD DENMAN, C.J.*).—*INGRAM v. WEBB* (1847), 9 L. T. O. S. 147.

1113. ——Divorce by reason of cruelty, by the wife against the husband, sustained almost entirely by the evidence of the children & near relations of the parties, but who saw no act of personal violence on the part of the husband, except his pushing the wife, & spitting in her face.

In cases of this kind, where it is often, & must often be, impossible to produce evidence of what occurred between husband & wife, admissions, in cases where every innocent man would deny with indignation if he could, are important evidence, for it is the best & most credible testimony the *res gestæ* would admit of (*DR. LUSHINGTON*).—*SAUNDERS v. SAUNDERS* (1847), 1 Rob. Eccl. 519; 5 Notes of Cases, 408; 9 L. T. O. S. 358; 163 E. R. 1131.

Annotations:—*Mentd.* *Saunders v. Saunders* (1858), 6 W. R. 328; *Smallwood v. Smallwood* (1861), 2 Sw. & Tr. 397; *Waddell v. Waddell* (1862), 2 Sw. & Tr. 584; *Sant v. Sant* (1874), L. R. 5 P. C. 542; *Russell v. Russell*, [1897] A. C. 395.

1114. Child, living with mother, called by particular name.—*Held*: where it is proved that the separated wife was the mother of a particular child, & it is also proved that it was the habit of persons in the house where the mother & child lived to call the child by a particular name, & that such persons would not be likely to do so unless they had the authority of the mistress of the house, such proof is some evidence of the fact that the child went by that name with the authority of the mother.—*FEARON v. AXLESFORD (EARL)* (1884), 12 Q. B. D. 539; 53 L. J. Q. B. 410; 50 L. T. 508, 662; 32 W. R. 718, D. C.; *on appeal*, 14 Q. B. D. 792, C. A.

Annotations:—*Mentd.* *Sweet v. Sweet*, [1895] 1 Q. B. 12; *Hunt v. Hunt*, [1897] 2 Q. B. 547; *Kennedy v. Kennedy*, [1907] 1 P. 49.

Sect. 2.—Admissions: Sub-sect. 3, C.; sub-sects. 4 & 5.]

Whether corroborative evidence within Evidence Amendment Act, 1869 (c. 68), s. 2.]—See HUSBAND & WIFE.

SUB-SECT. 4.—EFFECT OF PARTICULAR ADMISSIONS.

1115. Admission of possession—Refusal to give up possession.]—Ejectment against assignees of a bkpt.; proof, that upon being required to give up possession of the premises, they answered that it was not consistent with their duty to do so, is sufficient proof of possession.—*DOE v. RADNOR (EARL) v. TAYLOR* (1819), 2 Stark. 535, N. P.

1116. — Whether admission of previous possession.]—An admission by a party, that he is in possession of certain premises, is no evidence of his possession on any day antecedent to that on which the admission is made.—*TINDAL v. WHITROW* (1823), 1 C. & P. 22, N. P.

1117. Whether admission of party's title to sue—Admission of all facts "except the merits."]—Deft., in a suit by assignees of a bkpt., was told, at an interview with the attorney for the assignees, which was arranged by his own attorney, but which he thought proper to attend alone, that his attorney had proposed that he should admit every fact, except the merits, provided plffs. would waive their right of holding him to bail; & he was asked, whether that proposal was made with his authority. He replied, that it was; & that he was ready to carry it into effect, as the only question he wished to try was, whether he was liable on the undertaking he had given:—*Held*: this amounted to an admission of the right of the assignees to sue, although no mention was made of it in the conversation. *Semble*: it would have been otherwise, if, without further explanation, he had only said that he wished to try upon the merits.—*DAVIES v. BURTON* (1829), 4 C. & P. 166, N. P.

1118. — Letter entitled in pending cause.]—In an action, brought by bkpt.'s assignees, a letter written by deft. entitled in the cause, is not such an acknowledgment of their title as assignees, as will render it unnecessary to produce the commn. & the subsequent proceedings.—*LANCASTER v. BARKER* (1827), 5 L. J. O. S. K. B. 289.

1119. Admission suggesting offence committed—Whether party liable for offence—Refusal by witness in bankruptcy to answer "question."]—Comrs. of bkpt. committed a witness for refusing to read the entries in an account:—*Held*: (1) they were liable to an action for false imprisonment for so doing, because this was not a question; (2) the circumstance of the witness speaking of it as a

question at the time of his refusal made no difference.—*ISAAC v. IMPEY* (1830), 10 B. & C. 442; 4 C. & P. 113; 5 Man. & Ry. K. B. 377; 3 Man. & Ry. M. C. 40; 8 L. J. O. S. K. B. 169; 109 E. R. 514.

Annotation:—Refd. Ferguson v. Kinnoull (1842), 9 Cl. & Fin. 251.

1120. Promise to pay further instalment—Admission of debt due.]—It is sufficient proof that money is still due on a warrant of attorney, when the clerk of pltf.'s attorney swears that it is due; he having already received thereon different payments, & having also lately seen deft., when he promised to pay a further instalment.—*MIDDLETON v. STOCKDALE* (1842), 6 Jur. 509.

1121. Admission of debt—Whether explanation of items precluded.]—Pltf. is not precluded from explaining admissions in the particulars of demand of payments made to him by deft., & of showing on what account such payments were made. Thus, in an action for use & occupation to recover £12 8s. 10d. the balance of an account of £64 0s. 10d. where the particulars of demand contained an admission, "on account whereof pltf. admits she has received at various times sums of money, amounting in the whole to £21 12s. 0d.," & pltf., at the trial, proved a debt to the amount of £14 3s. 6d.:—*Held*: pltf. might explain on what account the £21 12s. 0d. had been paid; & on evidence given, that £12 10s. 0d. of that sum had been paid for a debt not due to pltf., & that she was entitled to recover £5 1s. 6d., being the difference between the amount of the debt proved & that part of the payments in the particulars of demand remaining unexplained.—*MERCY v. GALT* (1849), 3 Exch. 851; 6 Dow. & L. 656; 18 L. J. Ex. 317; 13 L. T. O. S. 167; 13 Jur. 412; 154 E. R. 1089.

In account stated.]—See CONTRACT, Vol. XII., pp. 576 et seq.

1122. Admission before & after action brought—Receipt of trust funds.]—Trust funds may be ordered to be brought into ct. by the trustee, an accounting party, upon admission contained in letters written before action brought that he has received the money, & a recital to that effect contained in the settlement, his execution of which as trustee has been proved; although there is no formal admission in his pleadings, or affidavits, that he has received & holds the money.—*HAMPDEN v. WALLIS* (1884), 27 Ch. D. 251; 54 L. J. Ch. 1175; 51 L. T. 357; 32 W. R. 977.

Annotations:—Refd. Re Beeny, French v. Sproston (1894), 42 W. R. 377. *Mentd. Wanklyn v. Wilson* (1887), 35 Ch. D. 180.

See, generally, TRUSTS & TRUSTEES.

1123. Admission under notice to admit—Whether admission of fact stated in description of document.]

evidence should not have been admitted.—*WATSON v. BOOKER* (1913), 18 B. C. R. 538.—**CAN.**

PART III. SECT. 2, SUB-SECT. 4.

t. Admission of third person.—As to transfer of goods.]—In an action against a sheriff for taking goods under an execution against P., which pltf. claimed under a previous assignment made to him by P. in payment of a debt, declarations of P.'s son, in whose possession pltf. had left the goods, as to the circumstances of the transfer, are not evidence against pltf. though the fact of such possession is proper for the consideration of the jury in determining the *bona fides* of the transfer.—*DOAK v. JOHNSON* (1843), 2 Kerr. 319.—**CAN.**

u. Admission of execution of deed or document.]—*McDONALD v. CLARKE* (1870), 30 U. C. R. 307.—**CAN.**

b. Resolution of corporation—Acceptance of offer to purchase.]—*NORTH VANCOUVER DISTRICT v. TRACY* (1903), 34 S. C. R. 132.—**CAN.**

c. Admission as to investment by notary—Whether evidence of agency.]—Admissions that a notary had invested moneys & collected interest on loans for pltf. do not constitute evidence of agency on the part of the notary.—*GERVAIS v. MCCARTHY* (1904), 35 S. C. R. 14.—**CAN.**

d. What amounts to judicial admission—Confession of judgment.]—A confession of judgment for a portion of the amount claimed is a judicial admission of pltf.'s right of action & constitutes complete proof against the party making it.—*CITIZENS LIGHT & POWER CO. v. ST. LOUIS TOWN* (1904), 34 S. C. R. 495.—**CAN.**

e. Title by adverse possession —

*Declarations of occupant of land.]—*The declarations of one in adverse possession made on the premises while in occupation, importing a claim of a statutory title in himself, are admissible in an action of ejectment against his representatives to support the presumption of title from possession, whether they are against interest or not, & whether made before or after the statutory title accrued.—*RUNDLE v. MCNEIL* (1908), 38 N. B. R. 406; 4 E. L. R. 522.—**CAN.**

f. Admission as to title to foreshore.]—On application by the Minister of Justice for a disclaimer of damages for the taking of the foreshore on the Miramichi river, the Govt. of New Brunswick passed an Order in Council stating that the owner of the adjoining land taken claimed title to the foreshore; that it had been used by the owners for booming purposes & other-

—The admission of a document described in the usual notice to admit, is not the admission of a fact stated in the description: it may be some evidence of the fact which may be rebutted by evidence to the contrary.—*PILGRIM v. SOUTHAMPTON & DORCHESTER RY. CO.* (1849), 18 L. J. C. P. 330; *sub nom.* *PILGRIM v. SOUTH DORCHESTER RY. CO.*, 13 L. T. O. S. 304.

Annotation:—Mentd. *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343.

—*See, generally, PRACTICE.*

Admission as evidence of account stated.]—See *CONTRACT*, Vol. XII., pp. 576 *et seq.*

Admission as evidence of money had & received.]—See *CONTRACT*, Vol. XII., pp. 545, 546.

Admission operating by way of estoppel.]—See, generally, ESTOPPEL, Vol. XXI., pp. 310–328, Nos. 1140–1226.

Representation as to title to goods delivered to carrier.—Effect on right of action.]—See *CARRIERS*, Vol. VIII., p. 225, No. 1439.

Admission by tenant.—Of rights of landlord.]—See *LANDLORD & TENANT*.

Admission by purchaser.—Of title of vendor.]—See *SALE OF LAND*.

Entries in pass book.]—See *BANKERS*, Vol. III., pp. 243 *et seq.*

Admission of adultery.]—See *HUSBAND & WIFE*.

SUB-SECT. 5.—ADMISSIONS BY CONDUCT.

1124. Weight as evidence.]—GOODMAN v. SCUSE (1708), 2 Eq. Cas. Abr. 183; 22 E. R. 157; *sub nom.* *WOODMAN v. SKUTE*, Prec. Ch. 236; Gilb. Ch. 9; *sub nom.* *ANON.*, 3 P. Wms. 294, n., L. C.

1125. Conduct amounting to an admission.—Note given with warrant to confess judgments & further security.—Judgment confessed.—Admission of liability.]—GOODMAN v. SCUSE (1708), 2 Eq. Cas. Abr. 183; 22 E. R. 157; *sub nom.* *WOODMAN v. SKUTE*, Prec. Ch. 266; Gilb. Ch. 9; *sub nom.* *ANON.*, 3 P. Wms. 294, n., L. C.

1126. —Advertisement.]—In an action for goods of a bkpt., against the person who sold them, an advertisement of deft.'s, describing them as the goods of bkpt., precludes him from disputing the bkpty.—MALTBY v. CHRISTIE (1795), 1 Esp. 339, N. P.

Annotation:—Reld. *Rankin v. Horner* (1812), 16 East, 191.

1127. —Non-application for annuity.—Admission of satisfaction.]—A married woman being entitled to an annuity, charged on a plantation & residuary estate in J., devised to A., her husband, under an authority from A. received the produce of the estate from 1811 to 1816, & never accounted for it; during that period she never applied for

wise for more than sixty years; that the A.-G. was of opinion that whatever rights the province may have had were extinguished, & that no claim should be made by it to said foreshore.—*Held:* this was an admission touching the title to the foreshore by the only authority competent to make it.—*TWEDIE v. R.* (1915), 52 S. C. R. 197.—*CAN.*

g. Malicious prosecution.—Evidence of defendant given in prosecution of plaintiff.—Whether admissible as admission.]—In an action for malicious prosecution the evidence given by deft. at the prosecution of pltf. is admissible in evidence against deft. as an admission by him.—MICKLESON v. SMALL (1905), 24 N. Z. L. R. 831.—*N.Z.*

PART III. SECT. 2, SUB-SECT. 5.

1130i. Conduct amounting to an admission.—Silence.]—In an action for false imprisonment against four defts.

any arrears of her annuity:—Held: the annuity must be presumed to have been satisfied.—*CARTER v. ANDERSON* (1830), 3 Sim. 370; 8 L. J. O. S. Ch. 91; 57 E. R. 1036.

1128. —Payment of interest on note.—Consent to alteration.]—In an action by the payee against the maker of a promissory note, the note, on being produced, appeared to have been altered; the words "or order" having been substituted for "or other." The attesting witness who had prepared the note stated that he could not say whether the alteration was in his writing or not, but that he ought to have drawn the note originally with the words "or order." Deft. had paid two years' interest on the note:—*Held:* this was reasonable evidence from which it might be inferred that the alteration had taken place with deft.'s consent.—*CARRIS v. TATTERSALL* (1841), 2 Man. & G. 890; Drinkwater, 209; 3 Scott, N. R. 257; 10 L. J. C. P. 187; 133 E. R. 1004.

1129. —Partial admission of account.—Whether admission of whole.]—Pltf. was the commercial agent of the E. I. Co. at A. It was his duty to send his account to J., the Co.'s agent at B., to examine & to transmit to the governor of M. On pltf.'s accounts, there appeared a balance of 1325 dollars against him, but on reference to the accounts kept by J. of the same transactions, instead of a deficiency, 4771 dollars appeared due to pltf. The Co. then allowed the 1325 only:—*Held:* this was not a sufficient admission & recognition of the correctness of J.'s accounts, as to entitle pltf. without further evidence, to the 4771 dollars.—*MARQUHAR v. EAST INDIA CO.* (1845), 8 Beav. 260; 50 E. R. 102.

—In action for breach of promise of marriage.]—See *HUSBAND & WIFE*.

1130. —Silence.]—Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not (BOWEN, L.J.).—WIEDEMANN v. WALPOLE, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114; 7 T. L. R. 722, C. A.

Annotations:—Reld. *Quirk v. Thomas*, [1916] 1 K. B. 516; *Thomas v. Jones*, [1921] 1 K. B. 22.

—Not answering letters.]—See Nos. 3799, 3824–3831, *post*.

Whether corroborative evidence in action for breach of promise of marriage.]—See *HUSBAND & WIFE*.

—Letter endorsed or otherwise adopted.]—See No. 2648, *post*.

—Account not disputed.]—See 3963, *post*.

the only evidence connecting two of them with an order given by the third of them for pltf.'s arrest was the evidence of a witness given on the hearing of a charge against the pltf. In a police ct. when the two defts. were present. The witness stated that he had the authority of all defts. for the arrest. The two defts. heard this evidence given & were silent:—*Held:* such silence in a ct. of justice could not be given in evidence of an admission by the two defts. of the facts stated by the witness.—*FISHER v. WHEATLAND, CROOK, ANDREWS & THOMSON* (1863), 2 W. & W. 130.—*AUS.*

1130ii. —.—[Acquiescence is not to be inferred from silence, when the person who remains silent has no authority to speak.—*CHERRY v. PERKINS* (1872), 3 V. R. (Law) 87.—*AUS.*

1130iii. —.—[Silence is not evidence of an admission that a statement of fact is true unless there are circumstances which render it more

reasonably probable that the person whom it affects would deny its truth than that he would be silent.—*YOUNG v. THIBBITS* (1912), 14 C. L. R. 114.—*AUS.*

1130iv. —.—[No inference is to be drawn from an omission to contradict a statement contained in a letter of the writer's construction of his relation under an agreement with the recipients, unless in the circumstances a denial was a necessary & reasonably anticipated result.—*LIGHTBRAND v. MAINE BROTHERS* (1905), 25 N. Z. L. R. 50.—*N.Z.*

1130v. —.—[When a servant is improperly dismissed before the expiry of the term of service, his duty is to leave quietly, & his silence is not to be regarded as evidence of his acquiescence of his master's breach of contract.—*ROSS v. PENDER* (1874), 1 R. (Ct. of Sess.) 352; 11 Sc. L. R. 175.—*SCOT.*

h. —Calling for disputed deed

Sec. 2.—Admissions: Sub-sects. 5, 6, 7, 8 & 9, A., B., C., D., E. & F. (a).]

1131. ——— Affidavit not disputed.]—In an administration action notice of motion was served upon deft., an exor., for payment into ct. of money, part of testator's estate, which it was shown by affidavit that he had received. Deft. did not appear on the motion:—*Held*: deft. not having disputed the affidavit, there was a sufficient admission that the money was in his hands, & he must be ordered to pay it into ct.—**FREEMAN v. COX** (1878), 8 Ch. D. 148; 47 L. J. Ch. 560; 26 W. R. 689.

Annotations:—*Follid. Porrett v. White* (1885), 31 Ch. D. 52. *Consd. Hollis v. Burton*, [1892] 3 Ch. 226; *Neville v. Matthewman*, [1894] 3 Ch. 345. *Follid. Re Beeny, French v. Sproston*, [1894] 1 Ch. 499. *Reid. Hampden v. Wallis* (1884), 27 Ch. D. 251.

1132. ———]—Deft., one of the trustees of a settlement, in letters written to pltf., his co-trustee, before the commencement of this action for the administration of the trusts, admitted having received £300, part of the trust funds, & invested in an unauthorised way. Pltf., after deft. had appeared in the action, took out a summons to have the £300 brought into ct., & made an affidavit deposing that he had paid the money to deft., & stating the admissions contained in deft.'s letters as to its application. Deft. did not answer this affidavit or adduce any evidence. The judge ordered the money into ct. on the ground that the letters were a sufficient admission within Ord. 32, r. 6. Deft. appealed:—*Held*: as deft. had not met the affidavit, there was a sufficient admission that the money was in his hands, & the appeal must be dismissed.

Qu.: whether the letters were not a sufficient admission within Ord. 32, rule 6.—**PORRETT v. WHITE** (1885), 31 Ch. D. 52; 55 L. J. Ch. 79; 53 L. T. 514; 34 W. R. 65, C. A.

Annotations:—*Apld. Re Beeny, French v. Sproston*, [1894] 1 Ch. 499. *Consd. Re Wright, Kirke v. North*, [1895] 2 Ch. 747. *Reid. Wanklyn v. Wilson* (1887), 35 Ch. D. 180.

1133. ———]—Upon a motion that deft. might be ordered to pay into ct. a sum of money which he had verbally admitted to be in his hands or under his control, an affidavit proving the admission was made by a clerk of pltf.'s solrs. A copy of the affidavit was served on deft. with the notice of motion, which stated that the affidavit would be read on the hearing of the motion. Deft. did not answer the affidavit, & he did not appear on the hearing:—*Held*: the deft. must be ordered to pay the money into ct.—**RE BEENY, FRENCH v. SPROSTON**, [1894] 1 Ch. 499; 63 L. J. Ch. 312; 70 L. T. 160; 42 W. R. 577; 38 Sol. Jo. 235.

Annotation:—*Reid. Ellis v. Allen*, [1914] 1 Ch. 904.

Statement made in presence of accused.]—*See CRIMINAL LAW*, Vol. XIV., pp. 393–396.

under notice to produce.]—Where pltf. claimed under a will, & deft. under a deed from the heir-at-law, registered before the will:—*Held*: pltf., by calling for the deed under a notice to produce, & putting in on another branch of the case, furnished *prima facie* evidence of the consideration as mentioned in it.—**BONDY v. FOX** (1869), 29 U. C. R. 64.—**CAN.**

k. ——— Of defendant's agent.]—**HENDRICKSON v. QUEEN INSURANCE CO.** (1870), 30 U. C. R. 108; 31 U. C. R. 547.—**CAN.**

l. ——— Mortgage of premises covered by insurance policy—Without consent of defendant insurance company—Defendant's acceptance of mortgage.]—Defts. pleaded that an incumbrance,

being a mtge. for a loan obtained by pltf. from a co., was created by pltf. without their written consent as required by the policy. F., defts.' agent who took pltf.'s application for insurance, also obtained the loan for him; he witnessed the assignment of the policy to the mtgees., & sent it to defts.' general agent, who assented to it in writing; & that after the fire defts. were told by the co. that they had a claim only to the \$100 insured on the buildings, which they sent to them by letter:—*Held*: defts.' assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment.—**HAZZARD v. CANADA AGRICULTURAL INSURANCE CO.** (1876), 39

Statement in pleading not disputed.]

—*See PLEADING.*

Payment of rent—Admission of landlord's title.]—*See LANDLORD & TENANT.*

Acting in public office—Admission of due appointment.]—*See PUBLIC AUTHORITIES.*

Payment into court.]—*See PRACTICE.*

In libel action.]—*See LIBEL & SLANDER.*

Acquiescence by director of club—Ratification of acts of committee.]—*See CLUBS*, Vol. VIII., p. 514, No. 56.

Authority of agent.]—*See, generally, AGENCY*, Vol. I., pp. 397 *et seq.*

Authority of wife to pledge credit.]—*See HUSBAND & WIFE.*

Acquiescence operating as estoppel.]—*See ESTOPPEL*, Vol. XXI., pp. 333–346, Nos. 1260–1390.

Estoppel by conduct.]—*See ESTOPPEL*, Vol. XXI., pp. 328 *et seq.*

SUB-SECT. 6.—ADMISSIONS ON DISCOVERY AND INTERROGATORIES.

Possession of documents by.]—*See DISCOVERY*, Vol. XVIII., pp. 74 *et seq.*

By interrogatories.]—*See, generally, DISCOVERY*, Vol. XVIII., pp. 178 *et seq.*

SUB-SECT. 7.—ADMISSIONS ON PLEADINGS.

See ADMIRALTY, Vol. I., p. 178, Nos. 898, 899; **PLEADING.**

By infants or lunatics.]—*See R. S. C.*, Ord. 19, r. 13.

SUB-SECT. 8.—ADMISSIONS FOR PURPOSES OF TRIAL.

See PRACTICE.

SUB-SECT. 9.—ADMISSIONS BY PARTICULAR PERSONS.

Admissibility as evidence.]—*See Part II.*, Sect. 4, sub-sect. 2, *ante*.

A. By Predecessors in Title.

1134. Against party reputed to claim.]—An answer in chancery is sufficient evidence against any person actually claiming under the party who put it in, & *prima facie* against a person reputed to claim under him.—**SUSSEX (EARL) v. TEMPLE** (1698), 1 Ld. Rayn. 310; 91 E. R. 1102.

Annotations:—*Reid. Doe d. Bacon v. Brydges* (1843), 7 Scott, N. R. 333. *Mentd. Story v. Windsor* (1743), 2 Atk. 630; *Kenworthy v. Ward* (1853) 11 Hare, 196.

U. C. R. 419.—**CAN.**

m. ——— Return of lease—Intention to make it inoperative.]—Evidence of conduct, as for instance return of a lease, is admissible in evidence to prove that such return was due to an intention to make the lease inoperative.—**SHYAMA CHARAN MANDAL v. HERAS MOLLAH** (1898), 1 L. R. 26 Calc. 160.—**IND.**

PART III. SECT. 2, SUB-SECT. 9.—A.

n. Admission of plaintiff's vendor —Whether original evidence or hearsay.]—The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another, are in the nature of original evidence & not

1135. Against party actually claiming—Answer in chancery.]—SUSSEX (EARL) *v.* TEMPLE, No. 1134, ante.

1136. ——— Whether infant heir bound.]—SLEEMAN *v.* SLEEMAN (1772), 2 Dick. 787; 21 E. R. 477; *sub nom.* SLEEMAN *v.* ANGOVE, 4 Sim. 133, n.

*Annotation:—*Dttd. Lock v. Foote (1833), 4 Sim. 132.

1137. ———]—An infant heir is not bound by the admission in the deceased heir's answer, of the will of testator.—CARTWRIGHT *v.* CARTWRIGHT (1778), 2 Dick. 545; 21 E. R. 382.

*Annotation:—*Dttd. Lock v. Foote (1833), 4 Sim. 132.

1138. — Rector & successor.]—An answer by a former rector, to a bill filed to establish a modus of a certain measure of meal as to one farm, admitting that the parish is exempt in consideration of a commutation for meal is not only admissible, but strong evidence to prove a district modus.—DE WHELPDALE *v.* MILBURN (1818), 5 Price, 485; 146 E. R. 671, Ex. Ch.

Admissions in respect of bills of exchange.]—See BILLS OF EXCHANGE, Vol. VI., pp. 182, 183, 486, Nos. 1137, 1141, 3085–3089.

B. By Tenant for Life.

1139. As to boundary of estate—Whether evidence against remainderman.]—The declarations of a tenant for life in possession as to the boundary of his estate are not evidence against the remainderman.—HOWE *v.* MALKIN (1878), 40 L. T. 196; 27 W. R. 340.

C. By Real Parties.

1140. Nominal party—Assignor of chose in action—After assignment.]—GRAIB *v.* D'ARETH (1790), 7 Term Rep. 670, n.; 101 E. R. 1190, n.

*Annotation:—*Mentd. Gibson *v.* Winter (1833), 5 B. & Ad. 96.

1141. Real party—Admission by ratepayer—As against parish.]—A rated parishioner not being bound upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, & the genuineness of the declarations, to be collected from circumstances.—R. *v.* HARDWICK (INHABITANTS) (1809), 11 East, 578; 103 E. R. 1129.

*Annotations:—*Refd. Perham *v.* Raynal (1824), 2 Bing. 306; Daniels *v.* Potter (1830), 4 C. & P. 262; R. *v.* Vickery (1848), 12 Q. B. 478; R. *v.* Petcherinf (1855), 7 Cox, C. C. 79.

D. By Partners.

See, now, Partnership Act, 1890 (c. 39), sect. 15, & generally, PARTNERSHIP.

1142. General rule.]—*Assumpsit*, against four, three of whom have been outlawed; an admission by the fourth, that he was in partnership with the other three is evidence as against that fourth of a joint promise by all the four.—SANGSTER *v.* MAZARREDO (1816), 1 Stark. 161.

*Annotation:—*Consd. Gibbons *v.* Wilcox (1817), 2 Stark. 43.

hearsay, though such person is alive & has not been cited as a witness.—ALI MOJIDIN *v.* KOMBI (1882), 1 L. R. 5 Mad. 239.—IND.

o. Admission of defendant's ancestor—As to mortgage.]—THAJI BEEBI *v.* TIRUMALAIAPPA PILLAI (1907), 1 L. R. 30 Mad. 386.—IND.

PART III. SECT. 2, SUB-SECT. 9.—C.

p. Real party—Action for ejectment—Lessor under age.]—NICHOLSON

d. SPAFFORD *v.* REA (1833), 3 O. S. 84.—CAN.

q. — Allegation that right to deal with property—Taken away by administration suit.]—A deft., by his answer, admitted that he was devisee as alleged in the bill; but added that his right to deal with the property had been taken away by a suit for administration in England:—*Held*: the latter statement was not an explanation of the former; & the admission as to the will might be read

1143. Admission after dissolution.]—An admission made by one of two partners, after the dissolution of the partnership, concerning joint contracts that took place during the partnership, is competent evidence to charge the other partner.—WOOD *v.* BRADDICK (1808), 1 Taunt. 104; 127 E. R. 771.

*Annotations:—*Consd. Lacy *v.* M'Nelle (1824), 4 Dow. & Ry. K. B. 7; Pritchard *v.* Draper (1831), 1 Russ. & M. 191. *Apld.* Wright *v.* Lockwood (1841), 1 Y. & C. Ch. Cas. 113. *Refd.* Attwood *v.* Small (1838), 6 Cl. & Fin. 232. *Mentd.* Topham *v.* Braddick (1809), 1 Taunt. 572; Brandram *v.* Wharton (1818), 1 B. & Ald. 463; Perham *v.* Raynal (1824), 9 Moore, C. P. 566; Hills *v.* Thorowgood (1836), 2 Har. & W. 102; Rodriguez *v.* Speyer, [1919] A. C. 59; Goldfarb *v.* Bartlett & Kremer, [1920] 1 K. B. 639.

1144. As evidence of partnership.]—In an action on a guarantee for the debt of a third person, signed by one of two partners in the partnership firm, it is necessary to give some evidence beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by the guarantee. But for this purpose it would be sufficient to prove a parol acknowledgment from the other partner subsequently to the giving of the guarantee, or to show a previous course of dealing, in which similar guarantees had been given in the partnership firm, with the privity of both partners.—DUNCAN *v.* LOWNDES & BATEMAN (1813), 3 Camp. 478.

*Annotations:—*Mentd. Brettell *v.* Williams (1849), 4 Exch. 623; *Re* Wike, *Ex p.* Keighley (1874), 30 L. T. 407.

1145. Admission that contract made in individual capacity.]—Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject matter of the contract was his property alone:—*Held*: his declaration was evidence against all the partners, & therefore they could not sue jointly upon such a contract.—LUCAS *v.* DE LA COUR (1813), 1 M. & S. 249; 105 E. R. 93.

*Annotations:—*Mentd. Cooke *v.* Seeley (1848), 2 Exch. 746; Humble *v.* Hunter (1848), 12 Q. B. 310; *Inderi Akt.* Transatlantic *v.* Drughnan, [1918] 1 K. B. 394.

1146. Admission of co-ownership.]—A. & B. are partners, & part-owners of a vessel. An admission by A. as to a subject of co-part-ownership, but not of co-partnership is not binding on B.—JAGGERS *v.* BINNINGS (1815), 1 Stark. 64.

1147. Admission as to transaction before commencement of partnership.]—A declaration by one of two partners is not evidence to charge the other with respect to a transaction with that other partner which occurred previous to the partnership, unless a joint responsibility in the subject matter be shown.—CATT *v.* HOWARD (1820), 3 Stark. 3, N. P.

*Annotation:—*Mentd. Clarke *v.* Chaplin (1847), 5 Ry. & Can. Cas. 294.

By Principal Debtor.

Whether surety bound.]—See GUARANTEE.

F. By Agents.

(a) In General.

See, generally, AGENCY, Vol. I., pp. 605 *et seq.*

by pltf. as evidence without making evidence of what followed.—STICKNEY *v.* TYLER (1867), 13 Gr. 193.—CAN.

PART III. SECT. 2, SUB-SECT. 9.—D.

11441. As evidence of partnership.]—The admission of one partner, that a third person was jointly interested with himself & his co-partners, is not evidence against the latter to prove such joint interest.—CAIRRAE *v.* VAN-BURKIRK (1850), 1 Gr. 539.—CAN.

Sect. 2.—Admissions: Sub-sect. 9, F. (b), (c) & (d), 3 & 4.]

(b) Husbands and Wives.

1148. Where wife acts as agent of husband.]—ANON. (1722), 1 Stra. 527; 93 E. R. 678.

1149. —.]—Deft. being pressed to pay a debt promised pltf. that he would either call again the following day or send some one to arrange the terms of a security that was to be given by him. He did not call on the following day, but his wife called & admitted the amount of the debt claimed:—*Held*: this admission was binding on pltf., there being sufficient *prima facie* evidence of the wife's agency.—BARKER v. VAUGHAN (1839), 9 L. J. Ex. 4; 4 Jur. 222.

1150. — Necessity for proof of privity.]—A declaration against husband & wife stated that the wife *dum sola*, together with J., made their joint & several promissory note payable to pltf., & the wife *dum sola* promised to pay the same to pltf. The declaration was, after issue, amended by adding, that the husband after the marriage, in consideration of the premises, promised to pay pltf. the note. Defts. pleaded Stat. Limitations. The evidence was, that the note was made in 1837, & that interest was paid on it regularly until 1843, when defts. married. On Aug. 10, 1844, a year's interest was paid by female deft., but without her husband's privity. The action was commenced on Aug. 2, 1850:—*Held*: under these circumstances, no promise was proved within six years, as none could have been made by the wife *dum sola* within that period, & as the payment made by the wife within six years was without her husband's privity no promise by him could be inferred.—NEVE v. HOLLANDS (1852), 18 Q. B. 262; 21 L. J. Q. B. 289; 19 L. T. O. S. 59; 16 Jur. 933; 118 E. R. 97.

*Annotation:—*Refd. Beck v. Pierce (1889), 23 Q. B. D. 316.

— Wife carrying on husband's business.]—See AGENCY, Vol. I., p. 608, Nos. 2376, 2379.

Admissibility of evidence of spouses.]—See, generally, Part V., Sect. 1, sub-sect. 1, A. (d).

— Admissions.]—See Part II., Sect. 4, sub-sect. 2, G. (n) v., *ante*.

(c) Counsel, Solicitors, etc.

1151. Admission by counsel—Out of court—To opponent's solicitor.]—A communication to or by the counsel of A., from or to the attorney of B., respecting the proceedings in a cause between A. & B., which takes place out of ct., is not binding upon A. Where, therefore, pending a rule *nisi*, the attorney served with the rule, inferred, from a conversation, out of ct., with the counsel, who had moved the rule, that the latter would forbear to move or make it absolute for a certain time, & the rule was made absolute by that counsel within the time mentioned, the ct. refused to reopen the rule.—RICHARDSON v. PETO (1840), 1 Man. & G. 896; 9 Dowl. 73; Drinkwater, 61; Woll. 78; 133 E. R. 595.

See, generally, BARRISTERS, Vol. III., pp. 345, 346.

PART III. SECT. 2, SUB-SECT. 9.—
F. (c).

*r. Admissions by counsel—With-
drawn by permission of court.]—*DUNN
v. BROWN (1911), 12 S. R. N. S. W.
22.—AUS.

s. — How far binding.]—Where in an action of covenant brought by the assignee in fee on a warranty of title, the declaration alleged, as part of the damages, that by reason of the defect in the title, pltf. had not been

enabled to obtain so large a price for the land as he otherwise might, & would have obtained, & pltf.'s counsel stated in his opening at the trial, that pltf. had before the commencement of the action sold & conveyed the land for an inadequate consideration, in consequence of such defect in the title & afterwards put the deed in evidence:—*Held*: deft. was entitled to the benefit of this admission & proof, as defeating pltf.'s action, although he could not have been permitted to give

1152. Admissions by solicitors—How far binding—Admissions to dispense with proof at trial.]—The admissions of the attorney in a cause are evidence against his client only when they are made with a view to obviate the necessity of proving facts admitted at the trial.—YOUNG v. WRIGHT (1807), 1 Camp. 139, N. P.

*Annotations:—*Refd. Doe d. Hulin v. Richards (1845), 2 Car. & Kir. 216. *Mentd.* May v. Brown (1824), 4 Dow. & Ry. K. B. 670.

Admissions for purposes of trial, *see* PRACTICE.

1153. — Confined to admissions in the cause.]—In debt for use & occupation, one of pltf.'s witnesses, on cross-examination, said that he had heard from pltf.'s attorney, that there was an agreement in writing:—*Held*: this was no evidence of the existence of an agreement, so as to render its production by pltf. necessary.

The attorney is not the agent of the client for the purpose of making admissions except in the cause & for the purpose of the cause. All that appeared here was—deft. having been proved to have held the premises at a certain rent—that one of pltf.'s witnesses heard pltf.'s attorney say that there was an agreement in writing. That clearly was no evidence at all to affect pltf. (WILDE, C.J.).—WATSON v. KING (1846), 3 C. B. 608; 1 New Pract. Cas. 534; 8 L. T. O. S. 118; 136 E. R. 243.

1154. — Admission by London agents.]—Where the town agents of deft.'s attorney gave an admission to pltf.'s attorney, that the printed copy of a private Act of Parliament should be receivable in evidence, without formal proof:—*Held*: it was not necessary to prove the handwriting of such agents, the admission having been made *bonâ fide*, & under the sanction of deft.'s attorney.—TRUSLOVE v. BURTON (1824), 9 Moore, C. P. 64; 2 L. J. O. S. C. P. 105; *subsequent proceedings* (1825), 10 Moore, C. P. 96.

1155. — As proof of opponent's exhibits.]—The confession of the proctor of a party contesting suit sufficient proof of the exhibits of the adverse party.—HILLYER v. MILLIGAN (1754), 1 Lee, 532; 161 E. R. 196.

1156. — In mere conversation.]—Declarations made by the attorney of a party in conversation are not evidence against his client.—PARKINS v. HAWKSHAW (1817), 2 Stark. 239, N. P. *Annotations:—*Apld. Petch v. Lyon (1846), 9 Q. B. 147. *Refd.* Whitlock v. Musgrave (1833), 3 Tyr. 541; Doe d. Hulin v. Richards (1845), 2 Car. & Kir. 216.

1157. — Before action brought.]—A letter written to pltf.'s attorney before action brought by the attorney who afterwards appears in the cause for deft. is not evidence of a fact admitted therein, without further proof that deft. authorised the communication.—WAGSTAFF v. WILSON (1832), 4 B. & Ad. 339; 1 Nev. & M. K. B. 4; 110 E. R. 483.

*Annotation:—*Refd. Ley v. Peter (1858), 3 H. & N. 101.

1158. — As proof of acceptance of bill—Primâ facie evidence.]—In an action against the acceptor of a bill of exchange, where deft.'s attorney had given notice to pltf. to produce all papers relating to a bill described as the bill in question, & said to be "accepted by deft.":—

evidence of such conveyance under any of the pleas upon the record.—WALLACE v. VERNON (1840), 1 Kerr, 5—CAN.

t. — No evidence given.]—Counsel may make admissions which will have the same effect as evidence to establish facts against their clients; &, when counsel make statements, in circumstances from which it is clear that it is intended that the judge shall rely on them, which are against the

Held: such notice was *prima facie* evidence of deft.'s acceptance.—*HOLT v. SQUIRE* (1825), Ry. & M. 282, N. P.

1159. — Evidence as to handwriting dispensed with.—In an action on a bill of exchange against the acceptor, to which deft. pleaded *non acceptavit*, pltf. gave in evidence the following letter, signed by deft.'s attorney: "I hereby admit that the acceptance to the bill of exchange, upon which this action is brought, is in the handwriting of deft."—*Held*: this was evidence to go to the jury of deft.'s acceptance, without the production of the bill itself.—*CHAPLIN v. LEVY* (1854), 9 Exch. 531; 2 C. L. R. 556; 23 L. J. Ex. 117; 22 L. T. O. S. 290; 2 W. R. 241; 156 E. R. 227.

Annotation:—*Refd.* *Sharples v. Rickard* (1857), 2 H. & N. 57.

1160. — In fraudulent defence—Put in without client's knowledge.—Where a solr. has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—*Held*: the ct. had jurisdiction to set aside the judgment & permit the client to withdraw the defence, & put in a fresh defence.—*WILLIAMS v. PRESTON* (1882), 20 Ch. D. 672; 51 L. J. Ch. 927; 47 L. T. 265; 30 W. R. 555, C. A.

Annotations:—*Refd.* *Re Youngs, Doggett v. Revett*; *Re Youngs, Vollum v. Revett* (1885), 30 Ch. D. 421.

See, generally, SOLICITORS.

(d) *Referees.*

1161. General rule.—Where deft. agrees to be bound by what a third party says, what such third party said is evidence.—*DANIEL v. PITTS* (1836), 1 Camp. 366, n.; 6 Esp. 74; Peake, Add. Cas. 238, N. P.

Annotations:—*Consd.* *Sybray v. White* (1836), 1 M. & W. 435. *Refd.* *It. v. Mallory* (1881), 13 Q. B. D. 33.

1162. ——If A. refers B. for information upon any particular subject to C., what C. says concerning it, when applied to by B. or his agent, is evidence for B. in an action against A.—*WILLIAMS v. INNES* (1808), 1 Camp. 364, N. P.

Annotations:—*Expld.* *Sybray v. White* (1836), Tyr. & Gr. 746. *Refd.* *R. v. Mallory* (1884), 59 L. T. 429.

1163. Agreement subject to affidavit by third party.—Where one party in a cause offers to the other party to settle it, if an affidavit is made of certain facts which are disputed, & the affidavit is made, it shall bind the party; nor shall he be permitted to dispute the question by a trial.—*LLOYD v. WILLAN* (1794), 1 Esp. 178, N. P.

1164. Reference under order of court.—Where in taking the accounts under a decree in a partnership suit the ct. is satisfied that they will result in a certain sum at least being found due from one party to the other the ct. will, without waiting for the chief clerk's certificate, order payment of that sum into ct. The chief clerk, with the consent of the parties, referred it to two accountants, one named by each partner, to make out a balance-sheet of undisputed items,

& also a list of disputed items. The accountants having agreed upon a balance-sheet showing that whatever might be the result as to the disputed items, £541 was due from one of the partners:—*Held*: this was a sufficient admission by the accounting party to justify the ct. in ordering payment of the amount into ct.—*LONDON SYNDICATE v. LORD* (1878), 8 Ch. D. 84; 48 L. J. Ch. 57; 38 L. T. 329; 26 W. R. 427, C. A.

Annotations:—*Folld.* *Hampden v. Wallis* (1884), 27 Ch. D. 251. *Consd.* *Wanklyn v. Wilson* (1887) 35 Ch. D. 180. *Apld.* *Re Beeny, French v. Sproston*, [1894] 1 Ch. 499. *Freeman v. Cox* (1878), 47 L. J. Ch. 560.

G. By Executors.

See EXECUTORS.

H. By Infants or Lunatics.

Admissions in pleadings, *see* R. S. C., Ord. 19,

SECT. 3.—CONFESSIONS.

1165. Value as evidence.—Confession . . . is the worst sort of evidence (*HOLT, C.J.*).—*ANON.* (1701), 12 Mod. Rep. 602; 88 E. R. 1548.

1166. — Apart from corroboration.—Confession is the worst sort of evidence, that is, if there be no proof of a transaction or dealing, or, at least, a probability of dealing between them; as here there was, the one being a sailor & the other a captain of a ship (*HOLT, C.J.*).—*ANON.* (1702), 7 Mod. Rep. 49; 87 E. R. 1087.

In criminal proceedings.—*See* CRIMINAL LAW, Vol. XIV., pp. 410 *et seq.*

In divorce proceedings.—*See* HUSBAND & WIFE. Compare Part II., Sect. 4, sub-sect. 3, *ante*.

SECT. 4.—PROOF OF JUDICIAL PROCEEDINGS.

1167. How far parol evidence admissible—Examination in bankruptcy.—Evidence may be given by parol of material facts which transpired at an examination before comrs. of bkpt. but which were not taken down in writing.—*ROWLAND v. ASHBY* (1825), 1 C. & P. 649; Ry. & M. 231, N. P.

— *In opposition to rule of court.*—The testimony of a witness in opposition to a rule of ct. cannot be received. The ct. cannot take the account of a witness of what passed in a ct. The ct. can only look to the rule of ct. itself.—*EDWARDS v. COOPER* (1828), 3 C. & P. 277, N. P.

1169. — Evidence before magistrates—On proof that not taken down in writing.—It is to be presumed, that what is stated on oath before a magistrate, is taken down in writing; & therefore, parol evidence of such a statement is not receivable, unless it be first shown that it was not so taken down.—*PHILLIPS v. WIMBURN* (1830), 4 C. & P. 273; 2 Man. & Ry. M. C. 295, N. P.

PART III. SECT. 4.

b. *Judge's minutes—Whether conclusive of what took place at trial.*—*HALIFAX BANKING CO. v. WORRALL* (1883), 16 N. S. R. (4 R. & G.) 482.—*CAN.*

c. — *Must prevail over shorthand writer's notes.*—The judge's statement of what took place at the hearing must prevail over the stenographer's notes.—*CONSOLIDATED ELECTRIC CO. CASES* (1897), 34 N. B. R. 334.—*CAN.*

d. *Return of evidence by shorthand writer—Necessity for production.*—*On*

opposite party, & no objection is made by opposing counsel, the judge is entitled to rely on those statements as admissions of the opposing counsel.—*MEUNIER v. CANADIAN NORTHERN RY. CO.* (1911), 17 W. L. R. 539; 3 Alta. L. R. 345.—*CAN.*

a. *Letters written by attorney—Whether receivable in evidence as admissions—Letters not part of res gestæ.*—Where, to let in secondary evidence of a bond, the attorney of the obligor was called, & upon being shown letters written by himself in which a deed & bond were referred to,

& the contents of the bond stated, he swore that he had no recollection whatever of these instruments, although he had no doubt from reading the letters that such bond existed, the ct. refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the *res gestæ*.—*CLARKE v. LITTLE* (1855), 5 Gr. 363.—*CAN.*

PART III. SECT. 3.

1165i. Value as evidence.—*It. v. JONES* (1869), 28 U. C. R. 416.—*CAN.*

Sect. 4.—Proof of judicial proceedings. Sect. 4.

1170. ———.]—The ct. will not, in the absence of positive evidence, presume that examinations before justices are not taken down in writing, so as to let in parol evidence.—*PARSONS v. BROWN* (1852), 3 Car. & Kir. 295, N. P.

1171. ———. **To explain record.**]—In an action between A. & B., it became a question whether damages had been recovered in a previous action against A. by a third party in respect of certain acts. A., to prove the affirmative, produced the record in the previous action, which showed counts on different causes of action, one count only being on the acts now in question. The damages were entered on all the counts, & damages entered generally on all. Evidence was then received that the damages had in fact been given for the matters in the one count only:—*Held*: such evidence was receivable, as explaining the former record, & not contradicting it; although, according to the evidence, it appeared that in the previous action the verdict on one of the other counts ought to have been for the then deft.—*PRESTON v. PEEKE* (1858), E. B. & E. 336; 27 L. J. Q. B. 424; 31 L. T. O. S. 162; 4 Jur. N. S. 613; 6 W. R. 591; 120 E. R. 534.

1172. **Whether production of record necessary—Where questions put in cross-examination.**]—Where a party to the cause gave evidence himself in support of his case:—*Held*: he might be asked, on cross-examination, with a view of testing his credit, whether an action had not been brought against him by another person in the county ct., in respect of a similar claim, upon which he had given evidence & had had notwithstanding a verdict of the jury against him; & he might be so examined without production & proof of the record of the proceedings in the county ct.—*HENMAN v. LESTER* (1862), 12 C. B. N. S. 776; 31 L. J. C. P. 366; 9 Jur. N. S. 601; 142 E. R. 1347. *Annotation*:—*Mentd.* *Beaufort v. Crawshaw* (1866), L. R. 1 C. P. 699.

SECT. 5.—JUDICIAL NOTICE.

SUB-SECT. 1.—IN GENERAL.

1173. **Knowledge of locality or evidence—Acquired in former proceedings.**]—It is an irregularity for a judge to found conclusions, as a basis for his judgment as to facts upon his personal knowledge, derived either from a personal view of the locality had in a former suit, or from a recollection of the evidence taken in that suit.—*VAN BREDA v. SILBERBAUER* (1869), L. R. 3 P. C.

an application for a rule *nisi* to rescind a judge's order imprisoning a judgment debtor, applt. cannot show by affidavit what took place before the judge to whom the application was made; the stenographer's return of the evidence must be produced.—*Re O'LEARY v. DESPRES, Ex p. DESPRES* (1902), 36 N. B. R. 13.—*CAN.*

PART III. SECT. 5, SUB-SECT. 1.

a. Want of legal authority.]—Where deft. pleads over & takes no exception to the declaration, the ct. cannot take judicial notice of the want of legal authority in plfts. to sue in their corporate capacity.—*BANK OF BRITISH NORTH AMERICA v. SH* (1849), 6 U. C. R. 213.—*CAN.*

i. Number of coroners in county.]—The ct. is not bound to take judicial notice that there are more coroners than one in the county.—*JOHNSON v. PARKE* (1862), 12 C. P. 179.—*CAN.*

PART III. SECT. 5, SUB-SECT. 2.—A.

g. Orders in Council—Whether proof necessary.]—A magistrate cannot take judicial notice of Orders in Council or their publication without proof thereof by production of the *Official Gazette*.—*R. v. BENNETT* (1882), 1 O. R. 445.—*CAN.*

h. ———.]—Judicial notice must be taken of Orders in Council bound up with Dominion Statutes.—*Re STANBRO* (1884), 2 Man. L. R. 1.—*CAN.*

k. ———.]—The ct. will take judicial cognisance, without further proof, of an Imperial Order in Council, upon production of a copy purporting to have been printed by the Queen's Printer in London.—*THE MINNIE* (1894), 3 B. C. R. 161.—*CAN.*

i. Emanations from Crown under authority of statute—Regulations of Territorial Force.]—The ct. does not

84; 6 Moo. P. C. C. N. S. 319; 39 L. J. P. C. 8; 22 L. T. 667; 18 W. R. 553; 16 E. R. 746, P. C. *Annotation*:—*Mentd.* *French Hock Comrs. v. Hugo* (1885), 10 App. Cas. 336

SUB-SECT. 2.—ENGLISH LAW, CUSTOM, AND PRACTICE.

A. The Crown.

1174. **Royal proclamation.**]—A judge at *Nisi Prius* will not take judicial notice of the King's proclamations.—*VAN OMERON v. DOWICK* (1809), 2 Camp. 42, N. P.

Annotations:—*Expld.* *De Bode v. R.* (1846), 10 Jur. 773. *Van Omeron v. Dowick* was not a decision; it appears that an objection was made, & the *Gazette* not being at hand, the verdict passed for plft.; nothing more was said (*COLERIDGE, J.*). *Mentd.* *Joseph v. Knox* (1813), 3 Camp. 320; *Dunlop v. Lambert* (1839), Macl. & Rob. 663.

1175. **Emanations from Crown under authority of statute—Articles of war under Army Act.**]—We must look therefore at the statute [*Mutiny Act*] only & to the articles of war which are an emanation from His Majesty under the statute law. . . . The book called "Rules & Regulations for the Government of the Army" is not a book of which we can take judicial cognisance. We are required to take judicial notice of the articles of war but we are not required to take judicial notice of any other regulations, & therefore they must be brought before us by proof in the same manner as any other fact (*ABBOTT, C.J.*).—*BRADLEY v. ARTHUR* (1825), 4 B. & C. 292; 2 State Tr. N. S. 171; 6 Dow. & Ry. K. B. 413; 107 E. R. 1068.

See, also, Nos. 1253–1255, *post*.

Privileges of Crown generally.]—*See CONSTITUTIONAL LAW*, Vol. XI., pp. 518–523, Nos. 236–283.

B. Matters relating to the Courts.

1176. **Practice of other superior courts.**]—Every ct. is bound to take judicial notice of the customs of the other superior cts.; *secus* of inferior cts.—*LANE'S CASE* (1588), as reported in 2 Co. Rep. 16 b; 76 E. R. 423.

Annotations:—*Refd.* *Kemp v. Barnard* (1638), Cro. Car. 513; *Mounson v. Bourn* (1639), Cro. Car. 527; *Shaffesbury's Case* (1677), 1 Mod. Rep. 144; *Cobbett v. Hudson* (1849), 13 Q. B. 497. *Mentd.* *Reid v. Boethsby* (1658), 2 Sid. 137; *Bankers' Case* (1695), Skin. 601; *Doe d. Biddulph v. Poole* (1818), 11 Q. B. 713.

1177. ———.]—We must take notice of the law, & the practice of every ct. is the law of that ct. (*per CUR.*).—*DAWSON v. BLACKWELL* (1700), Fortes. Rep. 238; 92 E. R. 834.

1178. **Judges of other superior courts—Master of the Rolls.**]—The ct. takes judicial notice that the Master of the Rolls is a judge of the Ct. of Ch.—

take judicial notice of the Regulations for the Territorial Force & County Assocns.—*TODD v. ANDERSON*, [1912] S. C. (J.) 105; 6 Adam, 713.—*SCOT.*

PART III. SECT. 5, SUB-SECT. 2.—B.

1176i. **Practice of other superior courts.**]—The ct. will take judicial knowledge of the titles of English Cts. & the effect of their judgments.—*BEER v. PATRICK* (1880), 1 N. S. W. L. R. 157.—*AUS.*

m. Name of chief justice of province.]—Where the certificate of proof of the execution of a deed was subscribed "Geo. D. Ludlow," without any description of his official character, either contained in the certificate or annexed to the signature:—*Held*: the ct. should take judicial notice that a person named Geo. D. Ludlow was chief justice of the province at the time the deed appeared to have been

Re CLARKE (1842), 2 Q. B. 619; 2 Gal. & Dav. 780; 11 L. J. Q. B. 75; 6 Jur. 757; 114 E. R. 243.

Annotations:—*Mentd.* Carus Wilson's Case (1845), 7 Q. B. 984; Watson v. Bodell (1845), 14 L. J. Ex. 281; Bowdler's Case (1848), 12 Q. B. 612; *Re Crawford* (1849), 13 Jur. 955; *Re Dimes* (1850), 19 L. J. Q. B. 158.

1179. Practice of the court.]—DOBSON v. BELL (1876), 3 Keb. 693; 2 Lev. 176; 84 E. R. 957.

Annotations:—*Refd.* Thomson v. Southwell (1701), 12 Mod. Rep. 647; Pugh v. Robinson (1786), 1 Term Rep. 116; Edwards v. R. (1854), 9 Exch. 628. *Mentd.* Miller v. Bradley (1723), 8 Mod. Rep. 189.

1180. ———.]—Though the bond was made two days after the return of the writ yet it is good, because deft. has four days to put in bail by the practice of the ct., which the ct. will take notice of (*per cur.*).—BELGARDINE v. PRESTON (1723), Fortes. Rep. 305; 92 E. R. 893.

1181. ———.]—A declaration entitled generally of the term relate to the first day of the term & the promises & breach being laid on the first day of the term may be presumed to have been made before the delivery of the declaration because by a reference to the ancient practice of declaring *ore tenus* the declaration cannot be supposed to have been delivered till the sitting of the ct. on that day.

It appears by the course of the ct., which we are bound to take notice of, that in ancient times the practice could not declare till the sitting of the ct. (BULLER, J.).—PUGH v. ROBINSON (1786), 1 Term Rep. 116; 99 E. R. 1004.

Annotations:—*Refd.* Edwards v. R. (1854), 9 Exch. 628. *Mentd.* Swain v. Morland (1819), 1 Brod. & Bing. 370; Dickenson v. Reynolds (1834), 4 Tyr. 374; Owen v. Waters (1836), 2 Gale, 208.

1182. Records of the court.]—The ct. has at all times power to look at its own records & to take notice of their contents although they may not be formally brought before the ct. by affidavit.—CRAVEN v. SMITH (1869), L. R. 4 Exch. 146; 38 L. J. Ex. 90; 20 L. T. 400; 17 W. R. 710.

Annotations:—*Mentd.* Sampson v. Mackay (1869), L. R. 4 Q. B. 643; Taylor v. Cass (1869), L. R. 4 C. P. 614; Moodie v. Steward (1870), 40 L. J. Ex. 25; Robinson v. Davison (1871), 24 L. T. 755; Hume v. Marshall (1877), 37 L. T. 711; Gath v. Howarth, [1884] W. N. 99; Cox v. Hill (1892), 36 Sol. Jo. 446.

1183. Practice of inferior courts.]—LANE'S CASE, No. 1176, *ante*.

1184. ———.]—**Ecclesiastical Court—Functions of archdeacon.]—**CHIVERTON v. TRUDGEON (1620), Palm. 97; 81 E. R. 996.

1185. ———.]—The practice of the ecclesiastical ct. is matter of fact to be proved by evidence & left to the jury.—BEAURAIN v. SCOTT (1812), 3 Camp. 388, N. P.

Annotations:—*Mentd.* Dicas v. Brougham (1833), 6 C. & P. 249; Houlton v. Smith (1850), 19 L. J. Q. B. 170; Foster v. Dodd (1867), 8 B. & S. 842; Wood v. Woad (1874), L. R. 9 Exch. 190.

1186. ———.]—A ct. of error will take judicial notice that a county ct. cannot give leave to plead double.—CHITTY v. DENDY (1835), 3 Ad. & El. 319; 4 Nev. & M. K. B. 812; 1 Har. & W. 169; 4 L. J. K. B. 195; 111 E. R. 435.

Annotation:—*Mentd.* Cook v. M'Pherson (1846), 8 Q. B. 1030.

1187. ———.]—**Court of recent origin.]—**To a declaration for false imprisonment, deft. pleaded, in justification, that the Ct. of Review in bkpey. ordered that pltf. should stand committed for a contempt of the ct., & that a warrant should

forthwith issue for that purpose. Assuming that the plea did, in substance, state the proceedings to be according to the practice of the Ct. of Review:—*Held:* the ct. could not, on such general statement, pronounce the justification sufficient, since they could not judicially know rules of practice adopted by a ct. of recent origin, & never communicated to them.—VAN SANDAU v. TURNER (1845), 6 Q. B. 773; 14 L. J. Q. B. 154; 4 L. T. O. S. 373; 9 Jur. 296; 115 E. R. 291.

Annotations:—*Mentd.* *Re* Carus Wilson (1845), 6 State Tr. N. S. 183; *Re* Martin, *Ex p.* Van Sandau (1846), De G. 303; Howard v. Gosset, Gosset v. Howard (1847), 6 State Tr. N. S. 319; Crawford's Case (1849), 13 Q. B. 613.

1188. ———.]—**Rules of Commissioners of Bankruptcy.]—**The ct. will not take judicial notice of the general rules & orders made by Comrs. of Bkpey. for the regulation of the practice of cts. under 5 & 6 Vict. c. 122, s. 70.—*Re* RAMSDEN (1846), 3 Dow. & L. 748; 15 L. J. Q. B. 234; 10 Jur. 879.

1189. Law of inferior court—Shown by return to writ of habeas corpus—Channel Islands.]—The Ct. of Q. B. will not receive affidavits to show what the law is in an inferior jurisdiction in the Channel Islands, in contradiction to the return made there by a competent ct. to a writ of *habeas corpus*, in order to ascertain whether a prisoner has been properly committed by it for contempt of ct.—CARUS WILSON'S CASE (1845), 7 Q. B. 984; 6 State Tr. N. S. 183; 1 New Pract. Cas. 193; 14 L. J. Q. B. 201; 5 L. T. O. S. 52; 9 J. P. 665; 9 Jur. 394; 115 E. R. 759.

Annotations:—*Refd.* Crawford's Case (1849), 13 Q. B. 613; *Re* Dimes (1850), 19 L. J. Q. B. 158; Dodd's Case (1858), 2 De G. & J. 510; *Ex p.* Pater (1864), 5 B. & S. 299. *Mentd.* *Ex p.* Anderson (1860), 25 J. P. 116; *Re* v. Tooke (1883), 48 J. P. 661; Bell Cox v. Hakes & Penzance (1890), 63 L. T. 392; *Re* v. Crewe, *Ex p.* Sekgome, [1910] 2 K. B. 576.

1190. Sittings of courts—Place of sitting.]—The ct. must take judicial notice where the Common Pleas sit (*per cur.*).—SAVILLE v. WILTSHIRE (1746), Barnes, 165; 94 E. R. 858.

1191. ———.]—**Continuation of assize from day to day.]—**A prisoner incarcerated on a charge of felony, made an assignment of his goods after the commission day of the assizes, but before conviction:—*Held:* notwithstanding the entire period over which assizes extend in one place is, by contemplation of law, & for some purposes one legal day, the particular day on which a conviction took place, may when necessary be shown, & the assignment was valid.

As far as the record is concerned, the assizes may be regarded as of one day; but that is a legal day, which may, & often does consist of more than one natural day of 24 hours. The ct. will itself take judicial notice that the assizes are continued from day to day.—WHITAKER v. WISBEY (1852), 12 C. B. 44; 21 L. J. C. P. 116; 19 L. T. O. S. 156; 16 J. P. 314; 16 Jur. 411; 6 Cox, C. C. 109; 138 E. R. 817.

Annotations:—*Refd.* Preston v. Peeke (1858), 31 L. T. O. S. 162. *Mentd.* *Re* v. Roberts (1873), L. R. 9 Q. B. 77.

1192. Records of sheriff's books.]—The ct. will not take judicial notice of an entry of a writ of *ca. sa.* in the sheriff's book.—RUSSELL v. DICKSON (1830), 6 Bing. 442; 4 Moo. & P. 196; 8 L. J. O. S. C. P. 146; 130 E. R. 1351.

1193. Legal fictions.]—The ct. will notice legal

executed.—WATSON v. HAY (1847), 3 Kerr, 559.—CAN.

n. Signature of judge at Nisi Prius.]—A judge at Nisi Prius is bound to take judicial notice of the signature of another judge of the ct., in an order made under Winding-up Act.—

MCKENZIE (WESTMORELAND CURATOR) v. SCOVIL (1870), 2 Han. 6.—CAN.

o. Extinction of right of action—By prescription.]—The prescription of actions for personal injuries is not waived by failure of deft. to plead the

limitation, but the ct. must take judicial notice of such prescription as absolutely extinguishing the right of action.—MONTREAL CITY v. MCGEE (1900), 30 S. C. R. 582.—CAN.

p. Justice of the peace.]—Where R. had tried a case & sent it up to the

Sect. 5.—Judicial notice: Sub-sect. 2, B., C., D. & E.]

fictions, to avoid their working injustice by affording ground for objections merely technical, & having no other, or real foundation.—*BENNETT v. ISAAC* (1822), 10 Price, 154; 147 R. R. 274.

1194. Privileges & obligations of solicitors.]—An attorney of B. R., in pleading his privilege against being sued by original, improperly stated the custom of the ct. to be not to compel its attorneys to answer an original writ, unless first forejudged from their office, etc., which is the custom in C. B. but not in this ct.:—*Held*: that enough appearing to sustain the plea the custom which had no foundation here, might be rejected as surplusage.

We will take notice that an attorney of the ct. can only be sued by bill (*EILENBOROUGH, C.J.*).—*STOKES v. MASON* (1808), 9 East, 424; 103 E. R. 635.

1195. ——[—On an application to tax an attorney's bill, the ct. will take judicial notice of his being on the roll.—*Ex p. KING* (1834), as reported in 3 Dowl. 41.

Annotations:—Fold. Ex p. Hore (1835), 3 Dowl. 600. *Mentd. Ex p. Bowles's Trustees* (1835), 1 Scott. 583; *Doe d. Palmer & Butler v. Roe* (1835), 1 Har. & W. 339.

1196. ——[—On an application against an attorney for an attachment for his contempt of an order of ct., the ct. will take judicial notice of his being on the roll.—*Ex p. HORE* (1835), 3 Dowl. 600; *sub nom. Ex p. HOARE*, 1 Har. & W. 211.

1197. Rules of equity—By courts of common law.]—A bill filed by a creditor of a deceased testator, for the administration of the estate under the direction of the ct., does not of itself suspend or control the exor.'s right to dispose of the property & make a good title.

The cts. of common law take judicial notice of this principle of equity; & evidence to show a contrary practice is not admissible.—*NEEVES v. BURRAGE* (1819), 14 Q. B. 504; 19 L. J. Q. B. 68; 14 L. T. O. S. 391; 14 Jur. 177; 117 E. R. 196.

Annotation:—Mentd. Price v. Price (1887), 35 Ch. D. 297.

1198. ——[—The ct. takes judicial notice of the law of England as administered in the cts. of equity.—*SIMS v. MARRYAT* (1851), 17 Q. B. 281; 117 E. R. 1287; *sub nom. SIMMS v. MARRYAT*, 20 L. J. Q. B. 451.

Annotation:—Mentd. Eichholz v. Bannister (1861), 17 C. B. N. S. 708.

1199. Situation of prisons.]—The Queen's prison is the prison of the ct., & our officers are officers of it. The ct. will take notice that the Queen's prison is in England (*JERVIS, C.J.*).—*WICKENS v. GOATLY* (1851), 11 C. B. 666; 2

L. M. & P. 572; 21 L. J. C. P. 50; 18 L. T. O. S. 75; 15 Jur. 1198; 138 E. R. 636.

The law merchant.]—See CUSTOM & USAGES, Vol. XVII., pp. 26, 27, Nos. 276–291.

C. Statutes.

See, now, Interpretation Act, 1889 (c. 63), s. 9, & generally, STATUTES.

1200. Public Acts—Though not pleaded.]—23 Hen. 6, c. 9, relating to bail bonds is a public Act; therefore the ct. will take notice of it though it be not pleaded.—*SAMUEL v. EVANS* (1788), 2 Term Rep. 569; 100 E. R. 306.

1201. ——[—That part of Stat. Frauds, which directs certain agreements to be in writing, will be taken notice of by the ct., in the trial of an issue out of the Ct. of Ch.—*BURNAND v. NEROT* (1824), 1 C. & P. 578, N. P.

1202. ——[—If counsel for a party rely on an Act of Parliament, & cite it as an Act to be judicially noticed, the opposite party has no right to insist that counsel citing it should produce a copy of it printed by the Queen's printer.—*FORMAN v. DAWES* (1841), Car. & M. 127, N. P.

1203. ——[—I am bound to take notice of the statutes of the realm, but not of college statutes (*LORD COTTENHAM, C.*).—*RE UNIVERSITY COLLEGE, OXFORD* (1817), 10 L. T. O. S. 85, L. C.

1204. — Time of passing.]—An averment in the indictment that the insolvent filed his petition on May 20, 1859, is sufficient to show that he filed it after the passing of 10 & 11 Vict. c. 102, for the ct. will take judicial notice of the time at which a statute is passed.—*R. v. WESTLEY* (1859), Bell, C. C. 193; 29 L. J. M. C. 35; 23 J. P. 805; 5 Jur. N. S. 1362; 8 W. R. 63; 8 Cox, C. C. 244, C. C. R.

1205. Local Acts—Declared to be public.]—*R. v. TOMS* (1732), 2 Barn. K. B. 123; 94 E. R. 396.

1206. ——[—A local Act, with a clause declaring it to be a public Act, & that it shall be taken notice of as such without being specifically pleaded, need not be proved either to have been examined with the Parliament roll, or to have been printed by the King's printer.—*WOODWARD v. COTTON* (1834), 1 Cr. M. & R. 44; 6 C. & P. 491; 4 Tyr. 689; 3 L. J. Ex. 300; 149 E. R. 986.

1207. ——[—Where an Act for conducting a private concern is declared to be a public Act, & is required to be judicially taken notice of as such by all judges, without being specially pleaded, it is unnecessary at a trial to prove it by an examined copy of the original.—*BEAUMONT v. MOUNTAIN* (1834), 10 Bing. 404; 4 Moo. & S. 177; 3 L. J. C. P. 118; 131 E. R. 961.

Annotation:—Refd. Woodward v. Cotton (1834), 4 Tyr. 689.

High Ct., but it did not appear whether he had done so in his capacity of a magistrate or of a justice of the peace:—*Scmble*: the High Ct. was bound to take judicial notice that R. was a justice of the peace for Bengal.—*R. v. NABADWIP GOSWAMI* (1868), 1 B. L. R. 15; 15 W. R. 71, n.—**IND.**

PART III. SECT. 5, SUB-SECT. 2.—C.

1201 i. Public Acts.]—*SANKEY v. PLOYER, Ex p. PLOYER*, [1903] S. R. Q. 63.—**AUS.**

1201 ii. ——[—Upon a covenant to pay interest at 10 per cent. made while 16 Vict. c. 80, was in force, & before 22 Vict. c. 85:—*Held*: the ct. was bound to notice that by the statute no more than 6 per cent. could be recovered, though *non est factum* only had been pleaded.—*GIBBLESTONE v. O'REILLY* (1862), 21 U. C. R. 109.—**CAN.**

1201 iii. ——[—The cts. are bound to take judicial notice of every public Act of the Provincial Legislature, though its operation may be locally limited.—*DARLING v. HITCHCOCK* (1866), 25 U. C. R. 163.—**CAN.**

1201 iv. ——[—The corpn. of St. John being bound by law to lay & repair the street in the city, it is matter of public law, of which the ct. is bound to take notice.—*HENDERSON v. ST. JOHN CORPN.* (1872), 1 Pug. 197.—**CAN.**

1201 v. ——[—The ct. is bound to take notice that the Imperial Acts 11 Geo. IV. & 1 Wm. IV. c. 60 enable lands in this Province, held in trust by a person of unsound mind, to be conveyed by a committee appointed by the High Ct. of Ch. in England.—*THOMPSON v. BENNETT* (1872), 22 C. P. 393.—**CAN.**

1201 vi. ——[—The ct. must take notice as a matter of law, that Canada

Temperance Act is in force; & is also bound to find out & take notice of all facts necessary to determine the question of law.—*Ex p. WHITE* (1881) 20 N. B. R. 552.—**CAN.**

q. — Date of.]—The ct. will take judicial notice of the date of the passing of an Act of Parliament.—*R. v. SHOVELBOTTOM* (1868), 5 W. W. & A'B. 188.—**AUS.**

r. — Proclamations under.]—When judicial notice by statute directed to be taken of proclamations no formal evidence of these need be tendered.—*MCLAY v. REIS* (1899), 9 Q. L. J. 120.—**AUS.**

s. — Personal knowledge of magistrate.]—*MARSHALL v. WETTER-HALL BROTHERS*, [1914] V. L. R. 268.—**AUS.**

t. Prohibition of public order — By Civil Code — Whether rule of public

1208. ———.]—**HILLIARD v. WEBSTER** (1844), 6 Man. & G. 983; 7 Scott, N. R. 903; 2 L. T. O. S. 348; 8 Jur. 425; 134 E. R. 1100.
Annotation :—**Consd.** *Spooner v. Juddow* (1850), 6 Moo. P. C. C. 257.

1209. ———.]—A local Act of Parliament must be judicially noticed, & must have all the operation of a public statute.—**AITON v. STEPHEN** (1876), 1 App. Cas. 456, H. L.

1210. Private Acts—Must be pleaded.—23 Hen. 6, c. 9, of sheriffs' bonds is only a private statute, of which the ct. will not take notice unless it be pleaded.—**BENSON v. WELBY** (1670), 2 Saund. 154; 2 Keb. 670; 85 E. R. 891.

Annotations :—**Consd.** *Samuel v. Evans* (1788), 2 Term Rep. 569. **Refd.** *Bullythorpe v. Turner* (1744), Willes, 475.

1211. S. P. PARKER v. WELBY (1670), 2 Keb. 657; 1 Mod. Rep. 57; 1 Sid. 439; 84 E. R. 413.

1212. ———.]—The cts. cannot take notice officially of the wording of a private Act of Parliament.—**PLATT v. HILL** (1698), 1 Ld. Raym. 381; 3 Salk. 330; Holt, K. B. 662; 91 E. R. 1152.

1213. ———.]—The cts. cannot take notice judicially of a private statute.—**PITTS v. POLEHAMPTON** (1698), 1 Ld. Raym. 390; 91 E. R. 1158.

Annotation :—**Mentd.** *Gwynne v. Burnell* (1840), 6 Bing. N. C. 453.

1214. ———.]—Cts. cannot take notice *ex officio* of private Acts of Parliament.—**INGRAM v. FOOT** (1702), 1 Ld. Raym. 708; 12 Mod. Rep. 611; 91 E. R. 1372.

Annotation :—**Mentd.** *R. v. L. C. C.*, [1893] 2 Q. B. 454.

1215. ———.]—**ADCOCK v. GILL** (1752), Say. 60; 96 E. R. 803.

1216. ———.]—Where copies of a private Act of Parliament, printed by the Queen's printer, are made evidence, a deft.'s counsel at *Nisi Prius* cannot make an objection founded on that Act a ground of an application for a nonsuit, if the Act has not been given in evidence on the part of plff., because it is not an Act to be "judicially noticed," & is only before the ct. when given in evidence.—**GRESWOLDE v. KEMP** (1842), Car. & M. 635, N. P.

Annotation :—**Mentd.** *Wright v. Willcox* (1850), 9 C. B. 650.

D. Illegality.

Illegality of contracts, generally, *see* **CONTRACT**, Vol. XI., pp. 234–303, Nos. 1937–2501.

1217. Duty of court to take notice of—Agreement to withdraw from criminal prosecution.—An agreement to withdraw from a prosecution for felony or misdemeanour with a view to private benefit is bad, as being against public policy, & cannot be validated by the sanction of the criminal judge or magistrate obtained to the withdrawal. If such an agreement is afterwards sued upon, it is the duty of the ct. to take the objection that the agreement is bad, although no such objection is raised by the pleadings or by counsel at the bar.—**WHITMORE v. FARLEY** (1881), 45 L. T. 99; 29 W. R. 825; 14 Cox, C. C. 617, C. A.

Annotations :—**Refd.** *Windhill L. B. of Health v. Vint* (1890), 45 Ch. D. 351. **Mentd.** *Penley v. Anstruther* (1883), 48 L. T. 661.

1218. ———. **Contract of insurance containing p.p.i. clause—Consent of parties to try case with**

order.—The prohibition of parol testimony, in certain cases, by Civil Code is not a rule of public order which must be judicially noticed.—**GRIVAIS v. MCCARTHY** (1901), 35 S. C. R. 14.—**CAN.**

a. Public & private Acts.—*Manitoba Evidence Act*, 1913, c. 65, s. 8, provides that judicial notice shall
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be taken of "all the Acts of the Legislature of this Province." These words are wide enough to include private as well as public Acts, but *Manitoba Interpretation Act*, 1913, c. 105, s. 12, puts the matter beyond question.—**PENMAN v. WINNIPEG ELECTRIC Ry. Co.**, [1924] 3 D. L. R. 145; 2 W. W. R. 587; 34 Man. L. R. 283; *revers.*, [1924] 2 D. L. R. 1231; 2

clause excluded.—**BUCHANAN & Co. v. FABER** (1899), 15 T. L. R. 383; 4 Com. Cas. 223.

Annotations :—**Consd.** *Gedgo v. Royal Exchange Assoc. Corp.*, [1900] 2 Q. B. 214. **Refd.** *Royal Exchange Assoc. Corp. v. Sjöforsakrings Akt. Vega* (1901), 70 L. J. K. B. 874.

1219. ———.]—**GRIFFITHS v. FLEMING**, [1909] 1 K. B. 805; 78 L. J. K. B. 567; 100 L. T. 765; 25 T. L. R. 377; 53 Sol. Jo. 340, C. A.

Annotation :—**Mentd.** *Re Bradley & Essex & Suffolk Accident Indemnity Soc.*, [1912] 1 K. B. 415.

———.]—*See* **CONTRACT**, Vol. XI., pp. 302, 303, Nos. 2480,

Notice of statutory defence of illegality in county courts.—*See* **COUNTY COURTS**, Vol. XIII., pp. 496, 497, Nos. 466, 476.

E. Customs.

See, generally, **CUSTOM & USAGES**, Vol. XVII., pp. 19, 21, 22, 26–28, 38, Nos. 202, 218–226, 276–302, 428–432.

1220. Local meaning of "sack."—The ct. will notice what measure is meant by sack in a particular county.—**WINCOMBE v. COLBORNE** (1680), Freem. K. B. 483; 89 E. R. 363.

1221. Bank stock transferable only at bank.—The cts. cannot take notice that bank stock is only assignable at the bank, & will not attend to a simple allegation of the fact.—**SHALES v. SEIGNORET** (1699), 1 Ld. Raym. 410; 12 Mod. Rep. 248; 91 E. R. 1192.

Annotations :—**Refd.** *Lancashire v. Killingworth* (1701), 1 Ld. Raym. 686; *Wyvil v. Stapleton, Shelburne v. Fumdam* (1723), 1 Stra. 615.

1222. Fees for examining measures as clerk of market.—*R. v. REEFIT* (1734), Cunn. 36; 2 Barn. K. B. 436; 7 Mod. Rep. 220; Ridg. temp. H. 80; 94 E. R. 1047.

1223. Custom of hiring furniture—Exclusion of doctrine of reputed ownership.—A trader hired household furniture under a written agreement whereby he was to pay a weekly rent & the owner was empowered to repossess himself of same upon the hirer becoming bkpt. The hirer became bkpt. At the time of the bkpry. the furniture remained in his house in his apparently uncontrolled possession. Although no evidence was adduced of a custom of hiring furniture :—**Held** : the ct. must take notice of such custom & the goods were not in the order & disposition of bkpt.—*Re HAWKINS, Ex p. EMERSON* (1871), 41 L. J. Bcy. 20; *sub nom.* *EMERSON v. BARNETT, Re HAWKINS*, 20 W. R. 110.

Annotations :—**Consd.** *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808. **Refd.** *Re Conston, Ex p. Watkins* (1873), 8 Ch. App. 523, n.; *Re Jones* (No. 2), *Ex p. Lovering* (1874), 30 L. T. 622; *Re Kaufman, Segal & Domb, Ex p. Trustee*, [1923] 2 Ch. 89.

1224. ———.]—The custom of hiring furniture for the purposes of hotels is so notorious that no person giving credit to an hotel-keeper is entitled to assume that the furniture of which he is in possession is his own property. The foundation of the doctrine of "reputed ownership" is that a man has been permitted to obtain false credit; this custom is so common & so well known, that a man cannot gain false credit by the possession of furniture.—**CRAWCOUR v. SALTER**

W. W. R. 260.—**CAN.**

PART III. SECT. 5, SUB-SECT. 2.—E.

b. Custom of Lord Mayor's & Sheriff's Court.—The ct. will not acknowledge a custom of the Lord Mayor & Sheriff's Ct., which is not certified by the recorder.—**SIMMONDS v.** (1839), 1 Jebb & S. 531.—**IR.**

*Sect. 5.—Judicial notice: Sub-sect. 2, E., F.
sub-sects. 3 & 4.]*

51 L. J. Ch. 495; 45 L. T. 62; 30 W. R. 21, C. A.

*Annotations:—***Consd.** *Re* Parker, *Ex p.* Turquand (1885), 14 Q. B. D. 636; *Chappell v. Harrison* (1910), 103 L. T. 594. **Refd.** *Re* Fowler, *Ex p.* Brooks (1883), 23 Ch. D. 261; *Moult v. Halliday* (1897), 46 W. R. 318; *Re Tabor Ex p.* Cork, [1920] 1 K. B. 808. **Mentd.** *Re* Hambrough, *Hambrough v. Hambrough* (1909), 79 L. J. Ch. 19.

1225. ————j—The ct. will not take judicial notice of the custom of letting pianos on hire-purchase agreements, so as to exclude the doctrine of reputed ownership. Pianos, therefore, cannot be regarded by the cts., without any custom being proved, as articles so continuously let on hire-purchase agreements that they cannot be considered as being within the order & disposition of tenants.—**CHAPPELL & CO., LTD. v. HARRISON** (1910), 103 L. T. 594; 75 J. P. 20; 27 T. L. R. 85, D. C.

1226. Customs of Lloyd's.]—The customs [of Lloyd's], which has been proved in ct. so often that the cts. take judicial notice of it, is that the underwriter does not look to the assured for payment of the premium but to the broker who effected the policy between the two (**LORD ESHER, M.R.**).—**UNIVERSO INSURANCE CO. OF MILAN v. MERCHANTS MARINE INSURANCE CO.**, [1897] 2 Q. B. 93; 66 L. J. Q. B. 564; 76 L. T. 748; 45 W. R. 625; 13 T. L. R. 432; 8 Asp. M. L. C. 279; 2 Com. Cas. 180, C. A.

*Annotation:—***Mentd.** *G. N. Ry. v. I. R. Comrs.* (1901), 65 J. P. 275.

Customs of City of London.]—*See* METROPOLIS.

Usages in relation to termination of employment.]—*See* MASTER & SERVANT.

Usages in connection with cost book companies.]—*See* COMPANIES, Vol. X., pp. 1098, 1099, Nos. 7700–7703.

F. Parliament.

See, generally, PARLIAMENT.

1227. Office of Speaker of House of Commons.]—The ct. will take judicial notice of the office of the Speaker of the House, & of his authority to give effect to its order.—**MIDDLESEX (SHERIFF) CASE** (1840), 11 Ad. & El. 273; 3 State Tr. N. S. 1239; 113 E. R. 419; *sub nom.* *R. v. Gossett*, 3 Per. & Dav. 349; *sub nom.* *R. v. Evans & Wheelton*, 8 Dowl. 451; *sub nom.* *Stockdale v. Hansard*, 4 Jur. 70.

*Annotations:—***Refd.** *Howard v. Gosset*, *Gosset v. Howard* (1847), 6 State Tr. 319. **Mentd.** *Dimes's Case* (1850), 14 Q. B. 554; *Levy v. Moylan* (1850), 10 C. B. 189; *Swan v. Dakins* (1855), 16 C. B. 77; *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Ex p.* Fernandez (1861), 10 C. B. N. S. 3; *Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *Bradlaugh v. Erskine* (1883), 31 W. R. 365; *Felding v. Thomas*, [1896] A. C. 600.

1228. Order & course of proceedings in Parliament.]—The printing of a false & scandalous petition to a Committee of the House of Commons, & delivering copies thereof to the members of the Committee, is justifiable, because it is in the order & course of proceedings in Parliament, of which the cts. will take judicial notice.—**LAKE v. KING** (1870), 1 Saund. 131; 1 Lev. 240; 2 Keb. 832; 1 Mod. Rep. 58; 1 Sid. 414; 85 E. R. 137.

*Annotations:—***Refd.** *Barnardiston v. Soam* (1676), 3 Keb. 442; *R. v. Creevey* (1813), 1 M. & S. 273; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723; *Howard v. Gosset*, *Gosset v. Howard* (1847), 6 State Tr. N. S. 319. **Mentd.** *Jones v. Bodinham* (1695), 1 Salk. 173; *R. v. Drake* (1706), 2 Salk. 660; *Harman v. Delany* (1731), 2 Stra. 898; *Astley v. Kounge* (1759), 2 Burr. 807; *Hodgson v. Scarlett* (1818), 1 H. & Ald. 232; *Lewis v. Walker* (1821), 4 B. & Ald. 605; *Flit v. Pike* (1825), 4 B. & C. 473; *Stockley v. Clement* (1827), 4 Bing. 162; *Clement v. Chivis* (1829), 9 B. & C. 172; *Harrison v. Hush* (1855), 5 E. & B. 341; *Henderson v. Broomhead* (1859), 4 H. & N.

569; *Kennedy v. Hilliard* (1859), 1 L. T. 78; *Bremridge v. Latimer* (1864), 12 W. R. 378; *Wason v. Walter* (1868), 1 L. R. 4 Q. B. 73; *Usill v. Hales*, *Usill v. Brearley*, *Usill v. Clarke* (1878), 38 L. T. 65; *Proctor v. Webster* (1885), 16 Q. B. D. 112.

1229. Privileges of Parliament.]—**BARNARDISTON v. SOAMES** (1676), *Freem. K. B.* 380, 387, 390; 6 State Tr. 1003, 1101; 3 Keb. 442; *Poll*, 470; 89 E. R. 283, 237, 290; *sub nom.* *BERNARDISTON v. SOME*, 2 Lev. 114; *sub nom.* *SOAMES v. BARNARDISTON*, *Freem. K. B.* 430; *affd. sub nom.* *BARNARDISTON v. SOAMES* (1689), 6 State Tr. 1117, H. L.

*Annotations:—***Refd.** *Prideaux v. Morice* (1700), 1 Lut. 82; *Kendall v. John* (1708), *Forster*, Rep. 104; *Myddelton v. Wynn* (1746), *Willes*, 597; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723. **Mentd.** *Onslow's Case* (1681), 2 Vent. 37; *Ashby v. White* (1703), 2 Ld. Raym. 938; *Ford v. Tilly* (1706), 2 Salk. 653; *Musgrove v. Nevinston* (1724), 2 Ld. Raym. 1358; *Bradlaugh v. Gossett* (1884), 50 L. T. 620; *Everett v. Griffiths*, [1920] 3 K. B. 163.

1230. Privilege of peers.]—**HUNTER v. DELO-RAINE (LORD)** (1772), *Lofft*, 49; 98 E. R. 526.

1231. Journals of Parliament.]—Journals are not records of Parliament, & therefore we cannot take notice of them (**HOLT, C.J.**).—*R. v. KNOLLYS* (1694), 1 Ld. Raym. 10; 12 Mod. Rep. 55; 12 State Tr. 1167; 2 Salk. 509; 3 Salk. 242; 91 E. R. 904; *sub nom.* *R. v. BANBURY (EARL)*, *Skin*, 517; *sub nom.* *BANBURY'S (LORD) CASE*, *Carth.* 297.

*Annotations:—***Mentd.** *Prideaux v. Morrice* (1702), 7 Mod. Rep. 13; *R. v. Paty* (1704), 2 Ld. Raym. 1105; *Holiday v. Pitt* (1734), *Lee temp. Hard.* 37; *Ferrers's Case* (1760), 2 Eden, 373; *Burdett v. Abbot* (1811), 14 East, 1; *Digby v. Alexander* (1832), 4 Bing. 416; *Stockdale v. Hansard* (1840), 3 State Tr. N. S. 723; *Wensleydale Peverage Case* (1856), 8 State Tr. N. S. 479; *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Bradlaugh v. Gossett* (1884), 50 L. T. 620; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136; *Cowley v. Cowley*, [1900] P. 305.

See, now, Evidence Act, 1845 (c. 113), s. 3.

1232. Practice of parliamentary committees.]—**CALEDONIAN & DUMFRIES JUNCTION CO. v. HELENSBURGH HARBOUR TRUSTEES** (1856), 27 L. T. O. S. 241; 2 Jur. N. S. 695; 4 W. R. 671; 2 Macq. 391, H. L.

*Annotations:—***Mentd.** *Loominster Canal Navigation Co. v. Shrewsbury & Hereford Ry.* (1857), 3 K. & J. 154; *Shrewsbury & Birmingham Ry. v. North Western Ry.* (1857), 6 H. L. Cas. 113; *Bedford & Cambridge Ry. v. Stanley* (1862), 32 L. J. Ch. 60; *Shrewsbury v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593; *Mann v. Edinburgh North Train. Co.*, [1893] A. C. 69.

1233. Standing Orders of House of Commons.]—*Held:* a certificate of the withdrawal of a railway bill, signed "J. D., Deputy Speaker," was sufficient to warrant the ct. in making an order for the return of a parliamentary deposit, though there was no evidence that the certificate was signed during the illness of the Speaker. The ct. will, for this purpose, notice the Standing Orders of the House of Commons.—*Ex p.* **STOCKBRIDGE RAILWAY BILL** (1866), 12 Jur. N. S. 465.

1234. Beginning & end of prorogations & sessions.]—The ct. *ex officio* ought to take notice of the beginning & end of prorogations & sessions of Parliament.—*R. v. WILDE* (1670), 1 Lev. 296; 2 Keb. 686; *T. Raym.* 191; 83 E. R. 415. *Annotation:—***Mentd.** *Adcock v. Gill* (1752), *Say.* 60.

1235. ————]—Cts. are bound to take notice of the beginning of Parliaments.—**BIRT v. ROTHWELL** (1698), 1 Ld. Raym. 343; 91 E. R. 1125. *Annotation:—***Mentd.** *R. v. Longueval* (1795), 2 Leach, 694.

G. Stamp Duty.

1236. Duty of court to take notice of.—Objection under Stamp Act.]—On an objection, under Stamp Act, the ct. will not take judicial notice of the sufficiency of the penalty, or of the date at which the stamp purports to have been attached, as indicated by the figures in the margin of the

stamp. The only points for the decision of the judge are the sufficiency of the stamp, & the applicability of the determination to the particular instruments.—*JOHNSTONE v. SYMONS* (1847), 9 L. T. O. S. 535; 11 J. P. 618, N. P.

SUB-SECT. 3.—COLONIAL AND FOREIGN

See Part XI., *post*.

SUB-SECT. 4.—TIME.

See, generally, TIME.

1237. General rule.]—The ct. takes judicial notice of computation of time.—*HARVY v. BROAD* (1704), 2 Salk. 626; 6 Mod. Rep. 159, 196; Holt, K. B. 761; 91 E. R. 529.

Annotations :—*Mentd.* R. v. Gumley (1729), 2 Ld. Raym. 1528; *Beech v. Parker* (1730), 1 Barn. K. B. 356.

1238. Use of almanac.—To ascertain day of week or month.]—The almanac is good evidence to prove the day of the week by the day of the year; & a judgment recorded on a Sunday is void.—*PAGE v. FAUCET* (1591), Cro. Eliz. 227; 78 E. R. 482.

Annotation :—*Refd.* *Harvy v. Broad* (1704), 2 Salk. 626.

1239. ———.]—A conviction on a penal statute must show that deft. was summoned; & therefore if a conviction state that "deft. was summoned, & did by virtue thereof appear on Tuesday, Apr. 17," & it appears by the almanac, of which the ct. is bound to take notice, that Apr. 17 was on a Friday, the conviction shall be quashed; for the time of the summons being impossible, it is the same as if there had been no summons.—*R. v. DYER* (1703), 6 Mod. Rep. 41; Holt, K. B. 157; 1 Salk. 181; 87 E. R. 803.

Annotations :—*Refd.* *Tutton v. Darke, Nixon v. Freeman* (1860), 5 H. & N. 647. *Mentd.* *R. v. Venables* (1725), Fortes. Rep. 325; *R. v. Hall* (1825), 6 Dow. & Ry. K. B. 84; *Painter v. Liverpool Oil Gas Light Co.* (1836), 2 Har. & W. 233.

1240. ———.]—A writ of inquiry cannot be executed on a Sunday, & the ct. is bound to look into the almanac, & take notice of it though not specially assigned for error.—*HOYLE v. CORNWALLIS (LORD)* (1720), 1 Stra. 387; 93 E. R. 584; *sub nom.* *CORNWALLIS (LORD) v. HOYLE*, Fortes. Rep. 373.

Annotations :—*Refd.* *R. v. Sparrow* (1739), 2 Sess. Cas. K. B. 184. *Mentd.* *Smith v. R.* (1849), 13 Jur. 850.

1241. ———.]—In a case of this sort, where the time is material, it must be proved; the evidence offered is not sufficient to prove it. It is true that the ct. will take judicial notice of the days in the calendar, but not of the hours. The time of sunset must be proved like any other fact (*WILDE, C.J.*).—*COLLIER v. NOKES* (1849), 2 Car. & Kir. 1012; 15 L. T. O. S. 189, N. P.

1242. ——— To ascertain feast day.]—The ct. will take notice judicially of the day on which any feast ascertained by the calendar falls.—*BROUGH v. PARKINGS* (1703), 2 Ld. Raym. 992; 6 Mod. Rep. 80; 92 E. R. 161.

Annotations :—*Refd.* *Tutton v. Darke, Nixon v. Freeman* (1860), 5 H. & N. 647. *Mentd.* *Heylyn v. Adamson* (1758), 2 Burr. 689.

1243. ——— When Sunday falls.]—A writ of summons dated on a Sunday is a nullity, & the objection is not waived by lapse of time. The ct. is bound to take judicial notice that a particular

day of the month falls on a Sunday.—*HANSON v. SHACKELTON* (1835), 4 Dowl. 48; 1 Har. & W. 342. *Annotation* :—*Mentd.* *Maltby v. Murrells* (1860), 5 H. & N. 813.

1244. ——— Time of moon rise.]—The ct. will take judicial notice of an almanac for the purpose of ascertaining the time of the moon's rising, without requiring the prisoner to put in the almanac as his evidence, so as to entitle the counsel for the prosecution to a reply. But the almanac is only *prima facie* evidence.—*R. v. HILLIER & HARNHAM* (1840), 4 J. P. 155.

1245. ——— Time of sunset.]—*COLLIER v. NOKES*, No. 1241, *ante*.

1246. ——— Time of sunrise.]—An almanac is not evidence of the time of sunrise on a particular day (*POLLOCK, C.B.*).—*TUTTON v. DARKE, NIXON v. FREEMAN* (1860), 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. 361; 6 Jur. N. S. 983; 157 E. R. 1338.

Annotation :—*Mentd.* *Nash v. Lucas* (1867), L. R. 2 Q. B.

1247. Beginning & end of must *ex officio* take notice of the term.—*AUSTEN v. BEWLEY* (1619), Cro. Jac. 518; 79 E. R. 470.

Annotation :—*Refd.* *Harvy v. Broad* (1704), 2 Salk. 626.

1248. ———.]—The ct. will take notice of the end of a Trinity term.—*BAILL v. ROWE* (1691), 1 Ld. Raym. 4; 91 E. R. 900.

1249. ———.]—The cts. will take notice of the beginning & end of a movable term.—*ESTWICK v. COOKE* (1729), 2 Ld. Raym. 1557; 92 E. R. 509; *sub nom.* *ESTWICK v. COKE*, Fitz-G. 66.

Annotations :—*Refd.* *Harrington v. Taylor* (1812), 15 East, 378. *Mentd.* *Hore v. Gates* (1734), 2 Barn. K. B. 463; *Hart v. Weston* (1770), 5 Burr. 2587.

1250. Correspondence of dominical & regnal years.]—If certain figures are put after the day of a particular month which can be supposed to refer to the year of Christ, it shall be intended that it does refer to it. The cts. will take notice of the correspondence between the dominical year & the year of any king's reign. Therefore a deed which really is dated according to the dominical year only may be represented to bear date in the year of the reign of the king with which that dominical year corresponds.—*HOLMAN v. BURROW* (1702), 2 Ld. Raym. 791, 794; 2 Salk. 658; 92 E. R. 28, 30.

Annotation :—*Mentd.* *Waugh v. Bussell* (1814), 5 Taunt. 707.

1251. Date of order of judges.]—The ct. would not take judicial notice that an order of the judges, allowing a scale of fees under 1 Vict. c. 55, was made before the time of the alleged extortion stated in the declaration.—*PILKINGTON v. COOKE* (1847), 16 M. & W. 615; 4 Dow. & L. 347; 17 L. J. Ex. 141; 8 L. T. O. S. 516; 153 E. R. 1336. *Annotation* :—*Mentd.* *Wrightup v. Greenacre* (1847), 10 Q. B. 1.

1252. Variation of local meantime from Greenwich time.]—The time appointed for the sitting of a ct. must be understood as the meantime at the place where the ct. sits, & not Greenwich time, unless it be so expressed.

We are as much bound to take judicial notice that a particular place lies east or west of Greenwich & consequently has a different time from it as we are to know the days of the year (*POLLOCK, C.B.*).—*CURTIS v. MARCH* (1858), 3 H. & N. 866; 28 L. J. Ex. 36; 32 L. T. O. S. 149; 23 J. P. 603; 4 Jur. N. S. 1112; 157 E. R. 719.

Annotation :—*Mentd.* *Irwin v. Grey* (1867), L. R. 2 H. L. 20.

See Statutes (Definition of Time) Act, 1880 (c. 9).

PART III. SECT. 5, SUB-SECT. 4.

1243 i. Use of almanac.—When Sunday falls.]—The ct. is bound to take judicial notice that a particular day of the month falls on a Sunday. —*PEARSON v. SHAW* (1844), 7 L. L. R. 1. IR.

*Sect. 5.—Judicial notice: Sub-sect. 5, A., B. & C.]***SUB-SECT. 5.—AFFAIRS OF STATE, STATE OF WAR, FOREIGN STATES AND OFFICERS OF STATE.***A. Affairs of State.*

¶ 1253. Demise of Crown.—The ct. is bound to take notice of the demise of the King (DODERIDGE, J.).—*PETIT v. ROBINSON* (1627), Poph. 203; 79 E. R. 1293.

1254. ———. —The cts. will take notice on what day a king dies.—*HENRY v. COLE* (1702), 2 Ld. Raym. 811; 92 E. R. 42; *sub nom.* *COLE v. HENRY*, 7 Mod. Rep. 103.

1255. ———. —The ct. amended a writ of *habeas corpus* which had been erroneously tested as of Trinity Term, 1 Vict., instead of 7 Will. 4.

We take judicial notice that her present Majesty's accession did not take place until after the last day of Trinity Term (TINDAL, C.J.).—*Ex p. DAVIES* (1837), 4 Bing. N. C. 17; 6 Dowl. 181; 3 Hodg. 304; 5 Scott, 241; 132 E. R. 694; *sub nom.* *ANON.*, 7 L. J. C. P. 17.

Parliament.—See Sub-sect. 2, F., *ante*.

B. State of War.

1256. Between this country & another.—A war between foreign countries must be proved; but the cts. take notice of a war in which this country is engaged without proof.

You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the cts. taking judicial notice of that with reference to our own country (LORD ELDON, C.).—*DOLDER v. HUNTINGFIELD* (LORD) (1805), 11 Ves. 283; 32 E. R. 1097, L. C.

Annotations.—*Refd.* Commonwealth Shipping Representative v. P. & O. Branch Service, [1923] A. C. 191. *Mentd.* *Faulder v. Stuart* (1805), 11 Ves. 296; *Agar v. Regent's Canal Co.* (1815), Coop. G. 212; *John v. Dacie* (1824), 13 Price, 632; *Hullett v. Spain* (King) (1828), 2 Bl. N. S. 31; *Brunswick v. Hanover* (King) (1844), 13 L. J. Ch. 107; *Mason v. Wakeman* (1848), 2 Ph. 516; *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348; *Aksionarnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

1257. ———. —The ct. will take judicial notice that a war exists between this country & a foreign state, which war is recognised in different Acts of Parliament, & therefore an allegation to that effect need not be proved.—*R. v. DE BERENGER* (1814), 3 M. & S. 67; 105 E. R. 536.

Annotations.—*Refd.* Commonwealth Shipping Representative v. P. & O. Branch Service, [1923] A. C. 191. *Mentd.* *King v. R.* (1845), 7 Q. B. 795; *Ramoll Thackoorseydass v. Soojumnull Dhondnull* (1848), 4 Moo. Ind. App. 339; *Re Royal British Bank* (1857), 29 L. T. O. S. 148; *R. v. Gurney* (1869), 11 Cox, C. C. 414; *R. v. Aspinall* (1876), 2 Q. B. D. 48; *White v. R.* (1876), 13 Cox, C. C. 318; *Mogul S.S. Co. v. McGregor, Gow* (1888), 21 Q. B. D. 544; *Salaman v. Warner* (1891), 65 L. T. 132; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724; *Andrews v. Mockford*, [1896] 1 Q. B. 372; *R. v. Brailsford*, [1905] 2 K. B. 730; *R. v. Parker & Bulleel* (1916), 25 Cox, C. C. 145.

1258. ———. —Plea, *quis darrein continuance*, that plff. is an alien born in Russia, & is an enemy of our Lady the Queen, & not a subject, & residing in this country without leave of the Queen:—*Held*: the ct. must take judicial notice that Russia was at war with this country.—*ALCINOUS v. NIGREU* (1854), 4 E. & B. 217; 110 E. R. 84; *sub nom.* *ALCENIUS v. NYGREN*, 24 L. J. Q. B. 19; 24 L. T. O. S. 92; 1 Jur. N. S. 16; 3 W. R. 25.

Annotations.—*Refd.* *Porter v. Freudenberg*, [1915] 1 K. B. 857. *Mentd.* *Driefontein Consolidated Gold Mines v.*

Janson, West Rand Central Gold Mines Co. v. De Rongezmont, [1900] 2 Q. B. 339; *Tingley v. Muller*, [1917] 2 Ch. 144; *Rodriguez v. Speyer*, [1919] A. C. 59.

1259. ———. —The ct. will take judicial notice that this country is in a state of war, that its coasts have been attacked by Zeppelins & other aircraft, & further, that certain places on the east coast have been subject to attack by the enemy's fleet (LORD COZENS-HARDY, M.R.).—*Re A PETITION OF RIGHT*, [1915] 3 K. B. 649; 84 L. J. K. B. 1961; 113 L. T. 575; 31 T. L. R. 596; 59 Sol. Jo. 665, C. A.; *on appeal* (1916), 115 L. T. 419, H. L.

Annotations.—*Mentd.* *Sheffield Conservative & Unionist Club v. Brighton* (1916), 85 L. J. K. B. 1669; *The Zamora*, [1916] 2 A. C. 77; *Lobitos Oilfields v. Admiralty Comrs.*, Crown S.S. Co. v. Same (1917), 86 L. J. K. B. 1444; *Cannon Brewery Co. v. Central Control Board* (Liquor Traffic), [1918] 2 Ch. 101; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508.

1260. ———. —Not of dates of particular events.]—I know of no authority for the proposition that the date of a particular event in a modern war, such as an engagement or a withdrawal, however important in itself, may be stated without proof, & an inference based upon it; & in any case I do not understand how such an inference can be drawn for the first time in a ct. of appeal, when the opportunity of rebutting the inference has been passed by (LORD CAVE, C.).—COMMONWEALTH SHIPPING REPRESENTATIVE v. P. & O. BRANCH SERVICE, [1923] A. C. 191; 92 L. J. K. B. 142; 39 T. L. R. 133; 67 Sol. Jo. 182; 28 Com. Cas. 206; *sub nom.* *PENINSULAR & ORIENTAL BRANCH SERVICE v. COMMONWEALTH SHIPPING REPRESENTATIVE*, 128 L. T. 546; 16 Asp. M. L. C. 33, H. L.; *affy.* *S. C. sub nom. Re P. & O. BRANCH SERVICE & COMMONWEALTH SHIPPING REPRESENTATIVE*, [1922] 1 K. B. 706, C. A.

Annotations.—*Mentd.* *Atlantic Transport Co. v. Transports Director* (1921), 38 T. L. R. 160; *Charente S.S. Co. v. Transports Director* (1921), 38 T. L. R. 148; *A.-G. v. Adelaide S.S. Co.*, [1923] A. C. 292.

1261. Between foreign states.—*DOLDER v. HUNTINGFIELD* (LORD), No. 1253, *ante*.

C. Foreign States.

1262. Status of foreign state—If recognised by this country.—A judicial ct. cannot take notice of a foreign govt., not acknowledged by the govt. of the country, in which that ct. sits; & the fact of acknowledgment is matter of public notoriety.—*BERNE CITY v. BANK OF ENGLAND* (1804), 9 Ves. 347; 32 E. R. 636, L. C.

Annotations.—*Consd.* *Peru Republic v. Dreyfus* (1888), 38 Ch. D. 348; *Aksionarnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456. *Mentd.* *Taylor v. Carpenter* (1847), 9 L. T. O. S. 514.

1263. ———. —To prevent a demurrer to a bill, it was falsely alleged in it that a revolted colony of Spain had been recognised by Gt. Britain as an independent state: the ct. is bound to know, judicially, that the allegation is false, & not to give it the intended effect.—*TAYLOR v. BARCLAY* (1828), 2 Sim. 213; 2 State Tr. N. S. App. 1000; 7 L. J. O. S. Ch. 65; 57 E. R. 769.

Annotations.—*Apld.* *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811. *Refd.* *Two Sicilies* (King) v. Willcox (1850), 14 Jur. 163; *The Charkieh* (1873), L. R. 4 A. & E. 59; *Commonwealth Shipping Representative v. P. & O. Branch Service*, [1923] A. C. 191. *Mentd.* *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797.

1264. ———. —If a foreign state is recognised by this country, it is not necessary to support an allegation which describes it as a state, to prove that it is in fact an existing state, but if it

PART III. SECT. 5, SUB-SECT. 5.—A.

o. Treaty between England & United States.—The ct. can take

judicial notice of the treaty between England & the United States.—*It. v. BUTLER* (1879), 18 N. S. W. L. R. 146; 13 N. S. W. W. N. 222.—**AUS.**

d. Treaty between England & Netherlands.—*R. v. MACDONALD, Ex p. STRUTT* (1901), 11 Q. L. J. 85.—**AUS.**

be not so recognised, then such proof becomes necessary, & may be admitted.

If a body of persons assemble together to protect themselves, & support their own independence, & make laws, & have cts. of justice, that is evidence of their being a state; & it makes no difference whether they formerly belonged to another country or not, if they do not continue to acknowledge it, & are in possession of a force sufficient to support themselves in opposition to it.—*YRISARRI v. CLEMENT* (1825), 2 C. & P. 223; 2 State Tr. N. S. App. 986, N. P.; *subsequent proceedings* (1826), 3 Bing. 432.

Annotations:—*Reid*. British South African Co. v. Companhia De Mocimboque (1893), 69 L. T. 604. *Mentd*. Thompson v. Barclay (1831), 9 L. J. O. S. Ch. 215; Duff Development Co. v. Kelantan Government, [1924] A. C. 797.

1265. ——— **Existence & title.**—(1) A foreign sovereign state adopting the republican form of government & recognised by the govt. of Her Majesty, can sue in the cts. of Her Majesty in its own name so recognised.

(2) For the purposes of the demurrer the facts stated in the bill must be taken to be true, & the ct. is bound to take judicial notice of the existence, & of the title, of the United States of America as a sovereign power, & also that the name by which plffs. sue is their correct & appropriate designation (LORD CHIEF JUSTICE, C.).—*U.S.A. v. WAGNER* (1807), 2 Ch. App. 582; 36 L. J. Ch. 624; 16 L. T. 646; 15 W. R. 1026, L. C. & L. J.J.

Annotations:—*As to* (1) *Reid*. Peneco v. Johnson (1873), 29 L. T. 452. *Generalty*. *Mentd*. Liberia Republic v. Imperial Bank (1873), L. R. 16 Eq. 179; Costa Rica Republic v. Erlanger, Erlanger v. Costa Rica Republic (1875), 45 L. J. Ch. 145; Peru Republic v. Weguelin, Weguelin v. Peru Republic (1875), L. R. 20 Eq. 140; Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co. (1900), 83 L. T. 58.

1266. ——— **As de facto government.**—A statement of claim which sought relief on the footing that a compromise of certain disputes between a foreign *de facto* govt., recognised by this country, & defts. was not binding upon plffs., the succeeding *de jure* govt. was ordered to be struck out, on the grounds, (a) the acts of the *de facto* & recognised govt. by their duly authorised agents must be treated by the tribunals of this country as binding upon their *de jure* successors; & (b) the *de jure* govt., after retaining with full knowledge of the facts the money paid to their predecessors as one of the terms of compromise could not afterwards repudiate the arrangement.—*PERU REPUBLIC v. PERUVIAN GUANO CO.* (1887), 36 Ch. D. 489; 56 L. J. Ch. 1081; 57 L. T. 337; 36 W. R. 217; 3 T. L. R. 848.

Annotations:—*Reid*. Peru Republic v. Dreyfus (1888), 36 W. R. 492. *Mentd*. Fletcher v. Bethorn (1893), 68 L. T. 438; Hubbuck v. Wilkinson, Heywood & Clark, [1899] 1 Q. B. 86; Ripley v. Arthur (1900), 18 R. C. 82; Worthington v. Bolton (1902), 18 T. L. R. 438; West Rand Central Gold Mining Co. v. R., [1905] 2 K. B. 391; Edwards v. Motor Union Insee., [1922] 2 K. B. 249.

1267. ——— **—**—(1) The cts. of this country will not inquire into the validity of the acts of a foreign govt. which has been recognised by the govt. of this country. In this respect it is all one whether the foreign govt. has been recognised as a govt. *de jure* or *de facto*.

(2) The govt. of this country had recognised the Soviet Govt. as the *de facto* Govt. of Russia existing at a date before the decree in June, 1918; therefore the validity of that decree & the sale of the wood to defts. could not be impugned, & defts. were therefore entitled to judgment.—*AKSIONAIRNOYE OBSHESTVO A. M. LUTHER v. SAGOR (JAMES) & Co.*, [1921] 3 K. B. 532; 90 L. J. K. B. 1202; 125 L. T. 705; 37 T. L. R. 777; 65 Sol. Jo. 604, C. A.

Annotations:—*As to* (1) *Folld*. White, Child, & Beney v.

Simmons, Same v. Eagle, Star, & British Dominions Insee. (1922), 127 L. T. 571. *Reid*. The Jupiter (1924), 93 L. J. P. 156. *As to* (2) *Consd*. White, Child, & Beney v. Simmons, Same v. Eagle, Star, & British Dominions Insee. (1922), 127 L. T. 571; Duff Development Co. v. Kelantan Government, [1924] A. C. 797. *Reid*. Fenton Textile Assocn. v. Krassin (1921), 38 T. L. R. 259; Russian Commercial & Industrial Bank v. Le Comptoir D'Escompte De Mulhouse (1924), 93 L. J. K. B. 1098.

1268. ——— **—**—Plffs. were an English limited co. of engineers & merchants. Part of its business was transacted in Russia, & for the purpose of that business plffs., through their London bankers, deposited moneys & Russian Treasury Bonds with the Petrograd branch of the Banque de Commerce de l'Azoff-Don. Having done so plffs. took out two policies of insurance to insure themselves against loss or damage to the insured property "directly caused by fire, rioters, civil commotions, war, civil war, revolutions, rebellions, military or usurped power. . . ." No claim was to attach under the policy (*inter alia*) "for confiscation or destruction by the government of the country in which the property is situated." In Dec. 1917, during the currency of the policy, the Banque de Commerce was occupied by soldiers & sailors of the Red Guard, & by the Bolsheviks, purporting to act under the authority of an executive committee of the Commissaries of the People. They demanded & obtained control & possession of the bank & everything contained in it, including the insured property. Two actions were brought claiming for losses under the policies, & the question arose with regard to the recognition of the Soviet Govt. as a sovereign power:—*Held*: on the information then available, the act of the military in seizing the insured property was an act of confiscation by the Govt. of Russia, which was in existence at the material time, & had since been recognised by His Majesty's Govt. as the *de facto* Govt. of Russia, & was not an act of a usurped authority. Therefore the claim failed by reason of the clause which provided that no claim was to attach under the policy . . . for confiscation or destruction by the Government of the country in which the property is situated."—*WHITE, CHILD & BENEY, LTD. v. SIMMONS, WHITE, CHILD & BENEY, LTD. v. EAGLE STAR & BRITISH DOMINIONS INSURANCE CO.* (1922), 127 L. T. 571; 38 T. L. R. 616, C. A.

1269. ——— **—**—The ct. takes judicial cognisance not only of the status, but also of the boundaries of foreign states, & if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose reply is conclusive.—*FOSTER v. GLOBE VENTURE SYNDICATE, LTD.*, [1900] 1 Ch. 811; 69 L. J. Ch. 375; 82 L. T. 253; 44 Sol. Jo. 314.

Annotations:—*Consd*. Duff Development Co. v. Kelantan Government, [1924] A. C. 797. *Reid*. *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176; *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

1270. ——— **Effect of provisional recognition.**—On a motion to set aside a writ in *rem* claiming possession of a vessel in the possession of the Estonian Govt. the ct. invited the assistance of the Foreign Office as to the status of the Estonian National Council. The A.-G. on behalf of the Foreign Office stated that His Majesty's Govt. had, for the time being, & with all necessary reservations as to the future, recognised the Estonian National Council as a *de facto* independent body & had received an informal diplomatic representative of the provisional govt.:—*Held*: such provisional recognition accorded, for the time being, to the Estonian National Council the status of a foreign sovereign; to permit the arrest of the vessel would be contrary to principles

Sect. 5.—Judicial notice: Sub-sect. 5, C. & D.; sub-sect. 6, A. & B.]

of international comity, as it would compel the Estonian Govt., whose sovereignty was entitled to be respected, to submit to the jurisdiction of the British cts.—*THE GAGARA*, [1919] P. 95; 88 L. J. P. 101; 122 L. T. 498; 63 Sol. Jo. 301; 14 Asp. M. L. C. 517; *sub nom.* WEST RUSSIAN S.S. Co., LTD. v. *THE GAGARA*, 35 T. L. R. 259, C. A.

Annotations:—*Consd.* *The Jupiter*, [1924] P. 236; *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797. *Refd.* *The Annette, The Dora*, [1919] P. 105; *Duff Development Co. v. Kelantan Government*, [1923] 1 Ch. 385.

1271. Recognition by this country—Court informed by Foreign Office.]—The facts necessary to enable the Committee to judge of the status of the principalities of Moldavia & Wallachia were obtained by communication with the Foreign Office.—*CREMIDI v. POWELL, THE GERASIMO* (1857), 11 Moo. P. C. C. 88; 8 State Tr. N. S. 787; 29 L. T. O. S. 269; 5 W. R. 450; 14 E. R. 628, P. C.

Annotations:—*Mentd.* *Mitsui v. Mumford*, [1915] 2 K. B. 27; *The Anglo Mexlean*, [1918] A. C. 422.

1272. ———.]—*FOSTER v. GLOBE VENTURE SYNDICATE, LTD.*, No. 1269, *ante*.

1273. ———.]—*Mits.*, Estonian subjects, the owners of two sailing vessels, with the approval & support of the Estonian Govt., issued writs *in rem* claiming possession of the vessels, which had been requisitioned or sequestered by the provisional govt. of Northern Russia, & by them hired to a partnership assocn. for the purposes of trading subject to the control of the Director of Naval Transports. The provisional govt. entered appearances under protest, & motions were set down to set aside the writs & all subsequent proceedings on the grounds, *inter alia*, that the vessels were in the service of the provisional govt., & therefore immune from arrest; & that the dispute was between foreigners as to the possession of foreign ships, & therefore that, even if the ct. had jurisdiction, it should decline to exercise it. The learned judge invited the assistance of the Foreign Office as to the status of the provisional govt. of Northern Russia, & was informed by the Secretary of State for Foreign Affairs that, while the Allied Powers were co-operating with the provisional govt. in the opposition which that govt. was making to the forces of the Russian Soviet Govt., the provisional govt. had not been "formally recognised either by His Majesty's Govt. or by the Allied Powers as the govt. of a sovereign independent state":—*Held*: the ct. could not infer from the letter from the Foreign Office that the provisional govt. of Northern Russia had been "informally" recognised as a sovereign independent state.—*THE ANNETTE, THE DORA*, [1919] P. 105; 88 L. J. P. 107.

Annotations:—*Consd.* *Duff Development Co. v. Kelantan Government*, [1924] A. C. 797. *Refd.* *Aksionairnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456;

PART III. SECT. 5, SUB-SECT. 5.—D.

a. Ministers of Crown.]—A ct. will judicially notice who are the ministers of the Crown.—*HOLLAND v. JONES* (1917), 23 C. L. R. 149.—**AUS.**

f. ———.]—The ct. may take judicial notice of the persons who filled the great offices of State so long ago as 1803.—*WHALEY v. CARLISLE* (1886), 17 I. C. L. R. 792.—**IR.**

g. Signature of police magistrate—Certificate under hand of Secretary of State for India.]—*FERGUSON v.* (1887), 16 W. R. 71.—**IR.**

h. Decision of Vice-President of Scottish Board of Education.]—A statement made on record by the Education Department & endorsed by their counsel at the bar, that a decision of the department was the decision of the Vice-President fell to be accepted by the ct. without probation, in the absence of a specific averment to the contrary by the party challenging the decision.—*DALZIEL SCHOOL BOARD v. SCOTCH EDUCATION DEPARTMENT*, [1915] S. C. 234.—**SCOT.**

PART III. SECT. 5, SUB-SECT. 6.—A.

1280 i. Position & names of district

The Jupiter, [1924] P. 236. *Mentd.* *The Sylvan Arrow*, [1923] P. 14.

D. Officers of State.

1274. Lords of the Treasury.]—On the trial of an indictment for a fraud against an agent of govt. under the control of the Treasury, a letter of instructions addressed to deft. by the Lord of the Treasury may be read in evidence, without proving the comm. by which they were appointed.—*R. v. JONES* (1809), 2 Camp. 131, N. P.

Annotations:—*Mentd.* *R. v. Roberts* (1878), 38 L. T. 690; *Castro v. R.* (1881), 6 App. Cas. 229; *R. v. Baskerville*, [1916] 2 K. B. 658.

SUB-SECT. 6.—GEOGRAPHY.

A. In General.

1275. Foreign place.]—*GREENWAY & BAKER'S CASE* (1613), Godb. 193; 78 E. R. 117.

Annotation:—*Mentd.* *The Hercules* (1819), 2 Dods. 353.

1276. Boundaries of foreign state.]—*FOSTER v. GLOBE VENTURE SYNDICATE, LTD.*, No. 1269, *ante*.

1277. "Dublin."]—The declaration stated that a bill of exchange was drawn & accepted at Dublin, to wit, at Westminster, etc., for a certain sum therein mentioned, without alleging it to be at Dublin in Ireland:—*Held*: the bill upon this declaration must be taken to have been drawn in England for English money; & therefore proof of a bill drawn at Dublin in Ireland for the same sum in Irish money, which differs in value from English money, did not support the declaration, & this was a fatal variance.—*KEARNEY v. KING* (1819), 2 B. & Ald. 301; 1 Chit. 28; 106 E. R. 377: *subsequent proceedings*, 1 Chit. 273.

Annotations:—*Refd.* *Sprowle v. Legge* (1822), 1 B. & C. 16; *Smith v. Smyth* (1834), 10 Bing. 406; *Rothschild v. Currie* (1841), 10 L. J. Q. B. 77; *Benett v. Peninsular Steam-Boat Co.* (1845), 6 C. B. 775; *Crowther v. Bradney* (1863), Hop. & Ph. 63.

1278. "Kingdom of Ireland."]—The ct. would take notice that by the words Kingdom of Ireland were intended that part of the United Kingdom of Great Britain & Ireland, called Ireland.—*WHYTE v. ROSE* (1842), 3 Q. B. 493; 2 Gal. & Dav. 312; 4 Per. & Dav. 199; 11 L. J. Ex. 457; 114 E. R. 590; *sub nom.* *WHITE v. ROSE*, 4 Jur. 986, Ex. Ch. **Annotations:—***Mentd.* *Hervey v. Fitzpatrick* (1854), Kay, 421; *Vanquellin v. Bouard* (1863), 15 C. B. N. S. 341.

1279. "Colony of Victoria."]—The ct. were bound to take notice that "Geelong, in the colony of Victoria," is a place out of England.—*COOKE v. WILSON* (1850), 1 C. B. N. S. 153; 26 L. J. C. P. 15; 28 L. T. O. S. 103; 2 Jur. N. S. 1094; 5 W. R. 24; 140 E. R. 65.

Annotations:—*Mentd.* *Oglesby v. Yglesias* (1858), E. B. & F. 930; *Palce v. Walker* (1870), L. R. 5 Exch. 173; *Hough v. Manzanos* (1879), 4 Ex. L. 104; *Brandt v. Morris*, [1917] 2 K. B. 784; *Universal Steam Navigation Co. v. McKelvie*, [1923] A. C. 492.

1280. Position & names of district shown on Admiralty chart.]—A ct. should take judicial notice of the geographical positions of, & general names applied to a district as shown on the

shown on Admiralty chart.]—The ct. will take judicial notice of the geographical position & names of places laid down in Admiralty charts.—*O'LEARY v. PELICAN INSURANCE CO.* (1889), 29 N. B. R. 510.—**CAN.**

k. "Birmingham."]—It will not be judicially intended that a deed, purporting to have been made at Birmingham, was made at Birmingham, England.—*HASLUCK v. MCMASTER* (1825), 1 N. B. R. (Chp.) 4.—**CAN.**

l. "Boston."]—The ct. will not take judicial notice that a note payable in Boston is payable in the United

Admiralty chart.—*BIRRELL v. DRYER* (1884), 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. L. C. 267, H. L.

B. County, etc., Divisions.

1281. Counties.]—The judges could take judicial notice that the parish of Seighford, in the county of Stafford, is a parish in England, & the indictment need not aver that fact.—*R. v. SHARPE & VAUL* (1838), 8 C. & P. 436.

1282. Divisions of counties.]—The ct. must take judicial notice that the Isle of Ely was a division of a county in the nature of a Riding, & as such, *prima facie* liable to repair bridges within it.—*R. v. ISLE OF ELY (INHABITANTS)* (1850), 15 Q. B. 827; 4 New Mag. Cas. 128; 4 New Sess. Cas. 222; 19 L. J. M. C. 223; 15 L. T. O. S. 412; 14 J. P. 512; 14 Jur. 956; 4 Cox, C. C. 281; 117 E. R. 671.

Annotations:—Mentd. *R. v. G. W. Ry.* (1867), 32 J. P. 21; *R. v. Kitchener* (1873), L. R. 2 C. C. R. 88; *R. v. Southampton County* (1886), 17 Q. B. D. 424; *A. G. v. Oxford Canal Navigation* (1903), 72 L. J. Ch. 285; *Hertfordshire County Council v. New River Co.*, [1904] 2 Ch. 513; *Hertfordshire County Council v. G. E. Ry.*, [1909] 2 K. B. 403; *Macclesfield Corp. v. G. C. Ry.* (1911), 104 L. T. 728; *Sharpness New Docks & Gloucester & Birmingham Navigation Co. v. A. G.*, [1915] A. C. 654; *A. G. v. G. N. Ry.*, [1916] 2 A. C. 356.

1283. City & county coextensive.—When so made by statute.]—Where an Act of Parliament gives jurisdiction to justices of a county, & an order is made under it by justices of the county of a city, which county & city are coextensive by statute, the order is valid though the justices describe themselves merely as justices "in & for the city." For the ct. will take notice that the city is also a county.—*R. v. ST. MAURICE (INHABITANTS)* (1851), 16 Q. B. 908; 4 New Sess. Cas. 696; 20 L. J. M. C. 221; 17 L. T. O. S. 62; 15 J. P. 534; 15 Jur. 559; 117 E. R. 1130.

1284. Not of situation of places within county.]—We cannot take notice that the whole township or vill of Ivelchester is in the county of Somerset (LORD HARDWICKE, C.J.).—*R. v. BURRIDGE* (1735), 3 P. Wms. 439; Sess. Cas. K. B. 200; 24 E. R. 1133.

Annotations:—Folld. *Thorne v. Jackson* (1846), 3 C. B. 661. *Refd.* *R. v. Albert* (1843), 5 Q. B. 37; *R. v. O'Connor* (1843), 5 Q. B. 16. *Mentd.* *R. v. Francis* (1735), Cunn. 165; *R. v. Stanley* (1821), Russ. & Ry. 432; *Leu's Case* (1837), 2 Mood. C. C. 9; *Campbell v. R.* (1847), 11 Q. B. 814.

1285. —.]—The ct. will not take judicial notice of the local situation & distances of the different places in the counties of England from each other.—*DEYBEL'S CASE* (1821), 4 B. & Ald. 243; 106 E. R. 926.

Annotations:—Mentd. *Re Baines* (1840), Cr. & Ph. 31; *R. v. Mount* (1875), L. R. 6 P. C. 283.

1286. —.]—*HUMPHREYS v. BUDD* (1841), 9 Dowl. 1000; 5 Jur. 630.

1287. —.]—The cts. do not take judicial notice that particular places are or are not within particular counties. Therefore, where pltf., having

undertaken to give material evidence in London, produced only a record from the Tower, but gave no evidence that the part of the Tower from which the record came was in London:—*Held*: he was rightly nonsuited. On a motion to set aside the nonsuit, the ct. refused to act upon affidavits then produced as to the situation of the Tower.—*BRUNE v. THOMPSON* (1842), 2 Q. B. 789; 2 Gal. & Dav. 110; 11 L. J. Q. B. 131; 6 Jur. 581; 114 E. R. 306.

Annotation:—Mentd. *Newcastle on Tyne, Master, Pilots & Seamen v. Bradley & Potts* (1852), 2 E. & B. 428, n.

1288. —.]—Upon a motion for a suggestion under 23 Geo. 2 (c. 33), s. 19, deft., in his affidavit, described himself as "of No. 51 Bedford Row, Holborn, in the county of Middlesex"; & alleged that he, "before & at the commencement of the suit, was, & ever since had been, & still was, inhabiting & resident in Bedford Row, & that he, for & during all that time, was, & still was, liable to be summoned to the ct. of requests held at Kingsgate Street, Holborn, & that the cause of action, & every part thereof, arose within the jurisdiction of the ct."—*Held*: this affidavit did not allege, with sufficient distinctness, that deft. resided in Bedford Row, in the county of Middlesex, or that the ct. of requests held at Kingsgate Street, was the Middlesex ct. of requests.—*THORNE v. JACKSON* (1846), 3 C. B. 661; 16 L. J. C. P. 87; 8 L. T. O. S. 141; 136 E. R. 264.

Annotation:—Refd. *Anon.* (1846), 8 L. T. O. S. 161.

1289. —.]—We may happen to know that Park Street is not 20 miles from Russell Square, but it is not so stated in the affidavit, & we cannot take judicial notice of that fact (*WILDE, C.J.*).—*KIRBY v. HICKSON* (1850), 1 L. M. & P. 364; *Rob. L. & W.* 372; *Cox, M. & H.* 309; 15 L. T. O. S. 138; 14 J. P. 370; 14 Jur. 625.

Annotation:—Folld. *Room v. Cottam* (1850), 5 Exch. 820.

1290. —.]—If we could have taken judicial notice that the Board room is in the county of Middlesex, that would have met the objection [in the case] but we cannot do so (LORD CAMPBELL, C.J.).—*R. v. ST. GEORGE'S, BLOOMSBURY (INHABITANTS)* (1855), 4 E. & B. 520; 3 C. L. R. 550; 24 L. J. M. C. 49; 24 L. T. O. S. 213; 19 J. P. 166; 1 Jur. N. S. 231; 3 W. R. 170; 119 E. R. 190.

Annotations:—Consd. *R. v. Staverton* (1855), 3 W. R. 173. *Distd.* *R. v. Holborn Union Grdms.* (1856), 6 E. & B. 715.

1291. —.]—An order for binding a pauper child apprentice under Parish Apprentices Act, 1816 (c. 139), purported to be made by two justices for the county of Middlesex & to be signed & sealed by them at the Police Office, Hatton Garden. In Metropolitan Police Act, 1829 (c. 44), "Hatton Garden" is mentioned as one of the places in Middlesex forming the Holborn division of the Metropolitan Police District:—*Held*: jurisdiction sufficiently appeared on the face of the order, as the ct. would take judicial notice from the Act that Hatton Garden was in Middlesex.—

States.—*CUSHING v. GORDON* (1872), 6 All. 524.—**CAN.**

m. "*Windsor, Ontario.*"—*LICK v. RIVERS* (1901), 21 C. L. T. 166; 1 O. L. R. 57.—**CAN.**

n. "*Pincher Creek*"—In *Alberta*.—*Pincher Creek* is in the province of Alberta, but this was not disclosed in the evidence:—*Held*: judicial notice can be taken of such fact of local geography.—*R. v. CANADIAN PACIFIC RY. CO.* (1908), 8 W. L. R. 825; 1 Alta. L. R. 341.—**CAN.**

o. *Distance of Dunedin*—From *Gisborne*.—*PERA TE HIKUMATA v. TUCKER* (1894), 12 N. Z. L. R. 368.—**N.Z.**

PART III. SECT. 5, SUB-SECT. 6.—B.

p. *Jurisdiction of court.*—Justices may take judicial notice that the place where an offence was alleged to have been committed is within their jurisdiction.—*CRUDDINGTON v. COONEY, Ex p. COONEY*, [1902] S. R. Q. 176.—**AUS.**

q. —.]—When Justices have personal knowledge of the geographical limits of their jurisdiction, formal evidence thereof need not be given.—*UNION BANK OF AUSTRALIA, LTD. v. BROOM*, [1904] S. R. Q. 215.—**AUS.**

r. —.]—*LE COCQ v. McERVALE*, [1908] V. L. R. 69.—**AUS.**

s. *Territorial divisions*—Of pro-

vince.]—A judge is bound to take notice of the territorial division of the province.—*McDONALD v. DICAIRE* (1859), 1 Ch. Ch. 34.—**CAN.**

t. —.]—The ct. will take judicial notice of the territorial divisions of the Province.—*EASTERN JUDICIAL DISTRICT BOARD v. WINNIPEG CITY* (1886), 3 Man. L. R. 537.—**CAN.**

a. —. *Police division.*—The ct. is bound to take judicial notice of territorial divisions of a police division.—*Ex p. McDONALD* (1896), 27 S. C. R. 683.—**CAN.**

b. *Vessel lying near harbour*—In *Kent*.—The ct. cannot take judicial notice that a vessel lying "near the

Sect. 5.—Judicial notice: Sub-sect. 6, B.; sub-sect. 7, A., B. & C.]

R. v. HOLBORN UNION GUARDIANS (1856), 6 E. & B. 715; 25 L. J. M. C. 110; 27 L. T. O. S. 171; 20 J. P. 693; 2 Jur. N. S. 571; 4 W. R. 606; 119 E. R. 1031.

1292. Nct. of size of place.]—The ct. cannot take judicial notice of the size of the place where bail are described to reside; if it is too large that fact must be made to appear by affidavit. — *v. COSTAR* (1814), 5 Taunt. 554; 128 E. R. 806.

1293. Not of area of county court district.]—We can take no notice that Brompton is within the Middlesex County Ct.; if it be so it should have been stated (*POLLOCK, C.B.*). — *SANGSTER v. KAY* (1850), as reported in Cox, M. & H. 328; 15 L. T. O. S. 186.

Annotation:—Mentd. *Graham v. Lewis* (1888), 22 Q. B. D. 1.

1294. Not whether town within particular diocese.]—The ct. cannot take notice *ex officio* in what particular diocese a particular town lies. — *R. v. SYMPSON* (1724), 2 Ld. Raym. 1379; 8 Mod. Rep. 325; 1 Stra. 609; 92 E. R. 398.

Annotations:—Mentd. *R. v. Ward* (1730), 1 Barn. K. B. 411; *R. v. Sowter*, [1901] 1 K. B. 396; *R. v. Sarum* (Bp.), [1901] 1 K. B. 466.

1295. That place parochial.]—The ct. will presume that a place in England is parochial, if nothing to the contrary appears. — *R. v. Sr. MARGARET, WESTMINSTER (INHABITANTS)* (1845), 7 Q. B. 569; 1 New Mag. Cas. 328; 2 New Sess. Cas. 31; 14 L. J. M. C. 131; 5 L. T. O. S. 195; 9 J. P. 618; 9 Jur. 534; 115 E. R. 603.

1296. Judicial notice by quarter sessions.—Of petty sessional division.]—The ct. of quarter sessions was right in taking judicial notice of the petty sessional division. — *R. v. WHITTLES* (1849), 13 Q. B. 248; 3 New Mag. Cas. 102; 3 New Sess. Cas. 397; 18 L. J. M. C. 96; 12 L. T. O. S. 447; 13 J. P. 365; 13 Jur. 403; 116 E. R. 1258.

Annotations:—Mentd. *Murray v. Scott*, *Brimelow v. Murray*, *Agnew v. Murray* (1841), 51 L. T. 462; *Lawson v. Reynolds*, [1904] 1 Ch. 718.

SUB-SECT. 7.—NOTORIOUS FACTS.

A. In General.

1297. Public events universally known.]—If you look at this [state of Ireland] in the nature of a public event, universally known, it may be alluded to for the course of justice. I do not undertake to speak to the exact accuracy of the language, but in a treatise on evidence I have seen that laid down, contemporaneous history I have seen alluded to (*ERLE, J.*). — *R. v. DOWLING* (1848), as reported in 7 State Tr. N. S. 381.

Annotation:—Mentd. *R. v. Meany* (1867), 15 W. R. 1682.

1298. Common knowledge of great majority of mankind.]—The ct. will take judicial notice of that which is the common knowledge of the great majority of mankind, or of the great majority of men of business. — *R. v. ASPINALL* (1876), 2 Q. B. D. 48; 46 L. J. M. C. 145; 36 L. T. 297; 42 J. P.

mouth of Richibucto Harbour" is in the county of Kent. — *DESBRISSAY v. E. & N. A. RAILWAY COMRS.* (1867), 1 Ilan. 48.—**CAN.**

c. As to population of towns.]—*R. v. ATKINSON* (1888), 15 O. R. 110.—**CAN.**

d. Judicial districts.]—The ct. will take judicial notice of the limits of the various judicial districts. — *McHUGH v. UNION BANK OF CANADA* (1910), 14 W. L. R. 642; 3 Alta. L. R. 177; appeal allowed in part, [1913] A. C. 299.—**CAN.**

e. —.]—The ct. will not take

52; 13 Cox, C. C. 563; *sub nom.* *ASPINALL v. R.*, 25 W. R. 283, C. A.

Annotations:—Mentd. *Bradlaugh v. R.* (1878), 3 Q. B. D. 607; *R. v. Stroulger* (1886), 17 Q. B. D. 327; *Salaman v. Warner* (1891), 65 L. T. 132; *Scott v. Brown, Doering, McNab, Slaughter & May v. Brown, Doering, McNab*, [1892] 2 Q. B. 724; *R. v. Silverlock*, [1894] 2 Q. B. 766; *R. v. Whitaker*, [1914] 3 K. B. 1283.

B. Natural Laws.

1299. Seed time & harvest.]—*TOTNAM & HOPKIN'S CASE* (1623), Godb. 350; 78 E. R. 206.

1300. That rain falls.]—A declaration in case stated that defts. being possessed of a messuage adjoining a garden & messuage of pltf., placed a cornice upon his messuage, projecting over pltf.'s garden, by means whereof quantities of rain flowed from the cornice on to the garden, & did damage, & by reason of the premises pltf. had been greatly annoyed & incommoded in the use, possession, & enjoyment of his garden & messuage, & the same were damaged & deteriorated in value:—**Held:** the ct. would take judicial notice that rain falls, & after the lapse of some time, in the absence of evidence that none had fallen, would presume there had been rain. — *FAY v. PRENTICE* (1845), 1 C. B. 828; 14 L. J. C. P. 208; 5 L. T. O. S. 216; 9 Jur. 876; 135 E. R. 769.

Annotations:—Mentd. *Brusden v. Humphrey* (1884), 14 Q. B. D. 141; *Leunnon v. Webb*, [1894] 3 Ch. 1.

1301. Period of gestation.]—Non-access of the husband need not be proved during the whole period of the wife's pregnancy; it is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth. — *R. v. LUFFE* (1807), 8 East, 193; 103 E. R. 316.

Annotations:—Refd. *Head v. Head* (1823), 1 Sim. & St. 150; *Morris v. Davies* (1837), 5 C. & Fm. 163; *Brown v. Leech* (1924), 88 J. P. 208; *Russell v. Russell*, [1924] A. C. 687. **Mentd.** *R. v. Kea* (1809), 11 East, 132; *R. v. Hartington* (1816), 4 M. & S. 559; *R. v. Soutton* (1836), 2 Har. & W. 209; *R. v. King's Lynn, Recorder* (1846), 3 Dow. & L. 725; *Ormerod v. Chadwick* (1847), 16 M. & W. 367; *R. v. Shipperbottom* (1847), 10 Q. B. 514; *R. v. Collingwood* (1848), 12 Q. B. 681; *R. v. Suffolk J.J.* (1848), 12 J. P. 426; *R. v. Pilkington* (1853), 2 E. & B. 546; *Lezge v. Edmonds* (1855), 25 L. J. Ch. 125; *Ex p. Baker* (1857), 7 E. & B. 697; *Yates v. Chippindale* (1862), 11 C. B. N. S. 512; *Turnock v. Turnock* (1867), 36 L. J. P. & M. 85; *Re Parson's Trust* (1868), 18 L. T. 704; *Jones v. Davies*, [1901] 1 K. B. 118; *Webb v. Murrel* (1904), 68 J. P. 104.

1302. —.]—Where a husband after a long absence did not rejoin his wife till Nov. 24, 1849, & where she, nevertheless, produced to him a full-grown child on May 18, 1850:—**Held:** he could not have been the father & she was guilty of adultery. — *HEATHCOTE'S DIVORCE BILL* (1851), 1 Macq. 277, 11. L.

1303. —.]—A fund in ct. was settled upon a married woman absolutely in default of issue. The woman gave birth to a stillborn child on June 1, 1871, & her husband died on the 12th of the same month. There was no other issue. On an application by the woman on Dec. 9, following, that the fund be paid to her:—**Held:** the applica-

judicial notice of the distance from one another of two points within a judicial district. — *STONE v. STONE* (1902), 20 N. Z. L. R. 769.—**N.Z.**

PART III. SECT. 5, SUB-SECT. 7.—A.

1298 i. Common knowledge of great majority of mankind.]—Apart from statute, whenever a fact is so generally known that every ordinary person may be presumed to be aware of it, a ct. judicially notices it, either *simpliciter* if it is at once satisfied with the fact without more, or after such information or investigation as it considers reliable & necessary in order to eliminate any

reasonable doubt. — *HOLLAND v. JONES* (1917), 23 C. L. R. 119.—**AUS.**

1298 ii. —.]—It is usual & proper for a judge to refer to notorious matters without proof. — *It. v. LEW* (1912), 19 W. L. R. 853; 1 D. L. R. 99; 17 B. C. R. 77.—**CAN.**

1298 iii. —.]—It is unnecessary in New Zealand to prove that Tasmania & Norfolk Island were at one time convict settlements, & that the Chatham Islands were never a convict settlement, as they are matters of common knowledge. — *HORNSBY v. WARREN* (1883), 2 N. Z. L. R. 236 (S. C.).—**N.Z.**

tion was premature.—*A.-G. v. CLEMENTS* (1871), 25 L. T. 739.

1304. Mischievous disposition of children.]—(1) Deft. negligently left his horse & cart unattended in the street. Pltf., a child seven years old, got upon the cart in play; another child incautiously led the horse on; & pltf. was thereby thrown down & hurt:—*Held*: deft. was liable in an action on the case, though pltf. was a trespasser, & contributed to the mischief by his own act.

(2) He merely indulged the natural instinct of a child in amusing himself with the empty cart & deserted horse. We think that deft. cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real & only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of deft. which produced it (*LORD DENMAN, C.J.*).—*LYNCH v. NURDIN* (1841), 1 Q. B. 29; *Arn. & H.* 158; 4 Per. & Dav. 672; 10 L. J. Q. B. 73; 5 J. P. 319; 5 Jur. 797; 113 E. R. 1041.

Annotations:—As to (2) Consd. *Harrold v. Watney*, [1898] 2 Q. B. 320; *Cooke v. Mid. & W. Ry. of Ireland*, [1909] A. C. 229; *Glasgow Corp. v. Taylor*, [1922] 1 A. C. 44. *Refd.* *Lygo v. Newbold* (1854), 9 Exch. 302; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Hardy v. C. L. Ry.*, [1920] 3 K. B. 459. *Generally, Mentd.* *Davis v. Mann* (1842), 7 J. P. 53; *Barnes v. Ward* (1850), 9 C. B. 392; *Caswell v. Worth* (1856), 5 E. & B. 849; *Degg v. Mid. Ry.* (1857), 1 H. & N. 773; *Alsop v. Yates* (1858), 27 L. J. Ex. 156; *Singleton v. Eastern Counties Ry.* (1859), 7 C. B. N. S. 287; *Walte v. N. E. Ry.* (1859), E. B. & E. 728; *Hughes v. Macfie*, *Abbott v. Macfie* (1863), 3 New Rep. 394; *Atterton v. Mangan* (1866), 14 L. T. 411; *Mangan v. Atterton* (1866), 4 H. & C. 388; *Francis v. Coakerell* (1870), 10 B. & S. 950; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Mann v. Ward* (1892), 8 T. L. R. 699; *Ponting v. Noakes*, [1894] 2 Q. B. 281; *Engelhart v. Farrant*, [1897] 1 Q. B. 240; *McDowall v. G. W. Ry.*, [1902] 1 K. B. 618; *Lowery v. Walker* (1909), 79 L. J. K. B. 297; *Barker v. Herbert*, [1911] 2 K. B. 633; *Rickards v. Lothian*, [1913] A. C. 263; *Itouff v. Long* (1915), 114 L. T. 186; *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 33; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

See, generally, BASTARDY, Vol. III., pp. 358 et seq.

1305. —.]—The schoolmaster is bound to take such care of his boys as a careful father would take of his boys, & there cannot be a better definition of the duty of a schoolmaster. He is bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, & their propensity to meddle with anything that comes in their way. Having phosphorus in his house, he is bound not to leave it in any place in which they may get at it, & if he left it in the conservatory he did not use due care, but otherwise if he kept it locked up. If, therefore, deft. kept the bottle locked up, there would be no evidence of negligence. But if the bottle was left in the conservatory for any time before the accident then there is evidence on which the jury may find negligence & a want of proper care for the safety of the boys (*LORD ESHER, M.R.*).—*WILLIAMS v. EADY* (1893), 10 T. L. R. 41, C. A.

Annotation:—Refd. *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398.

1306. —.]—(1) A railway co. kept a turntable unlocked &, therefore, dangerous for children, on their land close to a public road. The co.'s servants knew that children were in the habit of trespassing & playing with the turntable, to which

they obtained easy access through a well-worn gap in a fence which the railway co. were bound by statute to maintain. A child between four & five years old playing with other children on the turntable having been seriously injured:—*Held*: there was evidence for a jury of actionable negligence on the part of the railway co.

(2) It would appear to me, first, that every person must be taken to know that young children & boys are of a very inquisitive & frequently mischievous disposition, & are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, & public places may not unlikely be frequented by children of tender years & boys of this character; &, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children & boys of this kind are rightfully entitled to frequent, & are not unlikely actually to frequent, unattended or unguarded & in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, & to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred (*LORD ATKINSON*).—*COOKE v. MIDLAND GREAT WESTERN Ry. Co. of IRELAND*, [1909] A. C. 229; 78 L. J. P. C. 76; 100 L. T. 626; 25 T. L. R. 375; 53 Sol. Jo. 319, H. L.

Annotations:—As to (2) Refd. *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Glasgow Corp. v. Taylor*, [1922] 1 A. C. 44. *Generally, Mentd.* *Lowery v. Walker*, [1910] 1 K. B. 173; *Schofield v. Bolton Corp.* (1910), 26 T. L. R. 230; *Barker v. Herbert*, [1911] 2 K. B. 633; *Clinton v. Lyons*, [1912] 3 K. B. 198; *Jenkins v. G. W. Ry.*, [1912] 1 K. B. 525; *Rickards v. Lothian*, [1913] A. C. 263; *Wheeler v. Morris* (1915), 113 L. T. 641; *Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 33; *Hardy v. C. L. Ry.*, [1920] 3 K. B. 459; *Mersey Docks & Harbour Board v. Procter*, [1923] A. C. 253.

1307. —.]—*Applt.*, a boy of 14, was employed by resps. at their colliery to pick stones out of coal passing along a belt. Another boy, who was similarly employed a few yards off, mischievously threw a stone, which hit *applt.* in the eye, so that he lost the sight of it. There was a notice prohibiting stone-throwing, but the boys, of whom there were several, sometimes threw stones at each other to attract attention. On an application by *applt.* for compensation, the county ct. judge found that the accident arose out of *applt.*'s employment, as he was exposed to the special risk of stones being thrown by other boys, & made an award in his favour:—*Held*: the question was one of fact, & there was evidence which, coupled with general knowledge as to boy's habits, was sufficient to support the judge's conclusion.—*CLAYTON v. HARDWICK COLLIERY CO., LTD.* (1915), 85 L. J. K. B. 292; 114 L. T. 241; 32 T. L. R. 159; 60 Sol. Jo. 138; 9 B. W. C. C. 136, H. L.

Annotations:—Mentd. *Dennis v. White*, [1916] 2 K. B. 1; *Ince v. Reigate Education Committee*, [1916] 2 K. B. 671; *Read v. Baker*, [1916] 1 K. B. 927.

C. Money and Other Values.

1308. Foreign money.]—The debt ought to be demanded by a name known, & the judges are not

PART III. SECT. 5, SUB-SECT. 7.—C.

f. Pint less than five gallons.—Or twelve bottles.]—It will be judicially noticed that a pint is less than five gallons; or twelve bottles.—*REID v. McWHINNIE & MARTIN* (1868), 27 U. C. R. 289.—*CAN.*

5.—Judicial notice: Sub-sect. 7. C., D. &.

apprised of Flemish money; & also when plff. has his judgment, he cannot have execution by such name, for the sheriff cannot know how to levy the money in Flemish (*per CUR.*).—*RASTELL v. DRAPER* (1605), Yelv. 80; Moore, K. B. 775; 80 E. R. 55; *sub nom.* *DRAPER v. RASTAL*, Cro. Jac. 88.

Annotation :—*Reid*. A.-G. v. Lade (1746), Park. 57.

1309. — Russian currency.—Plffs., who were coal exporters at Newcastle, shipped in Oct. 1914, to a merchant in Petrograd a quantity of coal for which payment was to be made by acceptances in sterling payable at the London branch of deft. bank. The merchant deposited roubles at defts. Petrograd office & it was arranged that the account should be transferred to the London branch. That branch informed plffs. that the amount was at their disposal "in Russian currency." Metallic coinage was no longer current in Russia :—*Held* : defts. were not bound to pay in Russian coin but must pay such a sum in English currency as was represented by the roubles held by them, both Imperial Russian notes & Kerensky notes, but not Bolshevik notes, being treated as currency.

The only question in the case is what at the present time is Russian currency. It is really a question rather for the Foreign Office than for a judge, but I must give the best opinion that I can on it. In my view metal coinage is excluded. The Imperial rouble notes were currency; & as the Kerensky govt. was a successor of the Tsar's govt., & while it was in existence, was recognised throughout Russia & by our own govt., I think Kerensky notes must also be considered currency. Bolshevik notes are on a different footing (*BAILLACHE, J.*).—*LINDSAY, GRACIE & Co. v. RUSSIAN BANK FOR FOREIGN TRADE* (1918), 34 T. L. R. 443.

1310. English money—Value of pound.—The ct. knows well enough how much money makes a pound, & it is certain enough (*per CUR.*).—*R. v. MARKS* (1701), 1 Ld. Raym. 702; 91 E. R. 1308.

1311. — Deterioration in value since 1189.—The parson is *prima facie* entitled to tithes in full, & it is, therefore, incumbent on one setting up a modus in lieu thereof, to make out his case satisfactorily to the jury; & to show that the payments relied on by him were actually paid as a *modus eo nomine*, & not as a composition for his tithes. Where it appears from the evidence offered by the party setting up the modus, that that modus is inconsistent with & contradicted by the commonly received notions, upon the deterioration of money since the time of Richard I., the judge is at liberty to draw the attention of the jury to that circumstance as an historical fact, without any evidence being given on that subject.—*MORRIS v. NORFOLK (DUKE)* (1841), 5 J. P. 725.

1312. ——*J.*—From the year 1808 to 1854 the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13s., viz. 10s. to the rector & 3s. to

the clerk. There was no evidence extending beyond 1808. The ct. having power to draw inferences of fact :—*Held* : considering the difference in value of money in 1189 & the present time, of which the ct. would take judicial notice, it was impossible that a payment of 13s. on every marriage could have been made at that period, & the objection of rankness applied, & rebutted the presumption, arising from uninterrupted modern usage, that the fee was taken as of right in the time of Richard I.—*BRYANT v. FOOT* (1868), L. R. 3 Q. B. 407; 9 B. & S. 444; 37 L. J. Q. B. 217; 18 L. T. 578; 32 J. P. 516; 16 W. R. 808, Ex. Ch.; *affg.* (1867), L. R. 2 Q. B. 161.

Annotations :—*Reid*. Lawrence v. Hitch (1868), L. R. 3 Q. B. 521. *Mentd.* Mills v. Colchester Corpn. (1867), L. R. 2 C. P. 478; Kirtou v. Dear (1869), L. R. 5 C. P. 217; Voley v. Portwee (1870), 18 W. R. 1024; Noville v. Bridger (1874), 22 W. R. 740; Maule v. White, Maule v. Herbert, Maule v. Green (1896), 60 J. P. 567; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140; *Re* New Parish of Haigh with Aspull, [1919] P. 143.

1313. — Scarcity in 1847.—*Semble* : the ct. will take judicial cognisance of the well-known scarcity of money in 1847.—*TYNTE v. HODGE*. *TYNTE v. BEAVAN* (1861), 2 Hem. & M. 287; 5 New Rep. 104; 11 L. T. 490; 13 W. R. 172; 71 E. R. 474.

1314. Value of commodities.—Cts. cannot take notice of the value of a commodity.—*VINKENSTERNER v. ELDEN* (1698), as reported in 1 Ld. Raym. 384; 91 E. R. 1151.

Annotations :—*Mentd.* Idd v. Morton (1692), 2 Salk. 501; Simpson v. Hartopp (1744), Willes, 512; Hutchins v. Chambers (1758), 1 Burr. 579; McCreagh v. Cox & Ford (1923), 92 L. J. K. B. 855.

D. Business and Trade.

1315. Ancient trade.—*LAURENCE v. TURNOR* (1623), Palm. 393; 81 E. R. 1139.

1316. ——*STAFFORD'S CASE* (1628), Palm. 528; 81 E. R. 1204.

1317. Banking—Nature of bank post-bill.—In an indictment for larceny, if the thing stolen be described as a bank post-bill, & be not set out, the ct. cannot take judicial notice that it is a promissory note; or that it is such an instrument as, under 2 Geo. 2, c. 25, may be the subject of, larceny, though it be described as made for the payment of money.—*R. v. CHARD* (1822), Russ. & Ry. 488.

1318. Stock Exchange—Course of business.—The nature & incidents of the employment of a broker on the London Stock Exchange by a customer are perfectly well known to the cts., & differ *toto coelo* from such a contract as was made in the present case. The broker returns to the customer the actual price made & charges him commission. But a suggestion that it is in accordance with the customs & conditions of the London Stock Exchange for a broker to add on to the price a sum at his own discretion, varying with the price at which he has made the bargain, without communicating the amount to his client, has never, to my knowledge, been made in these cts., & would, in my opinion, be a gross libel on the London Stock Exchange (*FLETCHER MOULTON, L.J.*).—*JOHNSON v. KEARLEY*, [1908] 2 K. B. 514; 77

lure of spirits.—The ct. will not take judicial knowledge that a "worm" used in the manufacture of spirits is generally known as "a worm," since the same is not a matter of common knowledge.—*R. v. HOLMES* (1922), 70 D. L. R. 851; 38 Can. Crim. Cas. 414.

—CAN.

m. Trade custom of hiring goods.—*Semble* : the ct. will not take judicial notice of a trade custom of hiring goods unless the custom has in respect of

PART III. SECT. 5, SUB-SECT. 7.—D.

g. Duty of station master—To burn fire trails.—It is the duty of a station manager to burn fire trails, & the ct. can take judicial notice of the fact that it is his duty.—*MACAULEY v. BANK OF NEW SOUTH WALES* (1893), 14 N. S. W. L. R. 269; 9 N. S. W. L. R. 195.—*AUS.*

h. Hotel—Place for sale of liquor.—Proof that the house in which liquor was seized was kept as an hotel will

not justify a search warrant on the information of one person, as it cannot be judicially noticed that an hotel is a place for the sale of liquor.—*R. v. SALTER* (1856), 3 All. 321.—*CAN.*

k. ——*J.*—It cannot be judicially noticed that an hotel is a place for selling liquors.—*STILES v. BREWSTER* (1859), N. B. Dig. 454.—*CAN.*

1. "Worm"—Used in manufac-

L. J. K. B. 904; 99 L. T. 506; 24 T. L. R. 729, C. A.

Annotations.—**Reid**, *Aston v. Kelsey*, [1913] 3 K. B. 314; *Blaker v. Hawes & Brown* (1913), 109 L. T. 320. **Mentd.** *Platt v. Rowe & Mitchell* (1909), 26 T. L. R. 49.

1319. Dangers of particular trades.—It requires no direct evidence to prove that a boy employed to ride a bicycle through London traffic runs the risk of injury by collision with other vehicles. The risk is inherent in the nature of the employment, or, to put it in another way, if a collision occurs, a causal relationship between the employment & the collision can be properly inferred, & in default of further evidence, in my opinion, ought to be inferred by a judge of fact. Most employments have peculiar risks inherent in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment (**LORD PARKER OF WADDINGTON**).—**DENNIS v. WHITE (A. J.) & Co.**, [1917] A. C. 479; 86 L. J. K. B. 1074; 116 L. T. 774; 33 T. L. R. 434; 61 Sol. Jo. 558; 10 B. W. C. C. 280, H. L.; *revers.*, [1916] 2 K. B. 1, C. A.

Annotations.—**Mentd.** *Harder v. Gains* (1916), 85 L. J. K. B. 806; *Ince v. Elgiate Education Committee*, [1916] 2 K. B. 671; *Kettle v. McKay & Ryland* (1916), 85 L. J. K. B. 1490; *Read v. Baker*, [1916] 1 K. B. 927; *Marsh v. Pope & Pearson* (1917), 86 L. J. K. B. 1349; *Allicock v. Rogers* (1918), 87 L. J. K. B. 693; *Arkell v. Gudgeon* (1918), 87 L. J. K. B. 1104; *Davidson v. McTobbs or Officer*, [1918] A. C. 304; *Knyvett v. Wilkinson* (1918), 87 L. J. K. B. 722; *Prophet v. Roberts* (1918), 120 L. T. 239; *Armstrong, Whitworth v. Redford*, [1920] A. C. 757; *Simpson v. Bolsover Colliery Co.* (1920), 13 B. W. C. C. 173; *Byrne v. Campbell* (1923), 16 B. W. C. C. 355; *Upton v. G. C. Ry.*, [1924] A. C. 302.

Post office routine.—*See* **LIBEL & SLANDER**.

E. In Time of War.

1320. Prize Courts—Carriage of contraband.—“In considering this case, I am told, that I am to set off without any prejudice against the parties, from anything that may have appeared in former cases; that I am not to consider former circumstances, but to suppose every case a true one, till the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation: but at the same time they are not to shut their eyes to what is generally passing in the world—to that obvious system of covering the property of the enemy, which, as the war advances, grows notoriously more artificial: higher prices are given for this secret & dishonourable service, & greater frauds become necessary; old modes are exploded as fast as they are found ineffectual, & new expedients are devised to protect the unsound parts better from the view of the ct. Not to know these facts as matters of frequent & not unfamiliar occurrence, would be not to know the general nature of the subject upon which the Ct. is to decide; not to consider them at all, would not be to do justice (**SIR W. SCOTT**).—**THE ROSALIE & BETTY** (1800), 2 Ch. Rob. 343; 1 Eng. P. Cas. 246; 165 E. R. 338.

Annotations.—**Reid**, *The Kim, The Alfred Nobel, The Bjornstjerne Bjornson, The Fridland*, [1915] P. 216; *The Sorfareren* (1915), 85 L. J. P. 121.

1321. ————**J**.—In prize proceedings the ct. is not governed or limited by the strict rules of evidence which bind our municipal cts., as it has always been deemed right to recognise well-

known facts which have come to light in other cases or as matters of public reputation; but when any presumptions or inferences have to be considered any concealment or misdescription, or device calculated & intended by neutrals to deceive & to hamper belligerents in their undoubted rights of search for contraband, will pass heavily against those adopting such courses.—**THE KIM, THE ALFRED NOBEL, THE BJORNSTJERNE BJORNSON, THE FRIDLAND, [1915] P. 215; 85 L. J. P. 38; 113 L. T. 1061; 32 T. L. R. 10; 60 Sol. Jo. 9, 26; 13 Asp. M. L. C. 178; *on appeal, sub nom. THE KIM (PART CARGO EX)* (1917), 116 L. T. 577, P. C.; *subsequent proceedings, sub nom. THE ALFRED NOBEL, THE BJORNSTJERNE BJORNSON, THE FRIDLAND*, [1918] P. 293.**

Annotations.—**Mentd.** *The Louisiana, The Nordic, The Tomsk, The Joseph W. Fordney* (1915), 32 T. L. R. 619; *The San Jose, Cometa & Salernio* (1916), 33 T. L. R. 12; *The Balto*, [1917] P. 79; *The Derfflinger, The Fürde, The Loda, Re American Meat Packers' Agreement, Re Certain Swedish Copper*, [1919] P. 261; *The Noordam*, [1919] P. 57; *The Itan*, [1919] P. 317; *Adelaide S.S. Co. v. R.* (1922), 92 L. J. K. B. 102.

1322. ————**J**.—A quantity of dried fruit was shipped on Swedish steamships in United States ports for carriage to a Swedish port. The fruit was afterwards seized by the Crown on board the Swedish vessels under the “Reprisals” Order on the ground that the goods were contraband & destined ultimately for Germany. The fruit was claimed by the Swedish Victualling Commission.—**Held**: on the facts, the fruit belonged to the Commission, & was *bona fide* intended for consumption in Sweden, & therefore, the claim must be allowed.

Hamburg was a great centre for this trade (dried fruit) before the war, & it was well known to the ct. from other cases, & indeed was notorious, that individuals & firms in Sweden had been extensively engaged since the early period of the war in facilitating the transmission into Germany of a large variety of food & other commodities of a contraband character, to their own great profit & the assistance of the German forces—& that notwithstanding or in spite of the prohibition of exportation. This fact could not & would not be ignored by the ct. in the investigation of claims brought before it & in the consideration of the kind of proof which should be forthcoming in such cases (**EVANS, P.**).—**THE PACIFIC & THE SAN FRANCISCO** (1917), 33 T. L. R. 529.

See, generally, **PRIZE LAW**.

1323. Modern methods of warfare.—I think, however, that the cts. are entitled to take judicial notice of certain notorious facts which may be summarised thus: There are a large number of German subjects in this country. This war is not being carried on by naval & military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered & largely used. I need only refer to wireless telegraphy, signalling by lights, & the employment on a scale hitherto unknown of carrier pigeons. Spying has become the hall-mark of German “Kultur” (**BAILHACHE, J.**).—**R. v. VINE STREET POLICE STATION (SUPERINTENDENT)**, *Ex p. LIEBMANN*, [1916] 1 K. B. 268; 85 L. J. K. B. 210; 113 L. T. 971; 80 J. P. 49; 32 T. L. R. 3; 25 Cox, C. C. 179, D. C.

Annotations.—**Mentd.** *Schaffinius v. Goldberg*, [1916] 1 K. B. 284; *R. v. Knockaloe Camp Commandant, Ex p. Forman* (1917), 87 L. J. K. B. 43; *Stoeck v. Public Trustee*, [1921] 2 Ch. 67.

ASSIGNED (1909), 28 N. Z. L. R. 875.—**N.Z.**

that class of goods been frequently proved in previous cases, & has been so extensively acted upon that the

ordinary creditors of the bailee may be reasonably presumed to have known of it.—**CAMPBELL v. BUCKMAN** (OFFI-

Sect. 5.—Judicial notice: Sub-sect. 7, E., F. & G.; sub-sect. 8, A.]

1324. ———.]—The other facts are those notorious facts of which deft. contends a judge, in dealing with a case of this kind, ought to take judicial notice. They may be summarised thus: Germany has throughout the war used her civilian subjects in foreign countries, & they have served her, in a way & to an extent hitherto unexampled. For instance, spying has been almost universal. Every German spy is, of course, an agent of the German Govt., & many German civilians in all grades of society have acted as spies. Germany has not made war by her men in uniform alone, but by all her subjects, wherever found, who were willing to help her by doing such mischief as each in his particular circumstances was able to compass. Niewerth, as a manager of electrical works, was peculiarly well able to construct an infernal machine. British ships were the special object of German spite, as witness the unrestricted submarine warfare, & no service could be more welcome or more in accord with the German policy of frightfulness than that of blowing one up (BAILLACHE, J.).—ATLANTIC MUTUAL INSURANCE CO. v. KING, [1919] 1 K. B. 307; 88 L. J. K. B. 1001; 120 L. T. 191; 35 T. L. R. 164; 14 Asp. M. L. C. 430; 24 Com. Cas. 107.

F. Meaning of Words.

1325. Local meaning.]—STAFFORD v. MACDONOGH (1621), Palm. 100; 81 E. R. 997; *sub nom.* MACDUNCOH v. STAFFORD, 2 Roll. Rep. 166, 189.

*Annotation:—*Consd. Kildare v. Fisher (1717), 1 Stra. 71.

1326. "Beans" are "pulse."]—Upon a statute which makes it capital to set fire to a stack of pulse, it is sufficient to state that the prisoner set fire to a stack of beans. The judges will take notice that beans are pulse.—R. v. WOODWARD (1831), 1 Mood. C. C. 323, C. C. R.

G. Other Cases.

1327. Assistant overseer—Duties & powers.]—The ct. will not take judicial notice of the duties & powers of an assistant overseer.—R. v. NORTH RIDING OF YORKSHIRE JJ. (1837), 6 Ad. & El. 863; 2 Nev. & P. K. B. 103; Nev. & P. M. C. 313; Will. Woll. & Dav. 395; 6 L. J. M. C. 110; 1 J. P. 169; 1 Jur. 404; 112 E. R. 330.

*Annotations:—*Consd. Walsh v. Southworth (1851), 6 Exch. 150. *Refd.* It. v. Warwickshire JJ. (1837), 6 Ad. & El. 873; R. v. Cambridgeshire JJ., It. v. Shropshire JJ., It. v. Gloucestershire JJ. (1838), 7 Ad. & El. 480. *Mentd.* It. v. Stainforth (1847), 3 New Sess. Cas. 53; R. v. Rye Borough JJ. (1864), 5 New Rep. 169.

1328. Assessor & collector of land tax—Whether public annual offices—Poor Relief Act, 1691 (c. 11), s. 6.]—The ct. will take notice that the offices of assessor & collector of the land tax & assessed taxes are "public annual" offices, within the above Act.—R. v. ANDERSON (INHABITANTS) (1846), 9 Q. B. 663; 2 New Sess. Cas. 479; 16 L. J. M. C. 25; 8 L. T. O. S. 135; 11 J. P. 55; 10 Jur. 1055; 115 E. R. 1428.

*Annotation:—**Mentd.* R. v. Clixby (1847), 2 New Sess. Cas. 619.

1329. That party suing a corporation—When incorporated by statute.]—A corp., incorporated by Act of Parliament, was sued in their corporate

name. After verdict & judgment in an inferior ct., the ct. took notice upon error, that the corp., suing, & that named in the Act, were identical.—(CHURCH v. IMPERIAL GAS, LIGHT & COKE CO. (1838), 6 Ad. & El. 846; 3 Nev. & P. K. B. 35; 1 Will. Woll. & H. 137; 7 L. J. Q. B. 118; 112 E. R. 324.

*Annotations:—**Mentd.* Gibson v. East India Co. (1839), 1 Arn. 493; Ludlow Corp. v. Charlton (1840), 6 M. & W. 815; Arnold v. Poole Corp. (1842), 2 Dowl. N. S. 574; Fishmongers' Co. v. Robertson (1843), 6 Scott, N. R. 56; Hall v. Swansea Corp. (1844), 5 Q. B. 526; Paine v. Strand Union (1846), 8 Q. B. 326; Clarke v. Cuckfield Union Grdms. (1852), Bail Ct. Cas. 81; Finlay v. Bristol & Exeter Ry. (1852), 7 Exch. 409; Henderson v. Australian Royal Mail Steam Navigation Co. (1855), 24 L. J. Q. B. 322; Frend v. Dennett (1858), 4 C. B. N. S. 576; Dyte v. St. Pancras Board of Grdms. (1872), 27 L. T. 342; Austin v. Bethnal Green Grdms. (1874), L. R. 9 C. P. 91; Wells v. Kingston-upon-Hull Corp. (1875), L. R. 10 C. P. 402; Young v. Royal Leamington Spa Corp. (1883), 8 App. Cas. 517; Lawford v. Billericay R. C. (1903), 72 L. J. K. B. 554.

1330. ———.]—"We know by a public Act that there is such a corp., as the South Eastern Ry. Co. . . . I think the ct. must intend that the South Eastern Co. is that mentioned in the Act, & no other" (MAULE, J.).—MACGREGOR v. DOVER & DEAL RY. CO. (1852), 18 Q. B. 618; 7 Ry. & Can. Cas. 227; 22 L. J. Q. B. 69; 19 L. T. O. S. 316; 17 Jur. 21; 118 E. R. 233, Ex. Ch.

*Annotations:—**Mentd.* Shrewsbury & Birmingham Ry. v. L. & N. W. Ry. (1853), 4 De G. M. & G. 115; South Yorkshire Ry. & River Dun Co. v. G. N. Ry. (1853), 9 Exch. 55; Bostock v. North Staffordshire Ry. (1855), 4 E. & B. 798; Eastern Counties Ry. v. Hawkes (1855), 5 H. L. Cas. 331; Norwich Corp. v. Norfolk Ry. (1855), 4 E. & B. 397; Bateman v. Ashton-under-Lyne Corp. (1858), 3 H. & N. 323; Taylor v. Chichester & Midhurst Ry. (1867), L. R. 2 Exch. 356; Riche v. Ashbury Ry. Carriage & Iron Co. (1874), 43 L. J. Ex. 177.

1331. Railway company—Necessity for Parliamentary authority.]—The ct. will take notice that the purposes of a railway [established under Act of Parliament] though not all specified in the pleading require the authority of Parliament for their being carried into execution.—LAWTON v. HICKMAN (1846), 9 Q. B. 563; 4 Ry. & Can. Cas. 336; 16 L. J. Q. B. 20; 7 L. T. O. S. 430; 10 Jur. 543; 115 E. R. 1390.

*Annotations:—**Mentd.* Van Booven's Case (1846), 9 Q. B. 669; Muttyloll Seal v. Dent (1853), 5 Moo. Ind. App. 328.

1332. ——— Payment of dividends.]—The ct. will not dispense with evidence that a railway co. has, for the last ten years, paid a dividend on its ordinary stock, whatever the common knowledge as to the fact may be.—*Re BYRON'S CHARITY* (1883), 23 Ch. D. 171; 48 L. T. 515; 31 W. R. 517. *Annotation:—**Mentd.* *Ex p.* Castle Bytham, *Ex p.* Mid. Ry., [1895] 1 Ch. 348.

1333. University of Oxford—Purposes of.]—The ct. takes judicial notice that the University of Oxford is a national institution, the purposes of which are the advancement of religion & learning.—OXFORD RATE (1857), 8 E. & B. 184; 27 L. J. M. C. 33; 3 Jur. N. S. 1249; 120 E. R. 68; *sub nom.* R. v. OXFORD UNIVERSITY (VICE-CHANCELLOR), 29 L. T. O. S. 343; 21 J. P. 644; 5 W. R. 872.

*Annotations:—**Mentd.* R. v. Stewart (1857), 8 E. & B. 360; North Manchester Overseers v. Winstanley, [1908] 1 K. B. 835.

1334. Duties of gamekeeper—Not to kill foxes.]—The ct. will not take judicial notice that it is the duty of a gamekeeper not to kill foxes.—

PART III. SECT. 5, SUB-SECT. 7.—F.
n. "About."]—BERLIN MACHINE WORKS v. RANDOLPH & BAKER (1917), 45 N. B. R. 201.—CAN.

PART III. SECT. 5, SUB-SECT. 7.—G.
o. *Dominion census.*]—Judicial notice will be taken of a Dominion

census.—It. v. RHAMAT ALI (No. 2) (1910), 15 B. C. R. 175.—CAN.

p. *Towns not thickly populated.*]—There was no evidence to show when the town was incorporated nor the present number of its inhabitants:—*Held:* the ct. could not take judicial notice of these matters, but could take

notice of the general condition of the province, & the towns generally were not thickly populated.—WILLIAMS v. NORTH BATTLEFORD (1911), 16 W. L. R. 391; 4 Sask. L. R. 75.—CAN.

q. *Scotch whisky—Intoxicating liquor.*]—The ct. will take judicial notice that Scotch whisky is an in-

FOULGER v. NEWCOMB (1867), L. R. 2 Exch. 327; 36 L. J. Ex. 169; 16 L. T. 595; 31 J. P. 503; 15 W. R. 1181.

Annotations:—*Reid*. *Miller v. David* (1874), 30 L. T. 58. *Mentd.* *Jones v. Jones*, [1916] 2 A. C. 481.

1335. Rabbit coursing—Whether nuisance.]—An owner let his field for the holding of rabbit coursing matches on Sundays & Wednesdays. The holding of the meetings was a nuisance to the adjoining owner:—*Held*: the fact that the rabbit coursing was an inevitable nuisance was a fact which ought to have been pleaded, & the ct. could not take judicial notice of such a fact, but it must be proved by evidence.—*AYERS v. HANSON*, *STANLEY & PRINCE* (1912), 56 Sol. Jo. 735.

1336. Impossibility of telling fortunes by stars.]—Applt. was convicted under Vagrancy Act, 1821 (c. 83), s. 4, which makes punishable as a rogue & vagabond "every person pretending or professing to tell fortunes . . . to deceive & impose on any of His Majesty's subjects." He had published advertisements in various newspapers offering to cast nativities, give yearly advice answer astrological questions. A detective wrote to him & received from him a circular setting forth applt.'s views of astrology as a science, & stating that by the positions of the planets in the nativity & their aspects to each other he was able to tell any applt.'s fortune in the various events of life in return for certain remuneration. He never actually told anything to the detective, & there was no evidence to show whether or not he believed in the truth of his professions:—*Held*: on this evidence applt. was rightly convicted.

In this case *res ipsa loquitur*. It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by knowing the hour & place of his birth & the aspect of the stars at such time. We do not live in times when any sane man believes in such a power (*DENMAN, J.*).—*PENNY v. HANSON* (1887), 18 Q. B. D. 478; 56 L. J. M. C. 41; 56 L. T. 235; 35 W. R. 379; 3 T. L. R. 409; 16 Cox, C. C. 173, D. C.

Annotations:—*Consd.* *Lewis v. Fermor* (1887), 18 Q. B. D. 532. *Distd.* *Davis v. Curry*, [1918] 1 K. B. 109.

1337. Wesleyan Methodist minister—Whether "office" within Municipal Corporation Act, 1882 (c. 50), s. 33.]—The name of applt. was on Division 3 of the overseers' list as entitled to be enrolled as a burgess in respect of the occupation of a dwelling-house; but he was objected to on the ground of short occupation. During the qualifying year applt., a Wesleyan Methodist minister, was appointed to a circuit by the Conference of the connection, & thereupon, entered upon the occupation of the dwelling-house, in question, which was the manse provided for the accommodation of one of the ministers of the circuit for the time being. The manse was vested in trustees, but the deeds creating the trust were not produced at the Registration Ct., & applt.'s name was struck off the list. Subsequently, however, copies of the deeds were shown to the revising barrister, who, at the request of the solrs. for applt., annexed such copies to the case stated by him for the ct., the solrs. undertaking to produce the originals if required:—*Held*: (1) the revising barrister could only decide on the evidence before him at the

hearing, & on appeal from his decision the ct. could only consider whether his decision was right on such evidence; (2) there was no evidence before the revising barrister to show that the position of applt. was an "office" within the above Act, & neither the revising barrister nor the ct. could take judicial notice that the position of a Wesleyan Methodist minister was an "office" & the revising barrister was, therefore, right in removing applt.'s name, from the list.—*WILLIAMS v. BLAKELEY* (1902), 88 L. T. 231; 67 J. P. 11; 51 W. R. 127; 47 Sol. Jo. 51; 1 L. G. R. 69; 1 Smith, Reg. Cas. 304, D. C.

1338. Standard of life among working population of district—Of county court judge.]—*PEARCE v. BOLCKOW, VAUGHAN & CO., LTD., YOUNG v. LONDONDERRY COLLIERIES, LTD.* (No. 1) (1921), 60 Sol. Jo. 123, C. A.

SUB-SECT. 8.—OFFICIAL SEALS AND SIGNATURES.

A. Seals.

1333. The Great Seal.]—*LANE'S CASE* (1588), 2 Co. Rep. 16 b; 76 E. R. 423; *sub nom.* *SMITH & LANE'S CASE*, 1 Leon. 170.

Annotations:—*Reid*. *Mounson v. Bourn* (1639), Cro. Car. 527. *Mentd.* *Kemp v. Barnard* (1638), Cro. Car. 513; *Field v. Boethsby* (1658), 2 Sid. 137; *Randall v. Riddle* (1673), Freem. K. B. 345; *Shaftesbury's Case* (1677), 1 Mod. Rep. 144; *Bankers' Case* (1695), Skin. 601; *Hayward v. Kinsey* (1701), 12 Mod. Rep. 568; *Doe d. Biddulph v. Poole* (1818), 11 Q. B. 713; *Cobbett v. Hudson* (1849), 13 Q. B. 497.

1340. Seal of Exchequer.]—*LANE'S CASE* (1588), 2 Co. Rep. 16 b; 76 E. R. 423; *sub nom.* *SMITH & LANE'S CASE*, 1 Leon. 170.

Annotations:—*Reid*. *Kemp v. Barnard* (1638), Cro. Car. 513; *Mounson v. Bourn* (1639), Cro. Car. 527. *Mentd.* *Field v. Boethsby* (1658), 2 Sid. 137; *Randall v. Riddle* (1673), Freem. K. B. 345; *Shaftesbury's Case* (1677), 1 Mod. Rep. 144; *Bankers' Case* (1695), Skin. 601; *Hayward v. Kinsey* (1701), 12 Mod. Rep. 568; *Doe d. Biddulph v. Poole* (1818), 11 Q. B. 713; *Cobbett v. Hudson* (1849), 13 Q. B. 497.

1341. —.]—An exemplification of a record of the Ct. of Exch., under the seal of that ct., is admissible evidence.—*TOOKER v. BRAUFORT (DUKE)* (1757), 1 Burr. 146; Say. 297; 97 E. R. 238.

Annotations:—*Reid*. *R. v. Eriswell* (1790), 3 Term Rep. 707; *Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520. *Mentd.* *Norwich v. Berry* (1769), 4 Burr. 2277; *Brisco v. Lomax* (1838), 8 Ad. & El. 198; *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Blandy-Jenkins v. Dunraven* (1898), 92 J. P. 667.

1342. Privy seal.]—*LANE'S CASE* (1588), 2 Co. Rep. 16 b; 76 E. R. 423; *sub nom.* *SMITH & LANE'S CASE*, 1 Leon. 170.

Annotations:—*Reid*. *Mounson v. Bourn* (1639), Cro. Car. 527. *Mentd.* *Kemp v. Barnard* (1638), Cro. Car. 513; *Field v. Boethsby* (1658), 2 Sid. 137; *Randall v. Riddle* (1673), Freem. K. B. 345; *Shaftesbury's Case* (1677), 1 Mod. Rep. 144; *Bankers' Case* (1695), Skin. 601; *Hayward v. Kinsey* (1701), 12 Mod. Rep. 568; *Doe d. Biddulph v. Poole* (1818), 11 Q. B. 713; *Cobbett v. Hudson* (1849), 13 Q. B. 497.

1343. Privy Signet.]—*LANE'S CASE* (1588), 2 Co. Rep. 16 b; 76 E. R. 423; *sub nom.* *SMITH & LANE'S CASE*, 1 Leon. 170.

Annotations:—*Reid*. *Mounson v. Bourn* (1639), Cro. Car. 527. *Mentd.* *Kemp v. Barnard* (1638), Cro. Car. 513; *Field v. Boethsby* (1658), 2 Sid. 137; *Randall v. Riddle* (1673), Freem. K. B. 345; *Shaftesbury's Case* (1677),

(1913), 1 L. R. 36 Mud. 418.—**IND.**

a. Dangerous work—To oil machinery.]—The ct. will not take judicial notice that it is a dangerous work to oil machinery.—*SMYLY v. GLASGOW & LONDONDERRY STEAM PACKET CO.* (1868), 16 W. R. 483.—**IR.**

toxicating liquor.—*MCPHERSON v. MORRISON* (1915), 32 W. L. R. 385; 9 W. W. R. 164; 25 Can. Crim. Cas. 60.—**CAN.**

r. Working of telephone system.]—The ct. will take judicial notice of the working of a telephone system with which it is familiar.—*FIDELITY OIL &*

GAS CO. v. JANSE DRILLING CO. (1916), 34 W. L. R. 370; 10 W. W. R. 533; 9 Alta. L. R. 430.—**CAN.**

s. Rule of the road.]—*OSBORNE v. LANDIS* (1916), 34 W. L. R. 118; 10 W. W. R. 226.—**CAN.**

t. Facts of public history.]—*AMBALAM PAKKIYA UDAYAN v. BARTLE*

Sect. 5.—Judicial notice: Sub-sect. 8, A. & B.]

1 Mod. Rep. 144; Bankers' Case (1695), Skin. 601; Hayward v. Kinsey (1701), 12 Mod. Rep. 568; Doe d. Biddulph v. Poole (1848), 11 Q. B. 713; Cobbett v. Hudson (1849), 13 Q. B. 497.

1344. Seal of Brecknock—Created by statute.]—OLIVE v. GWIN (1658), Hard. 118; 2 Sid. 145; 145 E. R. 409.

1345. Court of Admiralty.]—The exemplification of a sentence in the Admty. is conclusive evidence of the point decided by the sentence.—GREEN v. WALLER (1703), 2 Ld. Raym. 891; 92 E. R. 96.

*Annotations:—*Mentd. Bellow v. Aylmer (1719), 1 Stra. 188; Henriques v. Dutch West India Co. (1729), 2 Stra. 807; Lottian v. Henderson (1803), 3 Bos. & P. 499.

1346. Insolvent Debtors' Court.]—If a document be produced under 7 Geo. 4, c. 57, s. 76, with a seal purporting to be the seal of the Insolvent Debtors' Ct., it is not necessary to prove that the seal is actually the seal of the Ct.—DOE d. DUNCAN v. EDWARDS (1839), 9 Ad. & El. 554; 1 Per. & Dav. 408; 2 Will. Woll. & H. 12; 8 L. J. Q. B. 98; 3 Jur. 41; 112 E. R. 1322.

1347. Mayor's Court, London.]—A judge at *nisi prius* will take judicial notice of the custom of foreign attachment, & of the seal affixed to proceedings in the Mayor's Ct., London.—JEFFS v. DAY (1805), 12 L. T. 852, N. P.

1348. City of London.]—The common seal of the City proves title in ejectment.—DOE d. WOODMASS v. MASON (1703), 1 Esp. 53, N. P.

1349. Bank of England.]—Ejectment being brought on two demises, & a verdict being taken for pltf. on one, & for deft. on the other, & leave being reserved to pltf. to move to enter a verdict for him on the second demise, he is not precluded from doing so by his having obtained early execution on the verdict on the first demise, & possession having been taken under it. To an indenture of feoffment by the Bank of England, the seal of the bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the ct. of directors of the Governor & Co. of the Bank of England, Dec. 12, 1833. J., Secretary":—*Held*: J. was not an attesting witness, & the execution of the feoffment might be proved by the seal, without calling J.—DOE d. BANK OF ENGLAND v. CHAMBERS (1836), 4 Ad. & El. 410; 6 Nev. & M. K. B. 539; 1 Har. & W. 749; 5 L. J. K. B. 123; 111 E. R. 841.

*Annotation:—*Exp'd. Deffell v. White (1866), L. R. 2 C. P. 144.

1350. Notarial seal—Foreign notary.]—A notarial protest under seal is no evidence that a foreign bill of exchange has been presented for payment in England.—CHESMER v. NOYES (1815), 4 Camp. 129, N. P.

1351. ———.]—The notarial certificate & seal verified by the British consul, whose handwriting is sworn to, of the execution of a power of attorney, executed in America to a person in London, to receive money here for the party abroad, is not evidence in a ct. of law of the due execution of the instrument, without the affidavit of the subscribing witness.—*Ex p.* CHURCH (1822), 1 Dow. & Ry. K. B. 324.

1352. ———.]—Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen, the signature of the notary must be verified before the affidavit can be filed, unless by consent; & the ct. cannot take judicial cognisance of the notarial seal alone as a sufficient verification.—*Re* EARL'S TRUST (1858), 4 K. & J. 300; 70 E. R. 126, L. J.

*Annotation:—*N.F. *Re* Goff's Estate, Siddal v. Nicholson (1866), 14 L. T. 727.

1353. — English notary—Protest of foreign bill.]—CHESMER v. NOYES, No. 1350, *ante*.

1354. — Colonial notary.]—A petition was made by A., resident in a British colony, that a sum of money might be paid to his agent appointed by his power of attorney. A power of attorney to that effect was executed by A. in the presence of a notary public resident in the colony, who certified such signature by his official seal:—*Held*: such authority was sufficient under 15 & 16 Vict. c. 86, s. 22.—ARMSTRONG v. STOCKHAM (1854), 3 Eq. Rep. 130; 24 L. J. Ch. 176.

*Annotation:—*Folld. *Re* Goff's Estate, Siddal v. Nicholson (1866), 14 L. T. 727.

1355. ———.]—By the French Law prevailing in Lower Canada a certificate of a notary public in the Province of Lower Canada is sufficient evidence in the cts. of that Province of the due execution of the instrument referred to in the certificate, & identity of the parties thereto, but the certificate of a notary public in Upper Canada, where the English Law prevails, will not be received in the cts. in Lower Canada *per se* as proof of due execution of an instrument, or of the identity of the parties; such fact must be established by evidence, as required by English Law. In a petitory action brought in the Superior Ct. in Lower Canada to recover land in that Province, the material evidence of title of pltf. consisted of a deed of sale by a devisee, whose husband's Christian name, as it was alleged, was wrongly described in the will of testator. The deed of sale was executed under a power of attorney, & the only evidence of the identity of the parties was the certificate of a notary in Upper Canada that such power was executed before him by the devisee & her husband. The cts. in Lower Canada refused to give effect to the certificate in the absence of proof of identity of the parties named therein, & dismissed pltf.'s action. On appeal to the Judicial Committee:—*Held*: this decision would be affirmed on the ground, of the absence of evidence of identity of the parties executing the power of attorney, as being those described in the will of testator, & the same weight of evidence in a ct. governed by the Law of France could not be given to the certificate of an English notary public as to a certificate of a French notary public.—NYE v. MACDONALD (1870), L. R. 3 P. C. 331; 7 Moo. P. C. C. N. S. 134; 39 L. J. P. C. 34; 23 L. T. 220; 18 W. R. 1075; 17 E. R. 52, P. C.

1356. ———.]—The execution of a release was attested by a notary in a colony. There was no evidence that the attestation was for the purpose of using the deed in ct.:—*Held*: nevertheless, it was a document to be used in ct. within 15 & 16 Vict. c. 86, s. 22, & the ct. would take judicial notice of the notary's seal & signature.—BROOKE v. BROOKE (1881), 17 Ch. D. 833; 50 L. J. Ch. 528; 44 L. T. 512; 30 W. R. 45.

*Annotation:—*Consd. *Re* Davies, Davies v. Atkinson, [1909] W. N. 212.

1357. ———.]—*Re* DAVIES, DAVIES v. ATKINSON, [1909] W. N. 212.

1358. — Channel Islands.]—An affidavit was sworn before magistrate, Jersey, & verified by notarial certificate & seal:—*Held*: it was sufficient without any affidavit sworn in this ct.—COLE v. SHERARD (1855), 11 Exch. 482; 25 L. J. Ex. 59; 26 L. T. O. S. 138; 4 W. R. 126; 156 E. R. 920.

Wafer seals, Great & Privy.]—*See* Crown Office Act, 1877 (c. 41), s. 4.

Seals, Great & Privy, of Duchy of Cornwall.]—*See* Duchy of Cornwall Management Act, 1863 (c. 49), s. 2.

Air Council.—See Air Force Constitution Act, 1917 (c. 51), s. 10.

Bankruptcy courts' judges & registrars.—See Bkpcy. Act, 1883 (c. 52), s. 142.

Board of Education.—See Board of Education Act, 1899 (c. 33), s. 7.

Central Office of Royal Court of Justice.—See R. S. C., Ord. 61, rr. 6, 7.

County Courts.—See County Courts Act, 1888 (c. 43), s. 180.

Court of Vice Warden of the Stannaries.—See Stannaries Act, 1836 (c. 106), s. 19.

District registries.—See Jud. Act, 1873 (c. 66), s. 61.

Divorces Court.—See Matrimonial Causes Act, 1857 (c. 85), s. 13.

Enrolment Office in Chancery.—See Petty Bag Act, 1849 (c. 109).

Local Government Board.—See Local Government Board Act, 1871 (c. 70), s. 5.

Minister of Labour.—See New Ministries & Secretaries Act, 1916 (c. 68), s. 11.

Minister of Pensions.—See Ministry of Pensions Act, 1916 (c. 65), s. 6.

Patent Office.—See Patents & Designs Act, 1907 (c. 29), s. 64.

Probate Court.—See Court of Probate Act, 1857 (c. 77), s. 22.

Record Office.—See Public Record Office Act, 1838 (c. 94), s. 11.

Treasury Solicitor.—See Treasury Solicitor Act, 1876 (c. 18), s. 1.

Persons authorised to administer oaths.—See Commissioners for Oaths Act, 1889 (c. 10), ss. 3, 6; Commissioners for Oaths Act, 1891 (c. 50), s. 2.

B. Signatures.

See Evidence Act, 1845 (c. 113), s. 2.

1359. Stamp on copy of judge's order.—The stamp upon the copy of a judge's order, being merely the mark of the judge's clerk, will not be judicially noticed by the ct.—*BARRETT NAVIGATION CO. OF PROPRIETORS v. SHOWER* (1810), 8 Dowl. 173; 9 L. J. Ex. 145.

1360. Commissioner for oaths in colony.—An affidavit sworn in a colony before an officer describing himself as "a comr. for taking affidavits" is receivable, whether sworn antecedently to the act or not, on the ground that the ct. is to take

judicial notice of the signature of any person lawfully authorised to administer oaths.—*ANON.* (1853), 1 W. R. 186.

1361. Of judge stamped on order.—When an order purporting to be made by a judge at chambers, & bearing the signature of the judge impressed by a stamp, in the usual way, transferring a cause from the Superior Ct. to the county ct., is served on the judge of the county ct., he is bound to obey the order, & he cannot inquire into the circumstances under which it was made.—*BLADES v. LAWRENCE* (1874), L. R. 9 Q. B. 374; 43 L. J. Q. B. 133; 30 L. T. 378; 22 W. R. 613.

Annotations.—*Refd.* R. v. Mellor, [1914] 2 K. B. 588. *Mentd.* Howd v. Graves (1885), 1 T. L. R. 515; Kutner v. Phillips, [1891] 2 Q. B. 267; De Beauvais v. Green (1906), 22 T. L. R. 816.

1362. Of Public Prosecutor.—Without laying down any general rule as to how the consent, required by Prevention of Crime Act, 1908 (c. 59), s. 10 (4), of the Director of Public Prosecutions to a charge of being a habitual criminal being inserted in an indictment ought to be proved, it will be sufficient if some person who has been in correspondence with the Public Prosecutor is called to say that he received the document containing the consent in the ordinary course of correspondence & believes it to be signed by the Director of Public Prosecutions, but it is not necessary to call a witness who has seen him write.—*R. v. TURNER*, [1910] 1 K. B. 316; 79 L. J. K. B. 176; 102 L. T. 367; 26 T. L. R. 112; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103; *sub nom.* R. v. TURNER, R. v. WALLER, 74 J. P. 81; 54 Sol. Jo. 161, C. C. A.

Annotations.—*Refd.* R. v. Waller, [1910] 1 K. B. 364; R. v. Harris, [1922] 2 K. B. 543. *Mentd.* R. v. Johnson (1909), 3 Cr. App. Rep. 168; R. v. Condon (1910), 4 Cr. App. Rep. 109; R. v. Fawcett (1910), 74 J. P. 444; R. v. Marshall (1910), 74 J. P. 381; R. v. Moran (1910), 5 Cr. App. Rep. 219; R. v. Walker (1910), 27 T. L. R. 51; Brown v. Black, [1911] 1 K. B. 975; R. v. Summers (1914), 10 Cr. App. Rep. 11; R. v. Coney (1923), 92 L. J. K. B. 915; R. v. Dean (1924), 18 Cr. App. Rep. 21.

1363.—*R. v. WALLER*, [1910] 1 K. B. 364; 79 L. J. K. B. 181; 102 L. T. 400; 26 T. L. R. 142; 22 Cox, C. C. 319; 3 Cr. App. Rep. 213; *sub nom.* R. v. TURNER, R. v. WALLER, 74 J. P. 81; 54 Sol. Jo. 161, C. C. A.

Annotations.—*Refd.* R. v. Bates (1911), 80 L. J. K. B. 507; R. v. Westwood (1913), 8 Cr. App. Rep. 273; R. v. Metz (1915), 84 L. J. K. B. 1462. *Mentd.* R. v. Rowland (1909), 3 Cr. App. Rep. 277; R. v. Baggott (1910), 74

PART III. SECT. 5, SUB-SECT. 8.—B.

b. New South Wales officials.—*Under Federal Council Act, 1886.*—The above Act enabling the ct. to take judicial notice of signatures of certain officials therein mentioned, does not apply to officials in the colony of New South Wales, & does not enable the ct. to receive in evidence certified copies of documents signed by such officials on their mere production.—*PICTURESQUE ATLAS CO., LTD. v. SEARLE* (1892), 18 V. L. R. 633.—**AUS.**

c. Deputy Registrar - General.—The ct. cannot take judicial notice of the signature of the Deputy Registrar-General & an indorsement made by him on the back of a stock mtge. of the receipt of a memorial of the document is no evidence of registration without proof of the signature.—*SUTHERLAND v. COOLEY* (1898), 24 V. L. R. 410.—**AUS.**

d. Foreign consul in foreign country.—*LE LEUNG SHI v. LO LIM YUK* (1912), 7 Hong Kong L. R. 66.—**HONG KONG.**

e. Of Minister of Crown.—A ct. will judicially notice a signature purporting to be that of a Minister of the Crown.—*HOLLAND v. JONES* (1917),

23 C. L. R. 149.—**AUS.**

f. Minister of Defence or Attorney-General.—By War Precautions Act it is enacted that no offence against the Act shall be prosecuted summarily without the written consent of the A.-G. or Minister of Defence or a person authorised in writing by either of them. The information bore on its margin the words "I consent to this prosecution, G. F. P."—*Held*: as the proper conclusion from the document itself was that the signature was appended as an official act, it was to be regarded as an official signature, & therefore Evidence Act, 1905, s. 4 (a), which requires judicial notice to be taken of certain official signatures, applied.—*HOLLAND v. JONES*, [1917] V. L. R. 392.—**AUS.**

g. Signature of person not registrar.—The ct. cannot take judicial notice that the person who signs a certificate of registry, for a licence to sell the real estate, the latter indorsed upon a deed, was not the registrar at the time the deed was recorded, & in the absence of any such proof, it must be presumed that the registrar rightly certified.—*DOE d. ROBINSON v. CHANSEY* (1867), 1 Han. 50. —**CAN.**

h. Registrar of College of Physicians & Surgeons, Saskatchewan.—Plff. had sufficiently proved his status as a registered medical practitioner by the production of a certificate under the hand of the registrar of the College of Physicians & Surgeons of Saskatchewan, which expressly stated that he was registered, & by the production by the registrar of the *de facto* registrar of the college, upon which plff.'s name appeared, although the register was open to some objection as not having been formally accepted by the College Council.—*SANDWITH v. COWDER & GARRIHOE* (1911), 17 W. L. R. 1; 4 Sask. L. R. 12.—**CAN.**

k. Signature of Master in Chancery.—To affidavit.—A verification, in Ireland, of the signature of a Master in the English Ct. of Ch., to an affidavit made before him to the execution of a power of attorney.—*Held*: sufficient, without the production of an affidavit here, by some person who had seen the affidavit sworn before such master.—*KNOX v. KNOX* (1835), 3 Ir. L. Itcc. N. S. 185.—**IR.**

l. Signature of Secretary of State.—*STEVENSON v. ROGER*, [1915] S. C. (J). 21.—**SCOT.**

Sect. 5.—Judicial notice: Sub-sect. 8, B. Sect. 6: Sub-sects. 1 & 2.]

J. P. 213; R. v. Condon (1910), 4 Cr. App. Rep. 109; R. v. Marshall (1910), 74 J. P. 381; R. v. Everitt (1911), 6 Cr. App. Rep. 267.

1364. Of Attorney-General.]—The old practice was that the A.-G.'s clerk went down to the assizes to prove his signature to the fiat. The consent of the A.-G. was never taken for granted but I do not say that it is now necessary on every occasion to give formal proof of the A.-G.'s signature (LORD ALVERSTONE, C.J.).—R. v. BATES, [1911] 1 K. B. 964; 80 L. J. K. B. 507; 104 L. T. 688; 75 J. P. 271; 27 T. L. R. 314; 55 Sol. Jo. 410; 22 Cox, C. C. 459; 6 Cr. App. Rep. 153, C. C. A.

*Annotation:—*Refd. R. v. Metz (1915), 81 L. J. K. B. 1462.

See, also, Nos. 1350–1358, ante.

SECT. 6.—PRESUMPTIONS.

SUB-SECT. 1.—IN GENERAL.

1365. Nature of presumptions.]—There are presumptions of several sorts, some are violent, & some probable: A violent presumption that such a man hath done such a fact must be when a fact is done & no other can be thought of to have done it: as if a man be killed in a room & another man comes out of the room with a bloody sword in his hand & nobody else was in the room. Here is a plain fact done, & though nobody can swear they saw this man do the fact, that he killed him, yet from this evidence there is a very strong proof. . . . But a probable presumption alone is no proof to rely upon; where indeed there is some proof of witnesses positive & the presumption is probable that is added thereto, it may be a good fortifying evidence, but it signifies very little of itself for a foundation (HOLT, C.J.).—BATH & MOUNTAGUE'S CASE (1693), as reported in 3 Cas. in Ch. 55, 96; 22 E. L. 963, 988.

*Annotations:—*Mentd. Bertie v. Faulkland (1697), 3 Cas. in Ch. 129; Piggott v. Penrice (1715), 1 Com. 250; Bagot v. Oughton (1726), Fortes. Rep. 332; Fitzgerald v. Fauconberge (1731), Fitz-G. 207; Hervey v. Hervey (1739), 1 Atk. 561; Bennet v. Vade (1742), 2 Atk. 324; Middleton v. Pryor (1760), Amb. 828; Chapman v. Gibson (1791), 3 Bro. C. C. 229; Griffin v. Nanson (1798), 4 Ves. 344; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Haynes v. Haynes (1861), 1 Drew. & Sm. 426.

1366. —.]—It has been said that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence & yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil & criminal cases, & the rules of evidence prescribe the best course to get at truth, they must be & are the same in all cases, & in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which ets. of justice do not act upon this principle. Lord Mansfield gives the reason for this. "As it seldom happens that absolute

certainty can be obtained in human affairs, therefore reason & public utility require that judges & all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side & on the other. In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to incite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, & put it on the prisoner, by extracting facts in cross-examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary & highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, if the libel is calculated to produce the effect charged to be intended, you presume the intent. It, therefore, appears to me quite absurd to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised as to the *corpus delicti*, that it ought to be strong & cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall (BEST, J.).—R. v. BURDETT (1820), 4 B. & Ald. 95; 1 State Tr. N. S. 1; 106 E. R. 873.

*Annotations:—*Refd. Stikeman v. Dawson (1847), 1 De G. & Sm. 90; R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507. Mentd. Pearson v. McGowan (1825), 5 Dow. & Ry. K. B. 616; Perkins's Case (1826), 1 Lew. C. C. 99; A.-G. v. Kenfeck (1837), 2 M. & W. 715; R. v. Lovett (1839), 9 C. & P. 462; Hall v. Story (1846), 16 M. & W. 63; R. v. Duffy (1849), 7 State Tr. N. S. 795; Doe d. Bennett v. Hale (1850), 15 Q. B. 171; R. v. Meany (1867), 15 W. L. 1082; Cherry v. Thompson (1872), 41 L. J. Q. B. 243; R. v. Cooper (1875), 45 L. J. M. C. 15; R. v. Rogers (1877), 3 Q. B. D. 28; Bree v. Marescaux (1881), 7 Q. B. D. 434; R. v. Holmes (1883), 12 Q. B. D. 23; Tozler v. Hawkins (1885), 15 Q. B. D. 650; Broad v. Perkins (1888), 4 T. L. R. 545; R. v. Ellis, [1899] 1 Q. B. 230; R. v. De Marny, [1907] 1 K. B. 388.

1367. Effect of presumptions—To prove negative.]—Upon the hearing of a summons under Vaccination Act, 1867 (c. 81), s. 31, against the parent of a child for non-compliance with an order of justices directing him to have his child vaccinated, the burden of proving non-compliance is upon the prosecution. Evidence that the certificate of vaccination required by the Act has not been received by the proper officer is *prima facie* evidence from which non-compliance with the vaccination order may properly be presumed.

Generally the only way of proving a negative is by presumption, & the ct. has to apply the proper presumption. In the case of vaccination, machinery is provided under the Act whereby, if a child is vaccinated, the fact of vaccination is notified by various persons, & if no notification is made it can only be because some one has omitted to do his duty. The fact therefore that no notification of vaccination has been received by the proper officer is to my mind *prima facie* evidence sufficient to satisfy the burden of proving the negative proposition that the child has not been vaccinated. That seems to me to be the only possible conclusion. Whether this is the best proof is a question with which we have nothing

to do. If the public vaccinator were called, it would still be possible that another practitioner might have vaccinated the child, & the justices would still have to rely upon a presumption, & might refuse to act upon the presumption arising from the evidence of the public vaccinator (CHANNELL, J.).—*OVER v. HARWOOD*, [1900] 1 Q. B. 803; 69 L. J. Q. B. 272; 64 J. P. 326; 48 W. R. 608; 16 T. L. R. 163, D. C.

SUB-SECT. 2.—IGNORANTIA JURIS NON EXCUSAT.

1368. General rule.—MILDMAY'S CASE (1584), as reported in 1 Co. Rep. 175 a; 76 E. R. 379.

Annotations.—**Refd.** Poole v. Whitcomb (1862), 12 C. B. N. S. 770. **Mentd.** *Parrot's Case* (1591), 1 And. 259; *Bedell's Case* (1607), 7 Co. Rep. 40 a; *Cross v. Faustenditch* (1608), Cro. Jac. 180; *Colt & Glover v. Coventry & Lichfield (Bp.)* (1612), Hob. 140; *Harpur's Case* (1615), 11 Co. Rep. 23 a; *Howel v. Samday* (1615), 1 Brownl. 179; *Miller & Johns v. Manwaring* (1634), Cro. Car. 397; *Foster v. Foster* (1661), 1 Keb. 160; *Bate v. Amherst & Norton* (1663), T. Raym. 82; *Smith v. Ashton* (1675), 1 Cas. in Ch. 263; *Ratcliffe's Case* (1720), 1 Stra. 267; *Goodtitle v. Pettoc* (1723), Kel. W. 107; *Sargent v. Reed* (1745), 2 Stra. 1228; *Doe d. Milburn v. Salkeld* (1755), Willes, 673; *Rowe v. Roach* (1813), 1 M. & S. 304; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390; *Peover v. Hassel* (1861), 1 John. & H. 341; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260.

1369. —.]—If the law was mistaken the rule applies that *ignorantia juris non excusat* (BULLER, J.).—LOWRY v. BOURDIEU (1780), 2 Doug. K. B. 468; 99 E. R. 299.

Annotations.—**Consd.** *Bilbie v. Lumley* (1802), 2 East, 469; *Brisbane v. Dacres* (1813), 5 Taunt. 143. **Mentd.** *Andrew v. Fletcher* (1789), 3 Term Rep. 266; *Munt v. Stokes* (1792), 4 Term Rep. 561; *Tappenden v. Randall* (1801), 2 Bos. & P. 467; *Polze v. Thompson* (1808), 1 Taunt. 121; *Aubert v. Walsh* (1810), 3 Taunt. 277; *Martin v. Morgan* (1819), 1 Brod. & Bing. 289; *Hastelow v. Jackson* (1828), 8 B. & C. 221; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620.

1370. —.]—Money paid by one with full knowledge, or the means of such knowledge in his hands, of all the circumstances cannot be recovered back again on account of such payment having been made under an ignorance of the law.

Every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried (LORD ELLENBOROUGH, C.J.).—*BILBIE v. LUMLEY* (1802), 2 East, 469; 102 E. R. 448.

Annotations.—**Foldd.** *Brisbane v. Dacres* (1813), 5 Taunt. 143. **Apid.** *East India Co. v. Tritton* (1824), 3 B. & C. 280. **Refd.** *Lothian v. Henderson* (1803), 3 Bos. & P. 499; *Forrester v. Pigou* (1813), 1 M. & S. 9; *Currie v. Gould* (1817), 2 Madd. 163; *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37; *Martin v. Morgan* (1819), 1 Brod. & Bing. 289; *Morgan v. Palmer* (1824), 2 B. & C. 729; *Smith v. Alsop* (1824), McCle. 622; *Bramston v. Robins* (1826), 12 Moore, C. D. 68; *Young v. Timmins* (1831), 1 Tyr. 226; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Kelly v. Solari* (1841), 9 M. & W. 54; *Bell v. Gardiner* (1842), 4 Man. & G. 11; *Re Alexander, Ex p. Sanderson* (1856), 28 L. T. O. S. 133; *Re Eaton, Ex p. Eaton Assignees* (1856), 28 L. T. O. S. 178. **Mentd.** *Hales v. Esdaile* (1860), 15 Q. B. 384; *Baylis v. London & North Western Ry. Co. v. Swainson* (1847), 4 Ry. & Can. Cas. 565.

1371. —.]—The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said that he knew he was liable, & if the acceptor did not pay

it, he would:—*Held*: he was bound by such promise.

Here debt. had made the promise, with a full knowledge of the circumstances, three months after the bill had been dishonoured, & could not now defend himself upon the ground of his ignorance of the law when he made the promise (*per Cur.*).—*STEVENS v. LYNCH* (1810), 12 East, 38; 104 E. R. 16.

Annotations.—**Refd.** *Currie v. Gould* (1817), 2 Madd. 163; *Stewart v. Stewart* (1839), 6 Cl. & Fin. 911; *Southal. v. Rigg, Forman v. Wright* (1851), 20 L. J. C. P. 1451. **Mentd.** *Urquhart v. Butterfield* (1887), 57 L. J. Ch. 521.

1372. —.]—If a person with knowledge of the facts, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compellable to pay, he cannot upon discovering what his legal right was recover it back.

Money which is paid to a man who claims it as a right with a knowledge of all the facts, cannot be recovered back (GIBBS, J.).—*BRISBANE v. DACRES* (1813), 5 Taunt. 143; 128 E. R. 641.

Annotations.—**Refd.** *Andrew v. Hancock* (1819), 1 Brod. & Bing. 37; *Dow v. Parsons* (1819), 2 B. & Ald. 562; *Goodman v. Sayers* (1820), 2 Jac. & W. 249; *Morgan v. Palmer* (1824), 2 B. & C. 729; *Smith v. Alsop* (1824), McCle. 622; *Bramston v. Robins* (1826), 4 Bing. 11; *Wilson v. Way* (1837), 1 Jur. 637; *Parker v. G. W. Ry.* (1844), 7 Man. & G. 253; *Re Queen Dowager's Annuity, R. v. Treasury Lords Comrs.* (1851), 15 Jur. 767; *Miles v. Scotting* (1885), Cal. & El. 491; *Maskell v. Horner*, [1915] 3 K. B. 106. **Mentd.** *Hatchwell v. Cooke* (1816), 2 Marsh. 293; *Hales v. Freeman* (1819), 1 Brod. & Bing. 391; *Bayley v. Wilkins* (1849), 7 C. B. 886; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; *King-Hall & Heneage v. Standard Bank of South Africa* (1919), 88 L. J. K. B. 1058.

1373. —.]—The money was paid by pltf. not on a mistake of fact but of law; the case of *Bilbie v. Lumley*, No. 1370, *ante*, is therefore sufficient to dispose of this question (HOLROYD, J.).—*EAST INDIA CO. v. TRITTON* (1824), 3 B. & C. 280; 5 Dow. & Ry. K. B. 214; 3 L. J. O. S. K. B. 24; 107 E. R. 738.

Annotation.—**Mentd.** *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623.

1374. —.]—It is a rule not that every man is supposed to know the law, but that a person cannot be allowed in a ct. of justice to say that he was ignorant of it (MARTIN, B.).—*MALTRY v. MURRELLS* (1860), 5 Il. & N. 813; 29 L. J. Ex. 377; 2 L. T. 362; 157 E. R. 1405.

1375. Application of rule—Acts of Parliament.—The fact of a defence to a bill being founded on a great many Acts of Parliament, which it was stated by affidavit must be perused & considered before the answer could be put in, is not sufficient excuse for delay in putting in such answer, & an order of the master allowing six weeks further time discharged on application to the ct.

The ct. presumes that counsel know Acts of Parliament; indeed, every one is presumed to know the law; at all events, the solrs. on the line of the railway must be well aware of the powers of the co. under their several Acts, & nothing is easier than access to Acts of Parliament.—*LONDON & NORTH WESTERN RY. CO. v. SWAINSON* (1847), 4 Ry. & Can. Cas. 565.

1376. —.]—Where a co. is created by Act of Parliament, with liabilities & duties cast upon it, & privileges & rights granted to the persons dealing with it, the party imposing duties on the co. must be taken to know the provisions of the statute, although it be a private Act (ERLE, J.).—

PART III. SECT. 6, SUB-SECT. 2.

1368 i. General rule.—Every man is supposed to know the law. *It v. THOMPSON* (1896), 2 Terr. L. R. 383.—CAN.

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m. Application of rule—Only to liability of person whose knowledge is in question.—The maxim that every man is presumed to know the law is limited to the determination of the civil or criminal liability of the person whose

knowledge is in question. It cannot legitimately be made use of where the parties are different & distinct from him.—*EAST INDIAN RY. CO. v. KALLY DASS MOOKERJEE* (1899), 1 L. R. 26 Cal. 465.—IND.

Sect. 6.—Presumptions: Sub-sects. 2, 3, 4 & 5.]

CAHILL v. LONDON & NORTH WESTERN RY. CO. (1861), 10 C. B. N. S. 154; 30 L. J. C. P. 289; 4 L. T. 246; 7 Jur. N. S. 1164; 9 W. R. 653; 142 E. R. 409; *affd.* (1862), 13 C. B. N. S. 818, Ex. Ch. *Annotations*.—**Mentd.** *Phelps v. L. & N. W. Ry.* (1865), 12 L. T. 496; *Austin v. G. W. Ry.* (1867), 8 B. & S. 327; *Macrow v. G. W. Ry.* (1871), L. R. 6 Q. B. 612; *Wilkinson v. L. & Y. Ry.*, [1907] 2 K. B. 222.

1377. — To private rights.]—It is said "*Ignorantia juris haud excusat*"; but in that maxim the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application (**LORD WESTBURY**).—**COOPER v. PHIBBS** (1867), L. R. 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049, H. L.

Annotations.—**Consd.** *Galway County Election Petn., Trench v. Nolan* (1872), 27 L. T. 69; *Jones v. Clifford* (1876), 3 Ch. D. 779; *Allcard v. Walker*, [1896] 2 Ch. 369. **Refd.** *Daniell v. Sinclair* (1881), 50 L. J. P. C. 50; *Soper v. Arnold* (1887), 57 L. J. Ch. 145; *Re Oliver's Settlement*, *Evered v. Leigh*, [1905] 1 Ch. 191. **Mentd.** *O'Brien v. Hearn* (1870), 18 W. R. 514; *Allen v. Richardson* (1879), 13 Ch. D. 524; *Blenkhorn v. Penrose* (1880), 43 L. T. 668; *Briggs v. Massey* (1881), 29 W. R. 926; *Bettyes v. Maynard* (1882), 46 L. T. 766; *General Auction Estate & Monetary Co. v. Smith* (1891), 40 W. R. 106; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273; *Debenham v. Sawbridge*, [1901] 2 Ch. 98; *Scott v. Coulson*, [1903] 2 Ch. 249; *Carnell v. Harrison*, [1916] 1 Ch. 328.

1378. ——The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief.—**BEAUCHAMP (EARL) v. WINN** (1873), L. R. 6 H. L. 223; 22 W. R. 193, H. L.

Annotations.—**Consd.** *Daniell v. Sinclair* (1881), 6 App. Cas. 181. **Refd.** *Barrow v. Isaacs*, [1891] 1 Q. B. 417. **Mentd.** *Robinson v. Duleep Singh* (1879), 11 Ch. D. 798; *Bettyes v. Maynard* (1882), 46 L. T. 766; *Wilding v. Sanderson* (1897), 77 L. T. 57; *Stanley v. Nuneaton Corp.* (1913), 108 L. T. 986.

1379. — Knowledge of voters of disqualification of candidate.]—At the election of town councillors in a borough not divided into wards, there were four vacancies & five candidates. B., one of the four who had a majority of votes, was the mayor, & acted as returning officer, & was therefore incapable of being elected:—**Held**: the mere knowledge on the part of the electors who voted for B. that he was mayor & returning officer, did not amount to knowledge that he was disqualified in point of law as a candidate, & therefore, their votes were not thrown away, so as to make the election fall on the fifth candidate.—**R. v. TEWKESBURY CORPN.** (1868), L. R. 3 Q. B. 629; 9 B. & S. 683; 37 L. J. Q. B. 288; 18 L. T. 851; 32 J. P. 580; 16 W. R. 1200.

Annotations.—**Consd.** *Galway County Election Petn., Trench v. Nolan* (1872), 27 L. T. 69; *Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626; *Etherington v. Wilson* (1875), L. R. 20 Eq. 606. **Refd.** *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79; *Cork County (Eastern Division) Case* (1911), 6 O'M. & H. 318. **Mentd.** *R. v. Bangor Corp.* (1886), 56 L. T. 434.

1380. — Power to decline to answer criminal questions.]—The witness's knowledge of the law enabling him to decline to answer criminal questions must be presumed. "*Ignorantia juris non excusat*."—**R. v. COOTE** (1873), L. R. 4 P. C.

PART III. SECT. 6, SUB-SECT. 3.

1382 i. General rule.]—In an action against deft. who was a married man, for persuading plff. to go through a pretended marriage ceremony, & afterwards to cohabit with him:—**Held**: the presumption of innocence, that deft. had not been guilty of a crime, was an answer to any presumption of

a marriage ceremony to be drawn from the cohabitation proved.—**WRIGHT v. SKINNER** (1866), 17 C. P. 317.—**CAN.**

1382 ii. ——*Re WHITE, KERSTEN v. TANE* (1876), 24 Gr. 224.—**CAN.**

1382 iii. ——Fraud & dishonesty are not to be presumed on conjecture, however probable.—**IMDAD ALI v. MUSSUMAT KOOTRY BEGUM (1842), 6**

599; 9 Moo P. C. C. N. S. 463; 42 L. J. P. C. 45; 29 L. T. 111; 37 J. P. 708; 21 W. R. 553; 12 Cox, C. C. 557; 17 E. R. 587, P. C.

1381. — Duty to make full disclosure in divorce proceedings.]—Where a petitioner who had lived apart from his wife did not know & was not told that his own adultery, committed long after his wife left him, was a material fact which he ought to disclose at or before the hearing of his petition, the ct. refused to rescind the decree *nisi*, but ordered petitioner to pay the costs of the King's Proctor.—**HOOK v. HOOK & BROWN**, [1917] P. 56; 86 L. J. P. 41; 116 L. T. 383; 33 T. L. R. 181; 61 Sol. Jo. 284.

SUB-SECT. 3.—INNOCENCE.

1382. General rule.]—Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, & throws the burden of proving the negative on the party who insists on it.—**WILLIAMS v. EAST INDIA CO.** (1802), 3 East, 192; 102 E. R. 571.

Annotations.—**Appld.** *R. v. Hawkins* (1808), 10 East, 211. **Consd.** *Stikeman v. Dawson* (1847), 1 De G. & Sm. 90; *Brass v. Maitland* (1856), 6 E. & B. 470. **Refd.** *R. v. Haslingfield* (1814), 2 M. & S. 558; *Thornton v. Lance* (1815), 4 Camp. 231; *R. v. Twynning, Gloucestershire* (1819), 2 B. & Ald. 386; *Calder v. Rutherford* (1822), 3 Brod. & Bing. 302; *Pearce v. Whale* (1826), 7 Dow. & Ry. K. B. 512; *R. v. Whiston* (1836), 1 Har. & W. 696; *Newman v. Hardwicke* (1838), 2 J. P. 328; *Farrant v. Barnes* (1862), 11 C. B. N. S. 553; *Affalo v. Lawrence & Bullen*, [1903] 1 Ch. 318. **Mentd.** *Langridge v. Levy* (1837), 2 M. & W. 519; *Keates v. Cadogan* (1851), 15 Jur. 428; *Bamfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94.

1383. ——The presumption of law is that every person has conformed to the law till something appear to rebut that presumption.—**R. v. HAWKINS** (1808), 10 East, 211; 103 E. R. 755; *affd. sub nom.* **HAWKINS v. R.** (1813), 2 Dow, 124, H. L.

Annotations.—**Refd.** *R. v. Twynning, Gloucestershire* (1819), 2 B. & Ald. 386. **Mentd.** *R. v. Parry & Phillips* (1811), 14 East, 549; *Gosling v. Veley* (1853), 4 H. L. Cas. 679; *R. v. Bjornsen* (1865), 13 W. R. 664; *R. v. Tewkesbury Corp.* (1868), L. R. 3 Q. B. 629; *Galway County Election Petn., Trench v. Nolan* (1872), 27 L. T. 69; *Drinkwater v. Deakin* (1874), L. R. 9 C. P. 626; *Hobbs v. Morey* (1903), 89 L. T. 531.

1384. ——There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered.—**LAPSLEY v. GRIERSON** (1848), 1 H. L. Cas. 498; 9 E. R. 853, H. L.

Annotations.—**Consd.** *Breadalbane Case, Campbell v. Campbell* (1867), L. R. 1 S. & Div. 182. **Refd.** *R. v. Lumley* (1869), 17 W. R. 685.

1385. ——Entry will not be construed as tortious if it can be construed rightful.

No one shall be construed to have been acting tortiously if his conduct is consistent with his having acted rightfully; & no possession will be

W. R. 24; 3 Moo Ind. App. 1.—**IND.**

1382 iv. ——There is a presumption against crime & misconduct, & the more heinous & improbable a crime is, the greater is the force of the evidence required to overcome such presumption.—**WESTON v. PEARY MOHAN DASS** (1912), 1 L. R. 40 Calo. 898.—**IND.**

held adverse to the rightful claimant unless it is inconsistent with his claims (WOOD, V.-C.).—**THOMAS v. THOMAS** (1855), 2 K. & J. 79; 25 L. J. Ch. 159; 1 Jur. N. S. 1160; 4 W. R. 135; 69 E. R. 701.

Annotations:—*Apprvd.* **Corea v. Appuhamy**, [1912] A. C. 230. *Refd.* **Pelly v. Bascombe** (1863), 4 Giff. 390; Wall v. Stanwick (1887), 34 Ch. D. 763; **Tinker v. Rodwell** (1893), 69 L. T. 591; *Re Bliss*, **Bliss v. Bliss**, [1903] 2 Ch. 40; **Muttunayagam v. Brito**, [1918] A. C. 895.

1386. —[.]—The principle recognised in **Thomas v. Thomas**, No. 1385, *ante*, holds good. Possession is never considered adverse if it can be referred to a lawful title (*per* CUR.).—**COREA v. APPUHAMY**, [1912] A. C. 230; 81 L. J. P. C. 151; 105 L. T. 836, P. C.

Annotation:—*Apld.* **Muttunayagam v. Brito**, [1918] A. C. 895.

1387. —[.]—**MUTTUNAYAGAM v. BRITO**, [1918] A. C. 895; 87 L. J. P. C. 146; 119 L. T. 594, P. C.

1388. —[.]—Upon a claim in 1910 to set aside upon the ground of fraudulent misrepresentation a contract made in 1886, the general presumption which the law makes is in favour of the good faith & validity of transactions which have long stood unchallenged, & if the known facts & existing documents are, though such as to give rise to suspicion, nevertheless capable of a reasonable explanation, the ct. ought not to draw inferences against the integrity of persons who have long since been dead & cannot therefore defend themselves.—**VATCHER v. PAUL**, [1915] A. C. 372; 84 L. J. P. C. 86; 112 L. T. 737, P. C.

Annotation:—*Mentd.* *Re Wright*, **Hegan v. Bloor**, [1920] 1 Ch. 108; *Cochrane v. Cochrane*, [1922] 2 Ch. 230.

Criminal acts by infants between seven & fourteen.—*See* CRIMINAL LAW, Vol. XIV., pp. 53–55, Nos. 192–213.

SUB-SECT. 4.—CONTINUANCE OF STATE OF THINGS.

1389. Continuance of facts—Where lawful.—[.]—The law will presume a state of things to continue which is lawful in every respect, but if the continuance is unlawful it cannot be presumed (**POLLOCK, C.B.**).—**PRICE v. WORWOOD** (1859), 4 H. & N. 512; 28 L. J. Ex. 329; 33 L. T. O. S. 149; 5 Jur. N. S. 472; 7 W. R. 506; 157 E. R. 941.

Annotation:—*Mentd.* **Toleman v. Portbury** (1870), 22 L. T. 33.

1390. —[.]—**Possession of documents.**—[.]—The fact of a letter having been sent to a woman some years before her death, is not sufficient to raise a presumption that such letter is in the custody of her extrix, three or four years after, as testatrix might have destroyed it in her lifetime.—**DREW v. DURNBOROUGH** (1825), 2 C. & P. 198, N. P.

1391. —[.]—**Non-repair of leasehold premises.**—[.]—In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to show that the premises were not in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the deft. to give evidence that they have been put into repair before the right to re-enter accrued.—**DOE d. HEMMINGS v. DURNFORD** (1832), 2 Cr. & J. 607; 1 L. J. Ex. 251; 149 E. R. 280.

1392. —[.]—**Value of business.**—[.]—In an action for falsely representing that a good living might be got at a certain public-house; evidence that,

a year or two before pltf. took to it, some one else found it impossible to get a living:—*Held*: admissible, the character of the house not having since changed.—**PENN v. STEADMAN** (1861), 2 F. & F. 546, N. P.

1393. —[.]—**Absence of witness abroad.**—[.]—Proof to satisfy the ct. that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence is tendered, may be less stringent when the witness is resident abroad, than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose; & where the affidavit to found the order for the commission had stated that the object was to examine A., resident abroad, & the summons was served on the co-respondents:—*Held*: the presumption was that the witness continued abroad, unless the contrary were shown, & allowed the evidence to be used.—**MILLS v. MILLS, POLLACK v. POLLACK & DEANE & McNAMARA** (1861), 2 Sw. & Tr. 310; 30 L. J. P. M. & A. 183; 4 L. T. 479; 164 E. R. 1015.

1394. —[.]—**Religious opinions held.**—[.]—That disposes of a very large portion of the objections which were taken by deft. to the evidence that was admitted. Undoubtedly if he was right in contending that notwithstanding he had no religious belief, he could effectually take the oath under this statute, & therefore not be liable to the penalty for having voted, this evidence as to his religious belief which was given was wrong; but if the fifth count does state grounds for saying he incurred a penalty, then the evidence on the whole was right. . . . If evidence of what he said twenty or thirty years ago had been adduced, then the judges would have said the jury cannot reasonably infer from that, that this was his state of mind in Feb. 1884. But the facts relied on occurred in 1880, & that was *prima facie* strong evidence that that was his state of mind, & there was strong evidence therefore as to what was his state of mind in Feb. 1884 (**COTTON, L.J.**).—**A.-G. v. BRADLAUGH** (1885), 14 Q. B. D. 667; 51 L. J. Q. B. 205; 52 L. T. 589; 49 J. P. 500; 33 W. R. 673, C. A.

Annotations:—*Mentd.* *Re v. Hausmann* (1909), 73 J. P. 516; *Re Clifford & O'Sullivan*, [1921] 2 A. C. 570.

SUB-SECT. 5.—CONTINUANCE OF LIFE.

See Sub-sect. 6, *post*.

1395. Whether presumption exists—For seven years.—[.]—Where the ancestor died seised, leaving a son & daughter infants, & on the death of the ancestor a stranger entered, & the son soon after went to sea, & was supposed to have died abroad within age:—*Held*: the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years, more than twenty years having in the whole elapsed since the death of the person last seised.

The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living (**LORD ELLENBOROUGH, C.J.**).—**DOE d. GEORGE v. JESSON** (1805), 6 East, 80; 2 Smith, K. B. 236; 102 E. R. 1217.

Annotations:—*Refd.* **Doe d. Lloyd v. Deakin** (1821), 4 B. & Ald. 433; **Tolson v. Kaye** (1822), 3 Brod. & Bing. 217; **Stevenson v. Shipley** (1834), 3 L. J. Ex. 169; **Nepean v. Doe d. Knight** (1837), 2 M. & W. 894.

PART III. SECT. 6, SUB-SECT. 5.

1395 i. Whether presumption exists—For seven years.—[.]—There is no presumption in law that a person was alive for seven years from the time when he was last heard of.—**VEERAMMA v. CHENNA REDDI** (1914), 1 L. R. 37 Mad. 446.—*IND.*

A. & B.]

1396. ———.]—Under a plea of coverture where it appeared that deft.'s husband went abroad twelve years ago:—*Held*: she was bound to prove that he was alive within seven years.—*HOPWELL v. DE PINNA* (1809), 2 Camp. 113, N. P.

1397. ———.]—*R. v. ST. JAMES, CLERKENWELL* (1852), 16 J. P. Jo. 373.

1398. ———.]—In an action by husband & wife, deft., in support of a plea, that at the time of the contract the female pltf. was the wife of another person, gave in evidence an admission of the wife two years previously that her first husband was alive; & the jury, under a direction that the presumption of law was, that the first husband was alive until his death was proved, found for deft.; on a motion for a new trial, an affidavit was made on the part of deft., by the father of the first husband, stating that he had lately received a letter from his son from abroad:—*Held*: the verdict would not be disturbed.—*NEWMAN v. GODDARD* (1834), 3 L. J. Ex. 167.

1399. — **Governed by circumstances.**]—In all questions upon the existence of life at a particular time, the presumption in favour of life must be governed, & the weight that is to be attached to it, regulated by the circumstances of each particular case; & the determination of the question is for a jury or the sessions.—*R. v. HARBORNE (INHABITANTS)* (1835), 2 Ad. & El. 540; 1 Har. & W. 36; 4 Nev. & M. K. B. 341; 2 Nev. & M. M. C. 517; 4 L. J. M. C. 49; 111 E. R. 209.

Annotations:—**Consd.** *R. v. Lumley* (1869), L. R. 1 C. C. R. 196; *Re Phené's Trusts* (1870), 5 Ch. App. 139. **Refd.** *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894; *Sillick v. Booth* (1841), 1 Y. & C. Ch. Cas. 117; *Lapsley v. Grierson* (1848), 1 H. L. Cas. 498.

1400. ———.]—*LAPSLEY v. GRIERSON*, No. 1384, *ante*.

1401. ———.]—(1) Where a party has not been heard of for seven years, the presumption is not in favour of his having died during the first half of that period, although it is equally a presumption that he did not die at the end of the second half.

(2) It is a preliminary presumption of law that a party living at a given time is alive at a subsequent time within a reasonable limit.

(3) The *onus* of showing that a party was not alive at a given time lies on the party asserting that he was not.—*LAMBE v. ORTON* (1859), 29 L. J. Ch. 286; 1 L. T. 290; 6 Jur. N. S. 61; 8 W. R. 111.

Annotations:—*As to* (1) **Folld.** *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298; *Re Benham's Trusts* (1867), L. R. 4 Eq. 416. **Consd.** *Re Phené's Trusts* (1870), 5 Ch. App. 139. **Refd.** *Re Lewes' Trusts* (1870), 23 L. T. 692. *As to* (2) **Folld.** *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298. **Consd.** *Re Phené's Trusts* (1870), 5 Ch. App. 139. *As to* (3) **Folld.** *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298. **Consd.** *Re Phené's Trusts* (1870), 5 Ch. App. 139. *Generally, Mentd.* *Re Russell, Russell v. Oakes* (1893), 37 Sol. Jo. 212.

1402. ———.]—If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption, but of evidence, & the *onus* of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is

essential. There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive & in health on a certain day was alive a short time afterwards. Testator died on Jan. 5, 1861, having bequeathed his residuary estate equally between his nephews & nieces. One of his nephews, N., was born in 1829, had gone to America in 1853, had frequently written home till Aug. 1858, when he wrote from on board an American ship of war, but from that time no letter had been received from him, & nothing was afterwards heard about him, except that he was entered in the books of the American Navy as having deserted on June 16, 1860, while on leave:—*Held*: his personal representative had not established a title to any share of testator's estate, & it must be divided among the nephews & nieces who were proved to have survived testator.—*Re PHENÉ'S TRUSTS* (1870), 5 Ch. App. 139; 39 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303, L. J.

Annotations:—**Folld.** *Re Lewes' Trusts* (1871), 6 Ch. App. 356. **Apld.** *Hickman v. Upsall* (1875), L. R. 20 Eq. 136. **Consd.** *Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586; *Wills v. Palmer* (1904), 53 W. R. 169. **Apld.** *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181.

1403. ———.]—When a person has been absent for seven years without having been heard of, the only presumption arising is that he is dead, there is none as to the time of his death. Therefore, where a person was entitled for life to a share of residue under the will of testatrix who died in 1890, & nothing was heard of him after Mar. 31, 1895, the trustees of her will were justified in declining to pay the income of the share to persons claiming on his behalf after Mar. 31, 1895, the *onus* of proving that he was alive at the date of the applications for payment to the trustees being on those claiming the income.

In like manner the *onus* of proving his survivorship was upon those claiming a share accrued to him as a member of a class of persons under the same will who took it on the death of a beneficiary without issue on Mar. 16, 1896.

But to prevent an intestacy his children taking such accrued shares under a gift to the issue of deceased members of a class of which he was one will not have the *onus* cast on them of proving his death before that date.—*Re ALDERSEY, GIBSON v. HALL*, [1905] 2 Ch. 181; 74 L. J. Ch. 548; 92 L. T. 826.

— **On prosecution for bigamy.**]—*See CRIMINAL LAW*, Vol. XV., pp. 739, 740, Nos. 7990-7994.

1404. When inference drawn—Party seen eight months previously.]—Judgment was entered up on an old warrant of attorney, on an affidavit that deft. had been seen alive eight months previously in New South Wales.—*JOHNSON v. FRY* (1836), 2 Har. & W. 292.

1405. — **Letter recently received.**]—A letter recently received in the handwriting of deft. who is abroad, is sufficient evidence that he is alive, in order to sign judgment on a warrant of attorney.—*HOLKAM v. PLUNKET* (1838), 2 Jur. 494.

1406. — **Loss of exploration party—Proof that some of party alive at particular date.**]—E. went out with the Arctic Expedition under Sir John Franklin in May, 1845, & had not since been

1398 l. ———.]—A son, first tenant in tail in remainder, left this country on Apr. 14, 1858, & was never heard of afterwards; his father, tenant for life, died on May 8, 1858:—*Held*: it should be presumed that the son survived the father.—*PENNEFATHER v. PENNEFATHER* (1872), 6 L. R. Eq.

171.—**IR.**

1398 ii. ———.]—In an action for maintenance, where the paternity of the child was proved, but pltf. was not examined or cross-examined as to whether the child was alive at the time of the trial:—*Held*: as it was proved

that the child had been born alive & as it was not suggested before pltf.'s case was closed that the child no longer lived, the fact that pltf. did not give evidence of the continued existence of the child did not entitle the deft. to claim absolution.—*KILIAN v. STANDER* (1910), 20 C. T. R. 50.—**S. AF.**

1407. — **Party recently seen.**—J., a young sailor, was last seen in the summer of 1840 going to Portsmouth to embark. His grandmother died in Mar. 1841 :—*Held* : it would be presumed that he was the survivor.—*Ite TINDALL'S TRUST* (1861), 30 Beav. 151 : 51 E. R. 816.

A. In General.

1409. Bank of England not bound to act on evidence sufficient for court of law.]—Evidence which the Ct. of Ch. may now, in uncontested cases, consider sufficient to prove a death, is not necessarily binding & conclusive upon, or to be accepted as satisfactory by the Bank of England. The Bank has a discretion to exercise for its own

1410 vii. ———.]—Where a man had not been heard of by his near relatives for over seven years, in spite of diligent inquiry, the presumption was that he was dead.—*Rc QAG &*

Annotations: — **Foll.** R. v. St. James, Clerknewell (1852), 16 J. Ch. 373. **Consd.** Launce v. Orton (1859), 29 11 J. Ch. 286. **Thom.** v. Thomas (1864), 13 W. R. 225. **Re** Benham's Trust (1867), L. R. 4 Eq. 416. **Appl.** **Re** Bensley's Trusts (1869), L. R. 7 Eq. 498. **Consd.** **Re** v. Lumley (1869), L. R. 1 C. C. R. 196; **Re** Phené's Trusts (1870), 5 Ch. App. 139; **Re** Lewes' Trusts (1871), 6 Ch. App. 356; **Re** Corbishley's Trusts (1880), 49 L. J. Ch. 266; **Re** Rhodes, Rhodes v. Rhodes (1887), 36 Ch. D. 586. **Reid.** R. v. Harborne (1835), 2 Ad. & El. 540; *In the Goods of* How (1858), 27 L. J. P. & M. 37; *In the Goods of* Turner (1864), 3 Sw. & Tr. 476; **Re** v.

years, there is no presumption of law that he is alive or dead. After the expiration of that period there is a presumption that he is dead; & the *onus* of proving either before or after the lapse of such period that a person

1410 xvii.-----.]--An application by a wife whose husband had left her, & had, in spite of inquiries, not been heard of by her for eight years, for leave to re-marry, was refused.—*Ex p. ZIEDLER* (1897). 8 H. C. 136.—**S. AF.**

Sect. 6.—Presumptions: Sub-sect. 6, B. & C. (a) & (b).]

Willshire (1881), 6 Q. B. D. 366; *R. v. Tolson* (1889), 23 Q. B. D. 168; *Re Aldersley*, *Gibson v. Hall*, [1905] 2 Ch. 181. **Mentd.** *Doe d. Angell v. Angell* (1846), 9 Q. B. 328; *Hogan v. Hand* (1861), 14 Moo. P. C. C. 310; *Drummond v. Sant* (1871), L. R. 6 Q. B. 763.

1413. ———. **Unless contrary inference can be drawn.**—A person ought not to be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive.—*WATSON v. ENGLAND* (1844), 14 Sim. 28; 2 L. T. O. S. 455; 60 E. R. 266; *subsequent proceedings*, 4 L. T. O. S. 210.

1414. ———. **]**—The presumption of death, after seven years' absence, does not arise where the probability of intelligence is rebutted by circumstances.—*BOWDEN v. HENDERSON* (1854), 2 Sm. & G. 360; 65 E. R. 436.

1415. ———. **]**—*R. v. St. JAMES, CLERKENWELL* (1852), 16 J. P. Jo. 373.

1416. ———. **]**—When a person has not been heard of for seven years, the presumption of law is that he is dead, but there is no presumption when he died, & he must be taken to have lived to the end of the seven years.—*DUNN v. SNOWDEN* (1862), 2 Drew. & Sm. 201; 32 L. J. Ch. 104; 7 L. T. 558; 11 W. R. 160; 62 E. R. 598.

Annotations.—**Consd.** *Thomas v. Thomas* (1864), 2 Drew. & Sm. 298; *Re Phené's Trusts* (1870), 5 Ch. App. 139. **Refd.** *Re Benham's Trust* (1867), L. R. 4 Eq. 416; *Re Lowes' Trusts* (1870), 23 L. T. 692.

1417. ———. **]**—A. was not heard of from Dec. 1846. More than seven years afterwards, namely, in Sept. 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the Accountant-General of the Ct. of Ch., who, it was stated, was prepared to pay it to A.'s administrator. A. had no other property in this country:—**Held:** no general grant of administration would be made to A.'s brother, on the ground that A. must be presumed to have died before the death of his relative, but only a grant limited to substantiate proceedings in the Ct. of Ch.—*In the Goods of TURNER* (1864), 3 Sw. & Tr. 476; 33 L. J. P. M. & A. 180; 10 Jur. N. S. 708; 164 E. R. 1360.

Annotation.—**Mentd.** *In the Goods of Tucker* (1864), 3 Sw. & Tr. 585.

1418. ———. **]**—*Re PHENÉ'S TRUSTS*, No. 1402, *ante*.

1419. ———. **]**—If a person has not been heard of for seven years, there is a presumption of law that he is dead; but there is no presumption

as to when, during the seven years, he died. The person upon whom it rests to prove either that he was alive or dead at a particular time must do so by distinct evidence. A. was last heard of in 1873, but there was no evidence as to when he died. He died entitled to a sum of money, which had recently been paid to his administrator:—**Held:** in the absence of any evidence as to when he died, neither his next of kin in 1873, nor his next of kin in 1880, were entitled to have the money paid to them.—*Re RHODES, RHODES v. RHODES* (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652.

1420. ———. **]**—Although there is no legal presumption as to the actual time of death, there is a presumption at law, when a party has been absent & not heard of for seven years, that he is dead. Pltfs. having insured the life interest of one H. with deft. insurance co. for the better security of certain advances to H., & H. not having been seen or heard of for a period of over seven years:—**Held:** H. must be taken to have died, & pltfs. were entitled to the amount of the life policy & bonuses.—*WILLIAMS v. SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY* (1888), 52 J. P. 471; 4 T. L. R. 489.

1421. ———. **]**—**Though reason for concealment.**—The ct. will presume the death of a person after seven years, although there be strong evidence to show that the person has reason to keep his identity concealed.—*WILLS v. PALMER* (1904), 53 W. R. 169; 49 Sol. Jo. 165.

1422. Not against Commissioners for reduction of National Debt.—A fund in ct. was, in 1847, transferred to the separate account of F., a sailor. Nothing had been heard of F. since 1844, nor had any claim been made for the fund or dividends. In 1857 the fund was transferred to the Comrs. for the reduction of the National Debt, & in 1860 administration to the estate of F. was granted by the Probate Ct. On a petition by the administrator for the payment of the fund to him:—**Held:** the petition should stand over, with liberty to apply, the evidence being insufficient to prove the death of F.—*WOODHOUSELEE (LORD) v. DALRYMPLE* (1861), 30 L. J. Ch. 607; 4 L. T. 455; 7 Jur. N. S. 615; *sub nom.* *WOODHOUSELEE (LORD) v. DALRYMPLE*, *Re BEAMISH*, 9 W. R. 561, L. J.J.

C. Time of Presumed Death.

(a) In General.

1423. No date to be presumed.—*NEPEAN d. KNIGHT v. DOE*, No. 1412, *ante*.

1413 i. ———. **Unless contrary inference can be drawn.**—**In ejectment** by James It. claiming as heir at law of his uncle; to prove the death of John It., elder brother of James. Such evidence was given of John's absence from his last residence during seven years, unheard of by those who would have heard of him if he were not dead, that a jury might on that evidence have presumed John's death:—**Held:** the jury were not on such evidence bound to presume John's death, but were at liberty to draw the inference of his death, or reject it, according to their conclusions on the whole case.—*ROCHFORD v. JACKSON* (1864), 1 W. W. & A. B. 23.—**AUS.**

1413 ii. ———. **]**—**Held:** at the end of seven years the fact of death was to be presumed, & not sooner, unless there was some evidence affecting the probability of life continuing so long.—*DOE d. HAGERMAN v. STRONG* (1847), 4 U. C. R. 510; 8 U. C. R. 291.—**CAN.**

1413 iii. ———. **]**—The presumption of death after an absence of seven years without intelligence being received does not arise when the probability of intelligence being received is rebutted by circumstances.—*WILCOX v. WILCOX* (1914), 27 W. L. R. 359; 24 Man. L. R. 93; 16 D. L. R. 491.—**CAN.**

1413 iv. ———. **]**—The Ct. of Ch. acts upon the general rule, that a man's death is to be presumed after an interval of seven years since he was last heard of; but the rule admits of exceptions, & the ct. is bound to consider the circumstances of the particular case, in order to see whether the presumption is rebutted, or, rather, whether it fairly arises.—*M'MAHON v. M'ELROY* (1869), 5 I. R. Eq. 1.—**IR.**

n. Before expiry of seven years.—The presumption of death, not as a matter of law, but as a matter of fact, may arise on the particular facts of a case, although the seven years re-

quired for a presumption as a matter of law have not expired.—*HEDGE v. MORROW* (1914), 32 O. L. R. 218; 20 D. L. R. 561; 7 O. W. N. 279.—**CAN.**

o. ———. **Person encountering specific peril or danger.**—If it appears in evidence that a person has been heard of within a period of seven years, but not since encountering some specific peril or danger which might reasonably be expected to destroy life, the ct. may infer that he is dead. S. fought with the Boer forces in a certain engagement with the British in May, 1900. Since that time till time of application his wife had never heard of him, & none of his comrades had seen him:—**Held:** the ct. might infer that he was dead.—*Ex p. SMIT* (1903), T. S. 12.—**S. AF.**

PART III. SECT. 6, SUB-SECT. 6.—C. (a).

1423 i. No date will be presumed.—Whenever the question as to the exact time of death arises it must be dealt

1424. —[.]—A. arrived at Albany, in the State of New York, from England, in Apr. 1850, & from that date, though inquiries had been made, he had never been heard of. His wife died in England in Feb. 1857, leaving a will dated Jan. 1857:—*Held*: Probate would be granted to the exor. as of the will of a widow.

I think you are entitled to have your motion granted. Seven years have fully elapsed since the husband was heard of, which is a fair ground for presuming that a person is dead, but not for presuming that he died at the beginning or at the end of the seven years. Here, there is ground for supposing that this person died some time ago. If he had remained in Albany, he would probably have been known there; but not having been known, it is probable that he died very soon after his arrival there. You may fairly assume that he was dead before the date of his wife's death (CRESSWELL, J.).—*In the Goods of How* (1858), 1 Sw. & Tr. 53; 27 L. J. P. & M. 37; 31 L. T. O. S. 26; 4 Jur. N. S. 366; 164 E. R. 626.

1425. —[.]—*LAMBE v. ORTON*, No. 1401, *ante*.

1426. —[.]—*DUNN v. SNOWDEN*, No. 1416, *ante*.

1427. —[.]—Although the law presumes a person, who has not been heard of for seven years, to be dead, yet, in the absence of special circumstances, it draws no presumption from that fact as to the particular period when he died; & the *onus* of proving death at any particular period of time within the seven years lies with the party alleging death at such particular time.—*THOMAS v. THOMAS* (1864), 2 Drew. & Sm. 298; 11 L. T. 171; 13 W. R. 225; 62 E. R. 635.

Annotations:—*Expld. Re Phené's Trusts* (1870), 5 Ch. App. 139. *Refd. Re Benham's Trusts* (1867), L. R. 4 Eq. 416; *Re Lewes' Trusts* (1870), 23 L. T. 692.

1428. —[.]—A legatee under the will of testator, who died in 1860, had not been heard of since 1854:—*Held*: the ct. required evidence as to the time of death & could not come to a decision on the point upon mere presumption.—*Re BENHAM'S TRUSTS* (1867), 5 Ch. App. 141, n.; 37 L. J. Ch. 265; 16 W. R. 180, L. J.

Annotations:—*Consd. Re Phené's Trusts* (1870), 5 Ch. App. 139. *Refd. Re Boasey's Trust* (1869), 38 L. J. Ch. 159; *Re Lewes' Trusts* (1870), L. R. 11 Eq. 236.

1429. —[.]—*Re PHENÉ'S TRUSTS*, No. 1402, *ante*.

1430. —[.]—Although a person who has not been heard of for seven years is presumed by law to be dead, yet the law raises no presumption as to the actual time of his death, & therefore, if any one has to establish the precise period at which such person died, he must do so by evidence, & cannot rely upon the presumption of death or

with according to the evidence & circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years.—*DHARUP NATH v. GOBIND SARAN, GOBIND SARAN v. DHARUP NATH* (1886), L. L. R. 8 All. 614.—*IND*.

PART III. SECT. 6, SUB-SECT. 6.— C. (b).

1438 i. *On party asserting survivorship.*—A married woman was deserted by her husband in 1896, & from that time she heard nothing of him. In 1909 she married O.:—*Held*: in proceedings against O. for leaving her without means of support that, on proof of the above facts, the *onus* was upon O. to establish the existence of the first husband at the time of the second marriage.—*OUSLY v. OUSLY*, [1912] V. L. R. 32.—*AUS*.

1438 ii. —[.]—A will purporting to

of the continuance of life.—*Re GRAUFURD'S SETTLEMENT TRUSTS* (1886), 2 T. L. R. 492.

1431. —[.]—*Re RHODES, RHODES v. RHODES*, No. 1419, *ante*.

1432. —[.]—*WILLIAMS v. SCOTTISH WIDOWS' FUND LIFE ASSURANCE SOCIETY*, No. 1420, *ante*.

1433. —[.]—*Re ALDERSEY, GIBSON v. HALL*, No. 1403, *ante*.

1434. *Death presumed at end of seven years.*—*Re WESTBROOK'S TRUSTS*, [1873] W. N. 167.

Annotation:—*Consd. Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586.

(b) Onus of Proof.

1435. General rule.—A tenant for life entitled beneficially under a will assigned her interests to secure the repayment of certain advances, & the premiums on policies on her life. At the end of Mar. 1866, a small sum of money—usually paid quarterly—was paid to her. Shortly afterwards she went on a pedestrian tour, & had never been heard of since. The small sum which became payable at the end of June was never applied for:—*Held*: the presumption was that she was dead, & on the evidence she could not be presumed to have died before June, 1866, but she must be taken to have died soon after June, 1866.

It is impossible to distinguish a case of presumption of death from one of presumption of life, for whoever has to make out a case in order to establish a title which depends upon the fact of either the death or the life of any person must prove that fact (HALL, V.-C.).—*HICKMAN v. UPSALL* (1875), L. R. 20 Eq. 136; 23 W. R. 776; *subsequent proceedings* (1876), 4 Ch. D. 144, C. A. *Annotations*:—*Consd. Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266. *Refd. Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586.

1436. On party asserting death.—*THROGMORTON v. WALTON* (1924), 2 Roll. Rep. 461; 81 E. R. 917.

Annotations:—*Refd. Wilson v. Hodges* (1892), 2 East, 312; *Re Perton, Pearson v. A.-G.* (1885), 53 L. T. 707.

1437. —[.]—Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death.—*WILSON v. HODGES* (1892), 2 East, 312; 102 E. R. 388.

Annotation:—*Refd. Re Perton, Pearson v. A.-G.* (1885), 53 L. T. 707.

1438. On party asserting survivorship.—Persons claiming property as next of kin to a deceased intestate, & showing their kindred, are entitled, in the absence of evidence that a person now dead & nearer of kin to intestate survived him. The *onus* rests on those claiming through a deceased nearer of kin to intestate, to show that such deceased survived intestate.—*Re GREEN'S*

(1906), 12 O. L. R. 298; 7 O. W. R. 563.—*CAN*.

1438 iv. —[.]—Appl. through his father claimed a share in the property of his grandfather, who died in 1884. The father disappeared in 1870 & had not since been heard of:—*Held*: the *onus* was on applt. to prove that his father survived the grandfather.—*MOOLLA CASSIM v. MOOLLA ABDUL RAHIM* (1905), L. L. R. 33 Calc. 173.—*IND*.

1438 v. —[.]—B. left N. in 1892, & was not heard after Mar. 1895. His mother died in Sept. 1896. Administration to his estate was granted in 1903. In an action by the next of kin of B., requiring that the estate be distributed amongst them, in which the administrator of the mother's estate & the A.-G. on behalf of the Crown were added as parties, & claimed that the estate of B. should be distributed as though the mother survived

convey all testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs at law of testator & through conveyances from them to persons abroad:—*Held*: as the heirship at law was dependent upon the alleged heir having survived his father & it was not established, the ct. would not presume that his father had died before him.—*MAY v. LOGIE* (1897), 27 S. C. R. 443.—*CAN*.

1438 iii. —[.]—Testator, dying in 1895, gave his estate to his brothers & sisters. One brother was living in 1885, but had not been heard of for more than 7 years before the death of testator. There was no evidence that he was dead, nor that he survived testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead:—*Held*: the *onus* of proof that he survived testator lay upon those who claimed under him.—*Re McNEIL*

Sect. 6.—Presumptions: Sub-sect. 6, C. (b) & (c).]

SETTLEMENT (1805), L. R. 1 Eq. 288; 35 L. J. Ch. 252; 13 L. T. 541; 12 Jur. N. S. 70; 14 W. R. 192.

*Annotation:—***Reid**. *Re Phené's Trusts* (1870), 5 Ch. App. 139.

1439. —[.]—A married woman died intestate in 1856. Her husband was a transported felon, & had not been heard of since 1853. The wife's next of kin applied at her death for administration as in the case of a widow:—*Held*: it was the duty of persons applying under such circumstances, to prove affirmatively that the party whom they claimed to represent had survived the other.—*In the Goods of NICHOLLS* (1872), L. R. 2 P. & D. 461; 41 L. J. P. & M. 88; 27 L. T. 323; 30 J. P. 808; 21 W. R. 161.

1440. —[.]—**Legatee & testator.**—Where a legatee has not been heard of for seven years, his death will be presumed, & the *onus* of proving that he survived testator lies upon those who claim under him. In the absence of such proof, the legacy will be paid to the residuary legatee or the next of kin of testator, as the case may be.—*Re LEWES' TRUSTS* (1871), 6 Ch. App. 356; 40 L. J. Ch. 602; 24 L. T. 533; 35 J. P. 357; 10 W. R. 617, L. J.

*Annotations:—***Consd.** *Hickman v. Upsall* (1875), L. R. 20 Eq. 136; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586. **Reid**. *Re Courbisley's Trusts* (1880), 49 L. J. Ch. 266.

1441. —[.]—Testator gave a legacy to be equally divided, within twelve months, between the children of W. who should be living at his, testator's, death, such sum to be raised out of the property hereinafter given to his extrix. for life. He then gave to his extrix. certain real & personal estate for her life, & after her death to the children of W. living at his, testator's, death. At testator's death in Jan. 1847, there were four children of W. living, but another, J., had not been heard of since Feb. 1845, & nothing ever was heard of him afterwards. The extrix. paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, & in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic & the children of W., & the income was ordered to be applied for her benefit. In 1871 the four surviving children of W. & the administrator of J. petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of J.:—*Held*: there being no proof that J. survived testator, the share must be paid to the four children who were known to have survived him.

It [the *onus probandi*] lies upon those claiming under him to show that he was included (JAMES, L. J.).—*Re WALKER* (1871), 7 Ch. App. 120; 41 L. J. Ch. 219; 25 L. T. 775; 20 W. R. 171, L. J.

*Annotations:—***Appld.** *Re Benjamin, Neville v. Benjamin*, [1902] 1 Ch. 723. **Mentd.** *Lewis v. McKay, Algate v. Vugler, Clark v. Potter* (1924), 93 L. J. K. B. 840.

1442. —[.]—In Sept. 1892, P., who was then 24 years of age disappeared, & he had never since been heard of. Under his father's will he was entitled to a share of the residuary estate in the event of his surviving testator. Testator died in June, 1893. Upon a summons taken out by the trustees in 1900 to have it determined how

P.'s share ought to be dealt with:—*Held*: P. must be presumed to be dead, & in the absence of proof that he had survived testator, without making any declaration as to the date of P.'s death, liberty would be given the trustees to distribute his share on the footing that he had predeceased testator.

If he is to be presumed to be dead, the *onus* of proof is on his administrator (JOYCE, J.).—*Re BENJAMIN, NEVILLE v. BENJAMIN*, [1902] 1 Ch. 723; 71 L. J. Ch. 319; 86 L. T. 387; 18 T. L. R. 283; 46 Sol. Jo. 266.

1443. —[.]—*Re ALDERSEY, GIBSON v. HALL*, No. 1403, *ante*.

1444. Trusts declared by deed—Onus rests on party asserting death at date of deed.—By deed, dated in 1866, trusts of personally were declared after the death of the settlor in favour of a person by name. The named person had not been heard of since 1861. There was no evidence as to the date of his death, & on the death of the settlor her representatives claimed the money, contending that there was a resulting trust in her favour:—*Held*: where a trust was declared by deed in favour of a named person such person must, until the contrary was shown, be taken to have been in existence at the date of the deed, & the *onus* of proving his death before that date lay on the representatives of the settlor, but as it had not been discharged by them there was no resulting trust & the money must be paid to the representatives of the named person.—*Re COURBISLEY'S TRUSTS* (1880), 14 Ch. D. 846; 49 L. J. Ch. 266; 28 W. R. 536.

*Annotation:—***Consd.** *Re Tilt, Lampet v. Kennedy* (1896), 74 L. T. 163.

1445. On party alleging death within seven years.—*LAMBE v. ORTON*, No. 1401, *ante*.

(c) Sufficiency of Proof.

1446. Bad health when last heard of.—The presumption of death from length of time has relation to the commencement of the period.

If at the end of five or six years we were to have pronounced upon the fact of this man's existence, the conclusion that he was then living would not perhaps have been the subject of exception; but after this lapse of time since he appeared in a desperate state of health, & was to have returned to his relation in six months, surely he must be taken to have died (LORD ERSKINE, C.).—*WEBSTER v. BIRCHMORE* (1807), 13 Ves. 362; 33 E. R. 329, L. C.

1447. Ship proved to have sailed & not been heard of.—Where a vessel is proved to have sailed, & has not been heard of for two or three years, it is to be presumed that she is lost, but at what time an individual who sailed on board of such vessel perished, is to be collected by the jury from the particular circumstances of the case.—*WATSON v. KING* (1815), 4 Camp. 272; 1 Stark. 121, N. P.

*Annotations:—***Consd.** *Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86. **Mentd.** *Rundle v. Beaumont* (1828), 1 Moo. & P. 396; *Gausson v. Morton* (1830), 6 Man. & Ry. K. B. 613; *Gillett v. Abbott* (1838), 7 Ad. & El. 783; *Smart v. Sandars* (1848), 5 C. B. 895; *Carter v. White* (1882), 20 Ch. D. 225.

1448. —[.]—Presumption that a party died at a particular time within the seven years after he had been last heard of; the particular time being the hurricane months & the party having

the son:—*Held*: the *onus* was on the administrator of the mother's estate to prove that the mother survived the son.—*CAIRNS v. BROWNING, BROWNING*

v. WINTER (1906), 9 Nfld. L. R. 189.—**NFLD.**

1445 i. On party alleging death within

seven years.—*DOE d. HAGERMAN v. STRONG* (1847), 4 U. C. R. 510; 8 U. C. R. 291.—**CAN.**

sailed from Demarara before the expiration of the hurricane months.—*SILICK v. BOOTH* (1842), 1 Y. & C. Ch. Cas. 117; 11 L. J. Ch. 41, 123; 5 Jur. 1151; 6 Jur. 142; 62 E. R. 816.

Annotations.—*Mentd.* Underwood v. Wing (1854), 19 Beav. 459; Dutton v. Crowdy (1863), 33 Beav. 272.

1449. —.]—*ANON.* (1869), cited in 36 Ch. D. at p. 591.

1450. — **Certificate of Registrar-General of Shipping.**—Upon motion to presume the death of a man who sailed from this country for Western Australia on board a small vessel which called at Cape Town & was never heard of after leaving that port, the certificate of the Registrar-General of Shipping & Seamen was produced, which stated (*inter alia*) that the person in question was returned as serving upon the vessel as second mate at the time when she was last heard of, & that he was "supposed drowned." The certificate was furnished in pursuance of the provisions of Merchant Shipping Act, 1894 (c. 60), & two members of deceased's family swore to their belief in his death. The underwriters of the vessel had paid the insurance money, as upon a total loss, & notice had been given to the office with whom deceased's life was insured:—*Held*: the death would be presumed as having occurred on or since the date when the vessel was last heard of.—*In the Goods of DODD* (1897), 77 L. T. 137.

1451. **Death of tenant for life—Not heard of by person residing in neighbourhood.**—The fact of a tenant for life not having been seen or heard of for fourteen years by a person residing near the estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life.—*DOE d. LLOYD v. DEAKIN* (1821), 4 B. & Ald. 433; 106 E. R. 995.

1452. **Inquiries by family.—In poor health when last heard of.**—*GRISSALL v. STELFOX* (1845), 5 L. T. O. S. 475; 9 Jur. 890.

1453. —.]—A. left this country on Nov. 9, 1829. On June 16, 1831, his brother-in-law received a letter from America on behalf of A., describing him as having changed his name to B. Three months after this A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend who could not find him. He was not heard of any more, & it did not appear that any inquiries were made by his family:—*Held*: on this state of facts there was not sufficient information to ground presumption of death, still less of the particular period of death.—*Re CREED* (1852), 1 Drew. 235; 61 E. R. 441.

1454. —.]—A policy on the life of R. was granted in 1863. An action was brought upon it in 1874, & the question was whether R. was alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister & brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, & said that they had not heard of him for more than seven years. On cross-examination they said that a niece of his had said that when she was in Melbourne, in Dec. 1872, or Jan. 1873, she saw a man whom she believed to be her uncle R., but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at Melbourne, & the other relatives believed the niece to have been mistaken. The jurymen expressed a similar opinion. The judge directed the jurymen that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive, & well within the last three

years; & still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated"; & "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." & lastly, His Lordship said to the jury, "Under these circumstances unless you are prepared to find that he was dead in Apr. 1875, & find it upon evidence which tends to prove exactly the contrary, & in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for debts." The Ct. of Appeal had considered this to be a misdirection, & had ordered a *venire de novo*. On appeal to the House of Lords:—*Held*: the decision of the Ct. of Appeal would be affirmed.—*PRUDENTIAL ASSURANCE CO. v. EDMONDS* (1877), 2 App. Cas. 487, II. L.

1455. **Sailor leaving ship—No intention to desert.**—A sailor left his ship at the end of the year 1849 or very early in 1850 & had not since been heard of:—*Held*: (1) if he was shown to have intended to desert, it could not be presumed that he was dead in May, 1850; (2) if he intended to return to his ship, the ct. would assume that he had met with an accident, by which he perished a very short time after leaving the vessel & before May, 1850.—*LAKIN v. LAKIN* (1865), 34 Beav. 443; 12 L. T. 517; 11 Jur. N. S. 522; 13 W. R. 704; 55 E. R. 707.

Annotations.—As to (1) & (2) *Refd.* *Re Phené's Trusts* (1870), 5 Ch. App. 139. *Generally, Mentd.* *Re Bringlee's Trusts* (1872), 26 L. T. 58; *Sweto v. Tindal* (1874), 31 L. T. 223.

1456. **Moneys payable periodically & not applied for—Death presumed before next payment due.**—*Re HENDERSON'S TRUSTS* (1868), cited L. R. 7 Eq. at p. 500; 38 L. J. Ch. at p. 159.

Annotations.—*Apld.* *Re Beasney's Trusts* (1869), L. R. 7 Eq. 498. *Refd.* *Re Phené's Trusts* (1870), 5 Ch. App. 139.

1457. — **Death presumed shortly after first payment not applied for.**—A person who was entitled to the dividends on stock payable in Apr. & Oct., applied for his dividends in Apr. 1860, & was last seen in Aug. in the same year, when he was in a very bad state of health. He never applied for his half-yearly dividends in the ensuing Oct. It appeared that he was of very dissolute habits, & chiefly depended on the dividends for his maintenance. The question being whether he died before Nov. 1860:—*Held*: not having applied for the dividends due to him in Oct. 1860, & having regard to the state of his health when last seen, the presumption must be that he died before Nov. 1860.—*Re BEASNEY'S TRUSTS* (1869), L. R. 7 Eq. 498; 38 L. J. Ch. 159; 19 L. T. 630.

Annotation.—*Refd.* *Re Phené's Trusts* (1870), 5 Ch. App. 139.

1458. —.]—*HICKMAN v. UPSALL*, No. 1435, *ante*.

1459. **When better evidence obtainable—Refusal to draw inference.**—Where the evidence that a legatee did not survive testator is not conclusive, & it appears that better evidence might possibly be obtained, the ct. will not draw an inference in law that the legatee is dead, but direct the amount of the legacy to be carried to a separate account.—*Re RHODES, FRASER v. RENTON* (1873), 28 L. T. 392.

1460. **Absconding debtor—Statement of intention to commit suicide.**—On Jan. 28, 1893, debtor departed from his dwelling house, & on the same day a hat bearing his name was discovered in the

Sect. 6.—Presumptions: Sub-sect. 6, C. (c), D. & E.]

neighbouring canal. A letter was also received from debtor by his manager intimating that before such letter arrived he would be out of his trouble. The evidence showed, however, that at the time of his going away debtor was in very embarrassed circumstances, & that, on the day before, he had collected about £25 from persons who owed him money, which sum he took with him. He also took his best clothes, clean linen, & such jewelry as he possessed. The canal was thoroughly dragged by the police, but nothing was found:—*Held*: under the circumstances, the ct. was not bound to presume that debtor was dead.—*Re LEWIS, Ex p. BECKER* (1893), 9 T. L. R. 406; 10 Morr. 141, D. C.

D. Application of Presumption in Proceedings as to Property.

1461. Redemption action—Death of eldest son of mortgagor presumed—After thirty years.]—*MASTEN v. COOKSON* (1734), 2 Eq. Cas. Abr. 414; 22 E. R. 352, L. C.

1462. Presumption of death of legatee—After twenty-seven years.]—*DIXON v. DIXON* (1792), 3 Bro. C. C. 510; 29 E. R. 672.

1463. Payment out upon recognisance to refund—After twenty years.]—Payment was ordered, where one party entitled had not been heard of for twenty years upon a recognisance to refund in the event of a claim.—*BAILEY v. HAMMOND* (1802), 7 Ves. 590; 32 E. R. 237.

1464. Presumption of death of person entitled as one of next of kin—After seventeen years.]—A person who, if living would have been entitled to a share of residue, as one of the next of kin, but who left England seventeen years ago, & had never since returned or been heard of, was presumed to be dead.—*BUCKMAN v. IVES* (1837), 6 L. J. Ch. 197.

1465. — Upon security to refund.]—A. went abroad in Sept. 1830. His father died in Sept. 1833. About twenty months previous to that time A. was heard of for the last time. The ct. ordered a share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it, in case A. should be living or should have died after his father.—*DOWLEY v. WINFIELD* (1844), 14 Sim. 277; 8 Jur. 972; 60 E. R. 365.

Annotations:—Refd. Re Bonham's Trusts (1867), L. R. 4 Eq. 416; *Re Phoebe's Trusts* (1870), 5 Ch. App. 139.

1466. — After twenty-four years.]—*Re LYFORD'S SETTLEMENT TRUSTS* (1853), 17 Jur. 570.

1467. Presumption of death of plaintiff—After twelve years—Reference to master.]—The bill was filed in 1839 by A. under a power of attorney, executed by pltf. in 1827. A motion was made in 1839 to take the bill off the file on the ground that pltf. was not alive at the time of the institution of the suit. The affidavit in support thereof stated that pltf. went to America in 1824 & had not since been heard of by deft. No direct evidence was produced that pltf. was living, nor the date of any letter from him since 1827:—*Held*: the circumstances afforded sufficient ground of suspicion to direct a reference to the master as to that fact.—*HOWE v. MACLEAN* (1839), 9 L. J. Ex. Eq. 1.

1468. Presumption of death of annuitant—Payment out of principal & accumulation—Upon security to refund.]—A sum of money was set apart in 1815 to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837 the master having certified, upon presumption, that she was dead, but without finding when she died, the ct. ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842 the master having certified, upon presumption, that she had died in 1822, & that no personal representative had been heard of, the ct. ordered immediate payment, to the same party, of the accumulations since that time; & in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund, in case the annuitant or her personal representative should ever establish a claim.—*CUTHBERT v. PURRIER* (1847), 2 Ph. 109; 41 E. R. 918.

1469. Presumption of death of tenant for life—Payment out of dividends—Upon security to refund—After fourteen years.]—A tenant for life of a fund in ct. was transported in 1838, & had not since been heard of. Upon an application made in 1852 by the remaindermen for payment:—*Held*: the dividends should be paid to them, & an undertaking would be required to replace the amount out of the capital, if the tenant for life should be still alive.—*Re MILEHAM'S TRUST* (1852), 15 Beav. 507; 51 E. R. 634.

1470. Presumption of death of husband—Payment out to wife of money in joint names—After fourteen years.]—A husband & wife in America, by a deed of separation, agreed to live apart, & that the wife should be at liberty to carry on business, etc., & to retain, for her own use, all her present & future property, in any way acquired. Subsequently a legacy, having accrued in right of the wife, was carried to the account of the

PART III. SECT. 6, SUB-SECT. 6.—D.

p. Payment out upon recognisance to refund—After twenty-four years.]—On a renewed application for the payment to K.'s heirs *ab intestato* of an inheritance due to him out of his mother's estate, it was proved that he had been absent from the colony for twenty-eight years, during the last twenty-four of which he had never been heard of, notwithstanding every possible effort made by his relatives & friends to find him:—*Held*: the probability of his death was so great as to justify an order for the distribution of the inheritance among those who would be his heirs *ab intestato*, if he were dead, upon their respectively giving their personal undertaking to the Master of the Supreme Ct. that they would restore the capital sums received by them respectively in case he should thereafter be found to be alive.—*Re KANNEMEYER, Ex p. KAN-*

NEMEYER (1899), 16 S. C. 407.—**S. AF.**

q. — After twenty-six years.]—Where a missing person had not been heard of for twenty-six years, the ct. refused to grant an order presuming his death, but appointed a curator to his estate with power to administer the same & to pay over the available balance to his heirs *ab intestato* against their personal security for restoration of the property in case it should subsequently be found that they were not entitled thereto.—*Re NICOLSON* (1903), T. S. 870.—**S. AF.**

r. —.]—There is no absolute certainty in the case of a legal presumption of death, & as it is only a presumption, the heirs among whom the property of the person thus presumed to be dead is distributed are bound to give security to restore the money in case he should turn up alive.—*DEMPEPS & VAN RYNEVELD v. S. A. MUTUAL LIFE ASSURANCE*

SOCIETY (1908), 25 S. C. 162.—**S. AF.**

s. Presumption of death of husband—Payment to wife of annuity.]—The wife of a contributor to a widows' fund sued the trustees of the fund for declarator that her husband, who had not been heard of for eighteen years, & who would have been sixty-one years of age at the date of the action, must be held to have died on the date he was last heard of, & for payment of an annuity which was contingent on his death:—*Held*: (1) pursuer's husband must be presumed to have died on a date ten years after that on which he was last heard of; (2) defenders must make payment of the annuity as from that date.—*GREIG v. MERCHANT CO. OF EDINBURGH*, [1921] S. C. 76; 58 Sc. L. R. 56.—**SCOT.**

t. Matter for discretion of court.]—In cases where the ct. is asked to divide the property of a person, on

husband & wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock:—*Held*: the stock must be sold, & the proceeds paid to her on her sole receipt.—*WHITLOW v. DILWORTH* (1854), 2 Sm. & G. 35; 18 Jur. 445; 2 W. R. 150; 65 E. R. 290.

1471. Presumption as to death intestate.—After forty years.—After search for probate.—Where a man had gone to India more than forty years ago, & no trace of him could be found in the official returns, & search was made in the three Presidencies, & no record could be found of his burial or of any grant of probate of his will or of letters of administration of his estate & effects:—*Held*: administration would be granted, upon the presumption that he had died intestate, upon a search being made in the Indian register of marriages, & no entry being found to show that he had been married.—*In the Goods of DEALY* (1861), 25 J. P. 809.

E. Commorientes.

See, now, Law of Property Act, 1922 (c. 16), s. 107 (3).

1472. Former rule.—Presumption of simultaneous death of husband & wife.—A husband appointed his wife extrix, & residuary legatee; he & his wife were drowned at the same time:—*Held*: administration with the will annexed would be granted to the next of kin of the husband.

Upon the whole I am not satisfied that proof is adduced that the wife survived. Taking it to be, they both died together, the administration is due to the representatives of the husband. I assume that they both perished at the same moment, & therefore, I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife (*SIR JOHN NICHOLL*).—*TAYLOR v. DIPLOCK* (1815), 2 Phillim. 261; 161 E. R. 1137.

Annotations:—*Follid.* *In the Goods of Thompson* (1854), 22 L. T. O. S. 292; *Underwood v. Wing* (1854), 19 Beav. 459. *Refd.* *Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86.

1473. ———.—*Where husband & wife are drowned by the same accident the presumption is that they died at the same time; & in order to entitle the next of kin of the husband to the wife's property, it must be shown that he survived the wife.*—*SATTERTHWAITE v. POWELL* (1838), 1 Curt. 705; 163 E. R. 246.

Annotations:—*Follid.* *Underwood v. Wing* (1854), 19 Beav. 459. *Refd.* *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88.

1474. ———.—*Husband & wife perishing together, where no evidence to the contrary, are presumed to have died at the same moment.*—*In the Goods of UNDERWOOD* (1853), 22 L. T. O. S. 292.

1475. ———.—*In the Goods of THOMPSON* (1854), 22 L. T. O. S. 292.

1476. Presumption that husband survived wife.—Former rule.—Administration of the goods of an intestate bastard, drowned together with his wife & only child, will be granted to a creditor, the King's Proctor having been cited, but not the representatives of the wife, on presumption that the husband survived; & the debt being large, & the property small.

the ground of his death, no definite period of absence is sufficient in itself to establish a presumption that the person who has not been heard of during that period is dead. The question is, in all such cases, one for the exercise of the discretion of the ct.

Where B. had not been heard of for

fifteen years, & no response had been made to advertisements which had been inserted in newspapers circulating in the place where he had last been known to live, the ct., in the absence of more accurate inquiries, refused to authorise the distribution of his property.—*Re BEAGLEHOLE* (1908), T. S. 49.—*S. AF.*

In strictness, the representatives of the wife ought to have been cited; but as the *prima facie* presumption of law is, that the husband survives, & as the property is small, & the debt large, the decree may pass (*per CUR.*).—*COLVIN v. PROCURATOR-GENERAL* (1827), 1 Hag. Ecc. 92; 162 E. R. 518.

1477. ———.—*The husband & wife having been drowned together, the ct., the wife's next of kin not opposing, granted probate in common form of the husband's will to exors. substituted "in the event of her dying in his lifetime," the will appointing her extrix., "if living at his decease."*

The general presumption is that the husband is the stronger & therefore survived (*per CUR.*).—*In the Goods of SELWYN* (1831), 3 Hag. Ecc. 748; 162 E. R. 1331.

1478. ———.—*A husband, his wife, & child having perished together, administration was granted of the husband's effects as dead, a widower.*—*In the Goods of MURRAY* (1837), 1 Curt. 596; 163 E. R. 209.

1479. ———.—*F. perished with his wife & only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the ct. granted administration of the personal estate of F. as having died a widower, to his mother, as his next of kin.*—*In the Goods of WAINWRIGHT* (1858), 1 Sw. & Tr. 257; 28 L. J. P. & M. 2; 164 E. R. 718.

Annotation:—*Refd.* *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88.

1480. ———.—*In the Goods of EWART* (1859), 1 Sw. & Tr. 258; 164 E. R. 718.

Annotations:—*Refd.* *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88. *Mentd.* *In the Goods of Beynon*, [1901] P. 141.

1481. No presumption of survivorship or simultaneous death.—(1) There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one & the same cause. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly on evidence, & if the evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined. Two persons, husband & wife, made their separate wills. In the husband's will the property was given to his wife, "& in case my wife shall die in my lifetime," then to W. in trust for the children on their coming of age, & in case all of them should die under age then to W. for his absolute use & benefit. In the wife's will, made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named, the property was given to the husband, subject to interests in the children, "& in case my husband should die in my lifetime" then to W. absolutely. The husband & wife & two children perished at sea, being all swept off the deck by one wave, & all disappearing together:—*Held*: there was no presumption that the husband had survived the wife, or the wife the husband.

(2) The *onus probandi* is on the person asserting the affirmative.—*WING v. ANGRAVE* (1860), 8 H. L. Cas. 183; 30 L. J. Ch. 65; 11 E. R. 397.

PART III. SECT. 6, SUB-SECT. 6.—E.

1481 1. No presumption of survivorship or simultaneous death.—*Testator, a mother, with her two daughters, who were the sole beneficiaries under the will, perished in a shipwreck, & there was no evidence as to whether either of the daughters had survived the*

Sect. 6.—Presumptions: Sub-sect. 6, E. & F.; sub-sect. 7.]

H. L.; *affg.* S. C. *sub nom.* UNDERWOOD v. WING (1854), 4 De G. M. & G. 633, L. C.

Annotations:—As to (1) Follid. In the Goods of Alston (1892), 66 L. T. 591. Re Phené's Trusts (1870), 5 Ch. App. 139; In the Goods of Nichols (1872), 41 L. J. P. & M. 88. As to (2) Apid. Re Green's Settlements (1865), L. R. 1 Eq. 288. Generally, Mentd. Tennant v. Heathfield (1855), 21 Beav. 255; Hull v. Warren (1861), 9 H. L. Cas. 420; Barnett v. Tugwell (1862), 31 Beav. 232; Evans v. Stratford (1864), 2 Hem. & M. 142; Re Tredwell Jeffray v. Tredwell, [1891] 2 Ch. 640; Saccharin Corp'n. v. Quincey, [1900] 2 Ch. 246.

1482. —. —.]—When a husband & wife are killed at the same time, & there is no evidence as to survivorship, the ct. will not presume that either of them survived the other, & will grant administration of their personal estate & effects to their respective next of kin.—*In the Goods of WHEELER (1861), 31 L. J. P. M. & A. 40; 26 J. P. 57.*

1483. —. —.]—T. his wife & three children went down in the same ship. There was no evidence as to survivorship, & no will:—*Held*: the ct. granted administration to the maternal grandfather of the surviving children.—*In the Goods of GRINSTEAD (1870), 21 L. T. 731; 31 J. P. 152.*

1484. —. —.]—A husband & wife executed identical wills, each appointing the other universal legatee & sole exor., & substituting exors. in case of the other dying first. They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other:—*Held*: a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each.—*In the Goods of ALSTON, [1892] P. 142; 61 L. J. P. 92; 66 L. T. 591.*

1485. —. —.]—By a settlement made on the marriage of L. & G., L. agreed that he would, after the marriage, transfer to the trustees a sum of consols, & G. assigned unto the same trustees some Portuguese bonds. The trustees were to pay the income of the consols to L. for life, & after his death to pay it to G. for life, & after the death of the survivor, in trust for the children of the marriage, & if none, in trust for the survivor of L. & G., his or her exors. & administrators. The trustees were to pay the income of the bonds to L. during his & G.'s joint lives, & in case he should survive, then after G.'s decease, to transfer the bonds to whom she might appoint by will, & in default of appointment, to her next of kin; but if she should survive L., then in trust to transfer the bonds to her, her exors. or administrators. After the marriage, the consols were transferred to the trustees. L., by will, gave to his wife the whole of his property absolutely, & G. bequeathed the whole of her property to her husband for life, & after his death to her sisters. Both husband & wife, who left Liverpool, in Apr. 1874, in the *Liberia*, were, with all hands on board, drowned at sea:—*Held*: the funds settled belonged to the legal personal representatives of each settlor.—*WOLLASTON v. BERKELEY (1876), 2 Ch. D. 213; 45 L. J. Ch. 772; 34 L. T. 171; 24 W. R. 360.*

mother or not:—*Held*: there was no presumption of law either that they perished at the same moment, or that the mother or either of the daughters survived.—*REID v. REID (1909), 29 N. Z. L. R. 124.—N. Z.*

a. *Statutory presumption of survivorship.*—Testator & his wife were drowned at sea, at night, through the foundering of their vessel in less than

five minutes, after striking a sunken rock in deep water. There was no evidence as to survivorship. Testator was five years older than his wife, who died intestate. There was no issue. On the presumption established by Titles to Land Act, s. 26, in respect of realty, the wife, being younger, was presumed to have survived. In respect of personality, the English rule fol-

1486. —. —.]—Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or anyone else on board, from that time:—*Held*: in giving leave to swear that both the brothers died on or about May 14, 1896, a declaration was added & the same was included in the oath in each case, to the effect that there was no reason to suppose that either died before the other.—*In the Goods of JOHNSON (1897), 78 L. T. 85.*

1487. —. —.]—Where a husband & wife with all their children were said to have perished in a massacre, the ct., upon affidavits that they were believed to have died intestate & uninsured, granted letters of administration to the respective next of kin of the husband & wife.—*In the Goods of BEYNON, [1901] P. 141; 70 L. J. P. 31; 81 L. T. 271; 65 J. P. 246; 17 T. L. R. 321.*

1488. —. —.]—Where the bodies of a husband & wife were found in a river tied together in such circumstances that a verdict of suicide was returned at the coroner's inquest, the ct. gave leave to swear the death of the wife on or since the day she was last seen, & that there was no reason to believe that her husband had survived her.—*In the Goods of GOOD (1908), 24 T. L. R. 493.*

1489. —. —.]—Where a husband & wife perished in the same disaster, the ct. allowed the form of oath to be varied by the insertion of a statement that the husband & wife perished at the time named, & that there was no reason to believe that the wife survived her husband.—*In the Estates of BRUCE (1910), 26 T. L. R. 381.*

1490. *Survivorship established by evidence.*—*BROUGHTON v. RANDALL (1596), Cro. Eliz. 502; 78 E. R. 752.*

Annotation:—Mentd. Bates v. Bates (1697), 1 Ld. Raym. 326.

1491. —. —.]—A. & B. perished at sea. By the law of England evidence may be adduced as to their age, health, & strength, for the purpose of drawing a presumption whether one of them survived the other.—*SILICK v. BOOTH (1812), 1 Y. & C. Ch. Cas. 117; 11 L. J. Ch. 123; 6 Jur. 142; 62 E. R. 816.*

Annotations:—Reid. Underwood v. Wing (1854), 19 Beav. 459. Mentd. Dutton v. Crowley (1863), 33 Beav. 272.

1492. —. —.]—*In the Goods of PAGE (1902), 46 Sol. Jo. 634.*

1493. *Onus of proof—Rests on party asserting affirmative.*—*WING v. ANGRAVE, No. 1481, ante.*

1494. —. —.]—Testator & two of the legatees in his will perished in a ship, which was supposed to have foundered. There being no evidence of survivorship:—*Held*: the bequest failed.

The two children who perished with testator take nothing, because it cannot be proved that they survived him; & you must prove that they survived testator in order that they may be entitled to take (*ROMILLY, M.R.*).—*BARNETT v. TUGWELL (1862), 31 Beav. 232; 31 L. J. Ch. 629; 7 L. T. 121; 8 Jur. N. S. 787; 10 W. R. 679; 54 E. R. 1127.*

Annotation:—Mentd. Occleston v. Fullalove (1873), 9 Ch. App. 147.

1495. —. —.]—Where testator appointed his wife residuary legatee during life or widowhood,

lowed.—*PALMER v. MUIR (1890), 4 Q. L. J. 46.—AUS.*

b. *No presumption of survivorship.*—Where two or more persons, & especially where relatives, perish in the same calamity, the law recognises no presumption of survivorship; but in the total absence of all evidence respecting the particular circumstances of the calamity the matter will be

& substituted after her death or re-marriage his son, & both testator & his son perished simultaneously by shipwreck:—*Held*: the widow on re-marriage was entitled to a regrant of letters of administration, there being no evidence to show that the son survived his father.—*In the Goods of CARMICHAEL* (1863), 4 Sw. & Tr. 224; 1 New Rep. 377; 32 L. J. P. M. & A. 70; 27 J. P. 264; 11 W. R. 462; 164 E. R. 1502.

1496. ———.]—Previously to her marriage with M., E. was the owner of a fund standing in the name of her late husband, in the books of a firm who had acted as her late husband's bankers. After the marriage the account was headed "Captain & Mrs. M." There was no evidence to show on whose authority the transfer of the account was made. Both the husband & wife drew upon the interest of the fund. The husband & wife perished by shipwreck. There was no evidence as to whether the husband survived the wife or not. The husband had purported to bequeath the fund by will:—*Held*: the fund belonged to the wife's representatives, there not being sufficient evidence that the husband had reduced it into possession, & it being impossible to prove that the husband was the survivor.—*SCRUTTON v. PATILLO* (1875), L. R. 19 Eq. 369; 44 L. J. Ch. 249; 32 L. T. 140; 39 J. P. 340; 23 W. R. 379.

———.].—*See* Sub-sect. 6, C. (b), *ante*; & generally Part I., Sect. 6, sub-sect. 1, *ante*.

F. Death without Issue.

1497. Whether presumption exists.]—*THROGMORTON v. WALTON* (1624), 2 Roll. Rep. 461; 81 E. R. 917.

Annotations:—*Expld.* *Re* Perton, *Pearson v. A.-G.* (1885), 53 L. T. 707. *Refd.* *Wilson v. Hodges* (1802), 2 East, 312.

1498. ———.]—*RICHARDS v. RICHARDS* (1731), 15 East, 204, n.; 104 E. R. 855.

Annotations:—*Consd.* *Greaves v. Greenwood* (1877), 2 Ex. D. 289; *Re* Jackson, *Jackson v. Ward*, [1907] 2 Ch. 354. *Refd.* *Cope v. Mooney* (1863), 10 L. T. 854.

1499. ———.]—In making a title by pedigree, evidence that a man has not been heard of many years is sufficient evidence *prima facie* to prove him dead without issue.—*ROWE v. HASLAND* (1763), 1 Wm. Bl. 404; 96 E. R. 230.

1500. ———.]—A. claimed in ejectment as heir-at-law of B. A. traced his pedigree through the youngest son of a common ancestor, who, in the year 1689, had four elder sons, whose descendants, if any, would have had a better title than B.:—*Held*: the length of time was a sufficient ground to presume their deaths, & the ct. would take it that they all died without issue, unless there was some evidence, to induce a presumption that they, or some of them, married & left issue.—*DOE d. OLDHAM v. WOOLLEY* (1828), 8 B. & C. 22; 108 E. R. 951; *sub nom.* *DOE d. OLDNALL v. DEARIN*, 2 Man. & Ry. K. B. 195; 3 C. & P. 402; *sub nom.* *DOE d. OLDNALL v. WOOLLEY*, 6 L. J. O. S. K. B. 286. *Annotations*:—*Consd.* *Greaves v. Greenwood* (1877), 2 Ex. D. 289. *Refd.* *Jones v. Hughes* (1887), 4 T. L. R. 37.

1501. ———.]—By a decree for administration in a county ct. a sale of real estate devised to A. & six other persons, parties to the suit, was ordered, & an inquiry was directed before the registrar of the ct. as to A., who had not been heard of for many years. On an affidavit being produced to the registrar, showing that A. had not been heard of

for seventeen years, the sale was effected without any certificate as to the result of the inquiry being made. The sale produced more than £500, & the cause was transferred to the Ct. of Ch. On motion by the purchaser to be discharged & to have his costs paid, on the ground that the sale was invalid as having been made before a certificate in answer to the inquiries had been made:—*Held*: A. must be presumed to be dead without issue.—*RAWLINSON v. MILLER* (1875), 1 Ch. D. 52; 46 L. J. Ch. 252.

1502. ———.]—If it is proved that long ago a man died & there is nothing to show whether he died with issue or without issue I agree that there is no presumption either way (*COCKBURN, C.J.*).—*GREAVES v. GREENWOOD* (1877), 2 Ex. D. 289; 46 L. J. Q. B. 252; 36 L. T. 1; 25 W. R. 639, C. A.

Annotations:—*Consd.* *Re* Jackson, *Jackson v. Ward*, [1907] 2 Ch. 354. *Refd.* *Jones v. Hughes* (1887), 4 T. L. R. 37; *Lyell v. Kennedy* (1887), 18 Q. B. D. 796.

1503. ———.]—*JONES v. HUGHES* (1887), 4 T. L. R. 37.

1504. ———.]—Though death will in a proper case be presumed, there is no presumption that the person died without issue. That is a matter to be proved, & there must be such evidence as would justify a jury in finding as a fact that there was no issue.—*Re* JACKSON, *JACKSON v. WARD*, [1907] 2 Ch. 354; 76 L. J. Ch. 553.

SUB-SECT. 7.—IMPOSSIBILITY OF ISSUE.

1505. Foundation of presumption.]—Evidence is not admissible for the purpose of the rule against perpetuities to show that a woman living at the death of a testator was past child-bearing at the date of his death.

The practice of the ct. in fixing an age when a woman may be considered past child-bearing, for the purpose of paying out money, is founded on convenience of administration & a high degree of improbability.—*Re* DAWSON, *JOHNSTON v. HILL* (1888), 39 Ch. D. 155; 57 L. J. Ch. 1061; 59 L. T. 725; 37 W. R. 51.

Annotations:—*Consd.* *Ward v. Van Der Loeff*, *Burnycat v. Van Der Loeff*, [1924] A. C. 653. *Refd.* *Re* Lowman, *Dovenish v. Pester*, [1895] 2 Ch. 348. *Mentd.* *Re* Wood, *Tullett v. Colville*, [1894] 3 Ch. 381; *Re* Hocking, *Michell v. Loc*, [1898] 2 Ch. 567.

1506. Whether presumption made—Married woman—Married for twelve years without issue.]—Land was settled on husband & wife for their lives, remainder to trustees to preserve contingent remainders, remainder to the sons successively in tail male. The husband & wife had been married twelve years & had never had any issue. They desired to sell part of the lands for payment of debts:—*Held*: it could not be presumed there would be no issue.—*DAVIES v. WEID* (1683), 1 Vern. 181; 2 Cas. in Ch. 144; 1 Eq. Cas. Abr. 386; 23 E. R. 401.

Moody v. Walters (1809), 16 Ves. 283

1507. ———.]—Aged forty-nine years.]—The ct. will not presume that a married woman aged forty-nine is past childbearing.—*Re* OVERHILL'S TRUSTS (1853), 1 Sm. & C. 362; 22 L. J. Ch. 485; 20 L. T. O. S. 200; 17 Jur. 312; 1 W. R. 208; 1 E. R. 159.

Annotations:—*Refd.* *Robinson v. Neal* (1868), 19 L. T. 142. *Mentd.* *Bentley v. Blizard* (1858), 4 Jur. N. S. 652; *Re* Williams' Will (1864), 10 L. T. 405.

PART III. SECT. 6, SUB-SECT. 7.

d. Whether presumption made.]—There is no presumption of law that a woman is past child-bearing at any particular age.—*ANDERSON v. AINSLIE*

treated as if all of them had perished at the same moment, & consequently none of the parties will be held to have transmitted any rights to the other.—*HARTSHORNE v. WILKINS* (1866), 2 Old. 276.—*CAN.*

c. ———.]—When brothers die by the same calamity & there is no evidence of the fact there is no presumption that one survived the other.—*In the Goods of DOWKERY* Nfld. L. R. 315.—*NFLD.*

B.—Presumptions: Sub-sects. 7 & 8.]

1508. — Aged forty-nine years & nine months—Long married without issue.]—Where a woman, aged forty-nine years & nine months, had been married to her husband twenty-six years without issue, the ct. presumed that she would never have a child by him.—*Re MILLNER'S ESTATE* (1872), L. R. 14 Eq. 245; 42 L. J. Ch. 44; 26 L. T. 825; 20 W. R. 823.

Annotations:—Foldl. Re Summers's Trusts (1874), 22 W. R. 639. *Reid. Croxton v. May* (1878), 9 Ch. D. 388; *Re White, White v. Edmond*, [1901] 1 Ch. 570.

1509. — Aged forty-seven—No children for seventeen years.]—A married woman, aged forty-seven, had had six children by her present husband, but had not been since pregnant for seventeen years. Medical evidence was produced that she had fourteen years ago suffered from a disease which, in the opinion of the medical man, rendered it improbable, if not absolutely impossible, that she should have further issue:—*Held*: there was sufficient presumption against any future issue for the ct. to act upon.—*Re SUMMERS'S TRUSTS* (1874), 30 L. T. 377; 22 W. R. 639.

1510. — Aged forty-one years & eleven months—Married fifteen years without issue.]—The presumption that a married woman aged forty-one years & eleven months, who had been married fifteen years & had never had any children, would not have any children, acted upon.—*Re ALLASON'S TRUSTS* (1877), 36 L. T. 653.

1511. — Aged fifty-four years & six months—Only married three years.]—The ct. refused to treat a woman as past child-bearing whose age was fifty-four & six months & had never had any children, but had only been married three years.—*CROXTON v. MAY* (1878), 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 325, C. A.
Annotations:—N.F. Re Taylor's Settlement. Trusts (1881), 29 W. R. 350. *Distd. Re White, White v. Edmond*, [1901] 1 Ch. 570.

1512. — Spinster—Aged fifty-three years—Parties entering into recognisances to refund.]—*FORTY v. REAY* (1853), cited in *Dart's Vendors*, Purchasers 5th ed. at p. 345.
Annotations:—Foldl. Re Widow's Trusts (1871), L. R. 11 Eq. 408. *Distd. Croxton v. May* (1878), 9 Ch. D. 388.

1513. — Aged fifty-six years—Party entering into recognisance to refund.]—A female [spinster] aged fifty-six years was absolutely entitled to a fund subject to the contingency of her having children. Payment was ordered on her own recognisances.—*LYDDON v. ELLISON* (1854), 19 Beav. 565; 24 L. T. O. S. 123; 18 Jur. 1066; 2 W. R. 690; 52 E. R. 470.

Annotation:—Consd. Re White, White v. Edmond, [1901] 1 Ch. 570.

1514. — Aged fifty-eight years.]—The ct. acted on the improbability of a lady in her fifty-eighth year having future issue.—*EDWARDS v. TUCK* (1856), 23 Beav. 268; 53 E. R. 105.

Annotations:—Reid. Re White, White v. Edmond (1901), 70 L. J. Ch. 300. *Mentd. Drewett v. Pollard* (1859), 27 Beav. 196.

1515. — Aged fifty-three years & two

(1890), 17 L. (Ct. of Sess.) 337; 27 Sc. L. R. 276.—**SCOT.**

e. —.]—GOLLAN'S TRUSTEES v. BOOTH (1901), 3 F. (Ct. of Sess.) 1035; 38 Sc. L. R. 762; 9 S. L. T. 121.—**SCOT.**

f. —.]—RACKSTRAW v. DOUGLAS, [1917] S. C. 284.—**SCOT.**

1511 i. — Married woman—Aged 54 years—Married for 15 years without issue.]—There is no fixed rule of law as to the age at which a woman must

be conclusively presumed to be past child-bearing, but after the age of fifty less evidence would be required than before that age. Upon an application by the executors of M. for leave to sell certain land bequeathed by him to his daughter N. & in case of her decease without issue to certain persons in remainder:—*Held*: as N. was fifty-four years of age, & although she had been married for over fifteen years, had borne no children, proof that her change of life had occurred would

months.]—A fund in ct. was paid out & distributed upon the assumption that a spinster, aged fifty-three years & two months would never have issue.—*HAYNES v. HAYNES* (1866), 35 L. J. Ch. 303; 14 L. T. 47; 14 W. R. 361.

Annotation:—Apld. Re White, White v. Edmond, [1901] 1 Ch. 570.

1516. — Aged fifty-three years & nine months.]—Money was ordered to be paid out of ct. on the presumption that a widow aged fifty-five years & four months, who had never had any children, & a spinster aged fifty-three years & nine months, would not have any children.—*Re WIDOW'S TRUSTS* (1871), L. R. 11 Eq. 408; 40 L. J. Ch. 380; 24 L. T. 87; 19 W. R. 468.

Annotations:—Distd. Croxton v. May (1878), 9 Ch. D. 388. *Apld. Re White, White v. Edmond*, [1901] 1 Ch. 570.

1517. — Aged fifty-one years—On issue of policy payable on birth of child.]—A fund in ct. a moiety of which in the event of a spinster lady then aged fifty-one years having children attaining twenty-one years would belong to them, but which otherwise belonged to petitioners, of whom she was one, was ordered to be paid out to petitioners upon a policy at a single premium being taken out in an approved office for the value of the moiety payable in the event of the spinster lady having a child.—*CARR v. CARR* (1912), 106 L. T. 753.

1518. — Widow—Aged fifty-five years & four months—Without having had issue.]—*Re WIDOW'S TRUSTS*, No. 1516, *ante*.

1519. — Aged fifty-two years—Having had one child only.]—A widow aged fifty-two having had one child only who had died after attaining the age of twenty-one years was treated as past the age of child bearing & on taking out administration to her son was allowed to take possession of the whole of a fund settled on her for life with remainder to her issue on attaining twenty-one.—*Re TAYLOR'S SETTLEMENT TRUSTS* (1881), 43 L. T. 795; 29 W. R. 350.

1520. — Aged fifty-four years—Without having had issue—Effect of presumption to deprive third party of chance of becoming entitled.]—Where property is given to B. in the event of A. having a child, the ct. will not enter into the question of A. being past child-bearing for the purpose of depriving B. of the chance of becoming entitled to the property.

Testator directed that, in the event of his sister A. marrying & having children, his property should be divided among the children of his sister A. & B. upon the youngest child attaining twenty-one, but did not provide for the event of A. marrying & having no children; & he empowered his trustees to raise a portion of the expectant, presumptive, or vested share of any child of B. for his or her advancement.

Upon a summons by the trustees to determine whether the power of advancement was exercisable in view of the fact that A. was then a widow of fifty-four years of age, & had never had a child:—*Held*: the power continued in operation during the lifetime of A.—*Re HOCKING, MICHELL v. LOE*,

complete the presumption that she was past the age of child-bearing.—*Re MEYER'S ESTATE* (1896), 13 S. C. 2; 6 C. T. R. 2.—**S. AF.**

1520 i. — Widow—Aged 54 years—All existing children of age.]—Held: the ct. should, without evidence as to the physical condition of M., a widow, 54 years of age, act on the presumption that there would be no further issue of her body.—*Re TINKING & WEBER* (1904), 25 C. L. T. 38; 8 O. L. R. 703; 4 O. W. R. 514.—**CAN.**

[1898] 2 Ch. 567; 67 L. J. Ch. 662; 79 L. T. 164; 47 W. R. 114, C. A.

Annotations:—*Distd. Re White, White v. Edmond*, [1901] 1 Ch. 570. *Fold. Re Cazenove, Perkin v. Bland* (1919), 122 L. T. 181.

1521. — Aged fifty-six years & three months—Having had one child twenty-four years before death of husband.—A widow, aged fifty-six years & three months, who had never had but one child, born when she was between twenty-one & twenty-two years of age, & lived afterwards with her husband for twenty-four years until his death, presumed to be past child-bearing.

The principle of the cases in which spinsters have been presumed to be past child-bearing applies also to widows who have had children.—*Re WHITE, WHITE v. EDMOND*, [1901] 1 Ch. 570; 70 L. J. Ch. 300; 84 L. T. 199; 49 W. R. 429;

Aged fifty-three years & five months, married seventeen years without issue—Bond for repayment in event of issue.—*Re WEBSTER, WEBSTER v. HABERSON* (1903), 114 L. T. Jo. 428.

1523. — Aged fifty-two years—Last child born twenty-two years before.—*Re THORNHILL, THORNHILL v. NIXON*, [1904] W. N. 112, C. A.

1524. — Effect of presumption to charge interest of third party.—Two daughters of testator, P. C., E. F. C., who became E. F. P., & E. C., who became E. H., testator having died in 1880 & divided his converted estate into nine equal parts or shares, were respectively entitled to one-ninth share under his will. The shares were given upon trust to pay the income unto each of his daughters during their lives, & after their respective decease & the decease of their surviving husbands each daughter's share was to be in trust for the daughter's children at twenty-one or marriage in equal shares & testator directed that if any of his daughters should die without leaving children her surviving then the share of such daughter should be divisible amongst brothers & sisters then living & the children of such of them as should be dead, such children to take equally their parent's share only.

One share of residue was held in trust for E. F. P. the mother of the first & second defts. The first deft., a daughter of E. F. P. was married in 1895. Her father died in 1910, her mother, E. F. P., in 1914, & her marriage was dissolved in July, 1917.

By her marriage settlement, date June 15, 1895, she covenanted that all property to which she should during her then intended coverture become entitled should be vested in the trustees as soon as circumstances permitted upon trusts as to the income as therein directed.

E. H., another of the testator's daughters, married, & having survived her husband, died, aged ninety-three, without having had a child. On E. H.'s death one-fifth of her share passed to the first deft., who had previously mortgaged her reversionary interest in P. C.'s estate to the second

deft.:—*Held*: the first deft.'s interest in the one-ninth share being contingent on the death of her mother & of E. H. without issue, & not having belonged to her absolutely during the coverture, since the ct. could not take into consideration that E. H. was from the date of the marriage settlement past the age of child-bearing, was not caught by her covenant to settle after-acquired property.—*Re CAZENOVE, PERKIN v. BLAND* (1919), 122 L. T. 181.

1525. — Male.—*P. v. N.* (1806), 31 L. Jo. 690.

Whether evidence of impossibility of issue admissible—To exclude rule against perpetuities.—*See PERPETUITIES.*

SUB-SECT. 8.—OMNIA PRÆSUMUNTUR RITE ESSE ACTA.

Sec, generally, DEEDS, Vol. XVII., pp. 285, 286, No. 968–976.

1526. Performance of duty.—*MONKE v. BUTLER* (1614), 1 Roll. Rep. 83; 81 E. R. 314.

Annotations:—*Refd. Powell v. Milburn* (1772), 3 Wils. 355; *Williams v. East India Co.* (1802), 3 East, 192; *R. v. Hawkins* (1808), 10 East, 211; *Pearce v. Whale* (1826), 7 Dow. & Ry. K. B. 512; *Heysham v. Forster* (1829), 5 Man. & Ry. K. B. 277.

1527. As to matters of long standing.—*ANON.* (1498), Jenk. 185; 145 E. R. 123.

Annotation:—*Consd. Re Airey, Airey v. Stapleton*, [1897] 1 Ch. 164.

1528. ——*COPE v. BEDFORD* (1627), Palm. 426; 81 E. R. 1154.

1529. ——*Reconveyance of the legal estate presumed under obscure circumstances, after a great lapse of time; though the possession originally not adverse, but under a trust.*

It has been said you cannot presume unless you believe. It is because there are no means of creating belief or disbelief that such general presumptions are raised upon subjects of which there is no record or written muniment. Therefore when the circumstances are incapable of forming anything like belief the legal presumption holds the place of particular & individual belief (*LORD ERSKINE, C.*)—*HILLARY v. WALLER* (1806), 12 Ves. 239; 33 E. R. 92, L. C.

Annotations:—*Refd. R. v. Upton Gray* (1830), 10 B. & C. 807; *A. G. v. Horner* (No. 2), [1913] 2 Ch. 140.

1530. ——*In favour of deft. in ejectment, who showed no title to the premises sought to be recovered, the ct. would not presume a surrender of a mtge. term to the owner of the inheritance, from the circumstance, that, in 1802, the Ct. of Ch. had decreed a sale of the mortgaged property for the payment of the money borrowed, & that some sales had taken place under the decree; but deft. had not purchased the land in question under the decree, & there was no evidence of any further proceedings in Ch.*

No case can be put in which any presumption has been made, except where a title has been

PART III. SECT. 6, SUB-SECT. 8.

1526 i. Performance of duty.—*Deft. was tried before a police magistrate & convicted. At the trial, the magistrate had the evidence taken by a shorthand writer.—Held*: there was nothing to show that the magistrate had not complied with Criminal Code, s. 793; & it must be assumed that he had done his duty.—*R. v. BOND* (1911), 19 W. L. R. 348; 19 Can. Crim. Cas. 96.—*CAN.*

1527 i. As to matters of long standing.—*At a distance of time "every intendment should be made in favour*

of what has been done as being lawfully & properly done."—*WATT v. ASSETS CO., HAIN v. ASSETS CO.*, [1905] A. C. 317; 7 F. (Ct. of Sess.) 104.—*SCOT.*

g. — Deed acted upon for thirty years.—*After a lapse of thirty years a deed by an administratrix, under a license from the Probate Ct. to sell, will be presumed to be good, though there is no affidavit of the administratrix indorsed thereon, as required by Probate Act, 1840, & no proof that the provisions of the Act as to notice of sale, etc., were complied with.—*

CAIRNS v. HORSMAN (1901), 35 N. B. R. 436.—*CAN.*

h. — Grant of water—Issue of statutory notices.—*Held*: a grantee of water under B. C. Land Ordinance, 1865, who has used the water granted to him for several years, would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by sect. 45, as it would be presumed that the same were given before recording the grant.—*MARTLEY v. CARSON* (1889), 20 S. C. R. 634.—*CAN.*

k. — Exercise of power of sale.

Sect. 6.—Presumptions: Sub-sect. 8.]

shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, & in such cases only, has it ever been allowed (TINDAL, C.J.).—DOE d. HAMMOND v. COOKE (1829), 6 Bing. 174; 7 L. J. O. S. C. P. 255; 130 E. R. 1247; *sub nom.* DOE d. HAMMOND v. COOKE, 3 Moo. & P. 411.

1531. — Presumption of enrolment.]—37 Hen. 8. c. 12, enacted, that such decree as should be made by the Archbishop & others, before Mar. 1, then next ensuing, of or concerning the payment of tithes, oblations, or other duties within the said city or liberties of the same, & enrolled in the King's High Ct. of Ch. of Record, should stand & remain, & be as an Act of Parliament, & should bind as well all the said citizens as the said clergy, etc. for ever. The decree was made, but no enrolment of it in Ch. could be produced, though the decree appeared, by a statement in the registry-book of the See of London, to have been given by the Archbishop to the Bishop of London, to be kept in the registry of St. Paul's Cathedral.

Appl't. filed his bill against resp. for an account of the tithes due from resp. under this Act, & the decree therein mentioned. Resp.'s answer denied the enrolment of the decree, & its existence as a legal instrument:—*Held*: after the cts. had repeatedly treated the decree as a binding instrument, & after the citizens had recognised it by the usage of paying tithes according to its order, the enrolment must be presumed.—MACDOUGALL v. PURRIER (1830), 4 Bli. N. S. 433; 2 Dow & Cl. 135; 5 E. R. 151, H. L.

Annotations:—*Refd.* Doe d. Woodhouse v. Powell (1846), 8 Q. B. 576; Doe d. Millett v. Millett (1848), 11 Q. B. 1036; Hebbert v. Purchas (1871), L. R. 3 P. C. 605; Haigh v. West, [1893] 2 Q. B. 19; Leigh v. C. v. King (1901), 70 L. J. K. B. 313.

—Where a power of sale has been exercised & enjoyment thereunder has continued for a long time, a presumption arises that all proper notices of its intended exercise were given.—BERARD v. BRUNEAU (1915), 8 W. W. R. 635; 25 Man. L. R. 400.—CAN.

1. — Mode of dealing with a fund.]—Parties entitled to a fund dealt with it in a particular way for a long series of years. In the absence of positive evidence showing what their shares were:—*Held*: the parties must be taken to have been entitled to it in the shares pointed out by their mode of dealing with it.—SKYD v. STEWART (1858), 10 Ir. Jur. 105.—IR.

m. Presumption of regularity of official acts.—Proceedings in court.—Jurisdiction.]—*Held*: the district ct. must be presumed not to have exceeded its jurisdiction.—HAMILTON v. McFARLAND (1849), 3 Ont. Dig. 6124.—CAN.

n. — Confirmation of bankrupt's certificate.]—It will be presumed that the ct. of Chancery, in confirming a certificate, acted on a sufficient affidavit of bkpt., as required by the 6 Vict. c. 4, s. 25.—MORRISON v. ALBER (1851), 2 All. 145.—CAN.

o. — —.]—*Held*: the case of the insolvent being within the jurisdiction of the superior cts., it would be presumed that all was done properly.—GREGG v. OSBORNE (1826), Batt. 140.—IR.

p. — Constitution of court-martial.]—Under Restoration of Order in Ireland Act, 1920, s. 1 (2) (b), a court-martial, when trying a person charged with a crime punishable by death, shall include as a member of the ct. a person of legal knowledge &

experience. W. was sentenced to death by a court-martial, no question as to the qualifications of the members of the ct. being raised. He afterwards applied to the K. B. Div. for a writ of *certiorari* to quash the conviction on the ground that no certificate as to legal knowledge & experience of a member of the ct. was handed in. The application was refused on the ground that, in the absence of any objection at the trial, there was a general presumption of law that the ct. was properly constituted.—WHELAN v. R., [1921] 2 I. R. 310.—IR.

q. — Foreign adjudication of bankruptcy.]—The cts. of this colony will presume *prima facie* that an adjudication in bkpty. in another colony has been duly made, & the preliminary steps duly taken.—STRIKE v. GLEICH (1879), O. B. & F. 50.—N.Z.

r. — Sheriff's proceedings.]—A. purchased lands at sheriff's sale in 1831, & took possession with the assent of the judgment debtor, who never disputed A.'s right or the regularity of the proceedings:—*Held*: in an action of trespass against A. by a person who showed no title, & had only recently obtained possession, but did not claim under the judgment debtor, that it would be presumed that the sheriff's proceedings were regular.—MCLARDY v. FLAHERTY (1847), 3 Kerr, 455.—CAN.

s. — Return to writ.]—The return of the sheriff as to the amount made on the ptff.'s writ will be presumed to be correct.—TURNER v. PATTERSON (1863), 13 C. P. 412.—CAN.

— Seizure of land.] —

1532. — —.]—On the separation of A. & B., husband & wife, in Apr. 1797, an annuity was settled by the husband on the wife determinable on payment of £1,000. In Nov. 1797, at which time B. was living in adultery with C., a bond & warrant of attorney was given by the husband to C. to secure £1,400. Judgment was entered up on the bond, & in 1801 proceedings were taken to enforce it, but were stopped by injunction. Afterwards another bond for £537 was given by the husband to C., which was satisfied in 1803. Upon a bill filed in 1833, by B. against A.'s extrix., for payment of the arrears of the annuity, ptff. being unable to prove that any payment had been made on account of the annuity since 1803, & deft. producing the bond for £1,400, the warrant of attorney to enter up judgment thereon & the bond for £537, with a receipt for that amount indorsed:—*Held*: considering the lapse of time, & the situation of the parties, it might be presumed that the bond for £1,400 was given in discharge of the £1,000, & the subsequent bond for £537 in full discharge of payment of the whole debt.—HAWORTH v. BOSTOCK (1840), 4 Y. & C. Ex. 1; 160 E. R. 894; *on appeal* (1842), 9 Cl. & Fin. 59, H. L.; *subsequent proceedings*, *sub nom.* BOSTOCK v. HUME (1841), 7 Man. & G. 893, Ex. Ch.

1533. — Legal foundation of charity.]—B. hospital is a freehold building, divided into rooms; each room is of the annual value of £1, & is inhabited by a bedesman, who is appointed to it by E., the heir male of the original founder, or by certain others. No deed, or charter, or enrolment, or letters patent of the hospital exists, nor any common seal, but the hospital is governed by certain rules, made 1597, of which there is a printed copy; these rules refer to certain feoffees & their heirs, but none are known. By one of the rules no one is to be admitted who is leprous or a drunkard, etc.; & by another, any one falling into these infirmities or vices is to be

The sheriff made a seizure of deft.'s land under ptff.'s execution. It did not appear that the execution had been registered in the land titles office:—*Held*: the seizure must be presumed to have been regularly made until the contrary was shown.—IMPERIAL ELEVATOR CO. v. SHERE (1910), 14 W. L. R. 32; 3 Sask. L. R. 197.—CAN.

a. — Notice of bye-law to close road.]—The ct. will assume that the requisite notice of a bye-law to close a road has been given until the contrary is shown.—FISHER v. VAUGHAN MUNICIPAL COUNCIL (1855), 10 U. C. R. 492.—CAN.

b. — Township bye-law.—Observance of statutory directions.]—FLETCHER v. EUPHRASIA TOWNSHIP, WHITE v. COLLINGWOOD MUNICIPALITY (1856), 13 U. C. R. 129.—CAN.

c. — Certificate endorsed on a deed.]—The certificate endorsed on a deed bearing date May 18, 1856, executed by a married woman was that at the Ct. of General Quarter Sessions holden at etc. "on Tuesday the 16th day of May" 1826, personally appeared the within-named S. E. wife of the within-named D. E. & being duly examined," etc., in the usual form:—*Held*: it should be assumed that the 16th was the first day of the sessions which might have been continued & the certificate signed after the execution of this deed.—ALLISON v. REDNOR (1857), 14 U. C. R. 459.—CAN.

a. — —.]—With regard to a deed thirty years old:—*Held*: from the certificate it was to be presumed that everything was done by the judge who made the same to justify him in

displaced. No instance has occurred of a bedesman once appointed having been displaced:—*Held*: the barrister was justified in point of law, & was warranted by the facts, in presuming that the hospital had a legal foundation, not investing the claimants with a corporate capacity.—**NORTHAMPTON COUNTY NORTHERN DIVISION CASE, SIMPSON v. WILKINSON (1844)**, 7 Man. & G. 50; Bar. & Arn. 308; Cox & Atk. 47; 1 Lut. Reg. Cas. 168; Pig. & R. 128; 8 Scott, N. R. 814; 14 L. J. C. P. 49; 4 L. T. O. S. 137, A.; 9 J. P. 57; 8 Jur. 1126; 135 E. R. 20; *previous proceedings* (1843), 5 Man. & G. 3, n.

Annotations:—**Refd.** *Heartley v. Banks* (1858), 5 C. B. N. S. 40; *Bulmer v. Norris* (1860), 9 C. B. N. S. 19; *Freeman v. Gainsford* (1861), 11 C. B. N. S. 68; *Roberts v. Percival* (1864), 18 C. B. N. S. 36; *Durant v. Kennett* (1869), L. R. 5 C. P. 262. **Mentd.** *Autey v. Topham* (1843), 5 Man. & G. 1; *Ashmore v. Lees* (1845), Bar. & Arn. 554; *Beeson v. Burton* (1852), 20 L. T. O. S. 111; *Smith v. Hall* (1863), Hop. & Ph. 11; *Fryer v. Bodenham* (1869), L. R. 4 C. P. 529; *Crow v. Hilleary*, [1913] 1 K. B. 385.

1534. —[—]—A decree to all appearance just in itself, when pronounced, & strengthened, moreover, by constant possession & unvarying recognition for more than two centuries:—*Held*: to require the strongest grounds to warrant its impeachment, the great principle applicable to such a case being *Omnia presumuntur a iudice rite et solemniter acta*. This principle was deemed peculiarly imperative in a case where the decree in question, with its warrant & register, was shown to have perished in a great fire so far back as 1700, nothing remaining but an extract.

We ought to presume everything that can be reasonably supposed in favour of long possession (LORD WESTBURY).—**LEE v. JOHNSTONE (1869)**, L. R. 1 Sc. & Div. 426, H. L.

1535. —[—]—We are bound to presume a legal origin if such be possible in favour of a right which appears from the facts stated in the case to have existed for many hundreds of years & that the inaccurate description of such a right in a

series of conveyances cannot interfere with the presumption which we should otherwise be entitled to make from the facts with relation to the enjoyment of the right (KELLY, C.B.).—**JOHNSON v. BARNES (1873)**, L. R. 8 C. P. 527; 42 L. J. C. P. 259; 29 L. T. 65, Ex. Ch.

Annotations:—**Refd.** *Saltash Corp. v. Goodman* (1880), 5 C. P. D. 431; *Simpson v. Godmanchester Corp.* (1897), 77 L. T. 409; *Brookbank v. Thompson*, [1903] 2 Ch. 344; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

1536. —[—]—A presumptive that land has acquired a particular character may arise from the acts of parties during a long period so as to estop persons claiming under those parties from denying that it has acquired that character.—**HOLMES v. MILWARD (1878)**, 47 L. J. Ch. 522; 38 L. T. 381; 26 W. R. 608.

1537. —Approval by local authority to construction of new sewer.]—The fact that the requisite sanction & approval for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolitan Management Acts, & as such vested in the vestry & repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe to carry off the drainage from them, & connected the pipe with a sewer belonging to the vestry in a neighbouring street. There was no evidence of any notice having been given to the vestry, or of any order having been made by them, or of their sanction or of the approval of the Metropolitan Board of Works having been obtained, under the Metropolitan Management Act, 1855 (c. 120) or Metropolitan Management Amendment Act, 1862 (c. 102):—*Held*: the probable inference of fact was that the pipe was laid with the sanction of the vestry & the approval of the Metropolitan Board of Works required by the Acts.—**ST. MATTHEW, BETHNAL GREEN VESTRY v. LONDON SCHOOL BOARD**, [1898]

certifying what he professed to certify.—**ORRER v. VERNON (1864)**, 14 C. P. 573.—**CAN.**

e. —Return to commission to examine witnesses.]—It will be presumed that a commission to examine witnesses produced in ct. is in the same state as it came from the commissioners, & that the exhibits enclosed are those referred to in the depositions.—**LAWTON v. TARRATT (1858)**, 4 All. 1.—**CAN.**

f. —[—]—Where depositions taken under a commission are returned to the ct. enclosed in an envelope addressed as directed by Consol. Stat. c. 37, s. 194, & sealed up, it will be presumed that the seal is that of the comr. who took the deposition.—**DOE d. HEATHCOTE v. HUGHES (1878)**, 2 P. & B. 296.—**CAN.**

g. —Certificate of examination by justices.]—Where, after the decease of one of the justices of the peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect & did not believe that the wife was examined as the certificate stated, the ct. gave credit to the certificate, notwithstanding the evidence.—**ROMANES v. FRASER (1870)**, 17 Gr. 267.—**CAN.**

h. —Administration of oath of allegiance.]—In 1821 J. S., with his son S., & his daughter H., came from the U.S., & settled in C., all being aliens. On Mar. 20, 1821, the Crown granted the land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on May 17, 1828, & S. about Nov. 6, 1842.—*Held*: under Alien Act, 1828, assented to on May 10, 1828, J. S. was a British subject, for it might be pre-

sumed that he took the oath when he got the patent.—**ELLER v. ELLIOTT (1872)**, 32 U. C. R. 434.—**CAN.**

k. —Issue of writ of mesne process.]—In the absence of evidence of the actual time of issuing a writ of mesne process, it will be presumed to have issued on the day it bears date.—**POMEROY v. PROVINCIAL INSURANCE CO. (1873)**, cited in Stevens' N. B. Digest, at p. 604.—**CAN.**

l. —Adoption of road by quarter sessions.]—A road was surveyed in 1834, & the surveyor's report was made to the quarter sessions in that year. The records were, however, lost or destroyed, & there was no evidence that the road had been adopted by the sessions under the Act then in force, nor was there a record of any order directing it to be opened. It was, however, actually opened before 1853, with the assent of the owners of the land, & was used for several years, & statute labour was done upon it:—*Held*: the due adoption of the road by the quarter sessions should be presumed.—**PALMATIER v. MCKIBBON (1894)**, 21 A. R. 441.—**CAN.**

m. —Deposit of cash security.]—There is a material difference in the evidence required by law to prove a recognisance & a security for cash. No proceedings can be brought to enforce a recognisance unless the condition for which the recognisance was made is evidence in writing, while by statute the condition for which the deposit was made is irrelevant, since it is presumed that when the registrar becomes custodian of the deposit the maxim *omnia presumuntur rite esse acta* applies.—**R. v. DAVIDSON (1900)**, 21

C. L. T. 98; 4 Terr. L. R. 425.—**CAN.**

n. —Use of lock-up as place of detention.]—Deft., who was confined in the lock-up of the town of S., was tried & convicted of the offence of breaking prison. The evidence showed that the lock-up was situated in the same building with the office of the police magistrate of the town, & had been used for years as a place of detention for persons charged with the commission of criminal offences, & that there was no other place in the town used for such purpose:—*Held*: the regularity of all proceedings necessary to constitute the lock-up a place of confinement in such cases was to be assumed.—**R. v. BROWN (1907)**, 41 N. S. R. 293.—**CAN.**

o. —Instructions of Ordnance officer.]—*Held*: upon the evidence defts. were liable as common carriers for the value of military clothing forming the contents of a box shipped by instructions of an Ordnance officer by defts. railway & lost in transit; the presumption & the proper inference from the facts were that the instructions of the officer had been carried out in the regular course of the business of the Ordnance office.—**R. v. CANADIAN PACIFIC RY. CO. (1912)**, 21 W. L. R. 709; 2 W. W. R. 627; 5 D. L. R. 176; 5 Alta. L. R. 9.—**CAN.**

p. —Legality of vote in election.]—*Held*: where a man's vote has been accepted by an officer in charge of a poll, it should be presumed that he has a right to vote without regard to any formalities or evidence about election lists.—**Re LAKEHEAD PROVINCIAL ELECTION, TIDSBERRY v. GARLAND (1914)**, 29 W. L. R. 628; N

Sect. 6.—Presumptions: Sub-sects. 8 & 9.]

A. C. 190; 67 L. J. Q. B. 234; 77 L. T. 635; 62 J. P. 116, 532; 46 W. R. 353; 14 T. L. R. 68, II. L.; *affg.* S. C. *sub nom.* R. v. ST. MATTHEW, BETHNAL GREEN VESTRY, [1896] 2 Q. B. 319, C. A.

Annotations.—*Consd.* Kershaw v. Paine (1913), 78 J. P. 149. *Mentd.* R. v. Hastings Corpn. (1896), 66 L. J. Q. B. 80; Appleyard v. Lambeth Vestry (1897), 76 L. T. 442; Holland v. Lazarus (1897), 66 L. J. Q. B. 285; Geen v. St. Mary, Newington Vestry, [1898] 2 Q. B. 1; Greater London Property Co. v. Foot (1899), 68 L. J. Q. B. 628; Woodthorp v. Spencer & Husbands (1899), 63 J. P. 246; Pakenham v. Titchhurst R. D. C. (1903), 67 J. P. 448.

1538. —.]—VATCHEL v. PAULI, No. 1388, *ante*.

1539. —.]—Statutory sanction to exchange of parsonage house.]—HARPER v. HEDGES, [1924] 1 K. B. 151; 93 L. J. K. B. 116; 130 L. T. 383; 88 J. P. 33; 40 T. L. R. 156; 68 Sol. Jo. 541, C. A.

—Notice of chargeability.]—See POOR LAW.

1540. As to correctness of documents—Genuineness of foreign licence—Acted on by foreign officials.]—An insured vessel is warranted to carry a French licence, it is not sufficient to show that the captain of the vessel in 1813, before the vessel sailed from Dantzic, received a document which purported to be a French licence, without showing that he received it from some officer or person in authority under the French govt.; but proof that after the arrival of the vessel at Bordeaux, she was allowed to remain there for upwards of a month after an inspection of the French licence & other documents by the officer of the French government is *prima facie* evidence that the document is genuine.—EVERTH v. TUNNO (1816), 1 Stark. 508, N. P.

1541. —.]—Deed acted upon for thirty years.]—Almost anything will be presumed in favour of a grant made fairly, & under good advice on the

8 W. W. R. 33; 20 D. L. R. 286; 25 Man. L. R. 197.—CAN.

q. —.]—Issue of assessment notices.]—The omission by the officer sending out assessment notices under the City Act to initial the indorsement on the roll showing date of mailing & otherwise want of evidence of such mailing is not fatal to the recovery of taxes by the city where the person assessed has not denied the receipt of notice.—NORTH BATTLEFORD CITY v. BREHAUT (1920), 1 W. W. R. 1053; 51 D. L. R. 609; 13 Sask. L. R. 202.—CAN.

r. —.]—Publication of Government order.]—There being no proof given by either party as to whether an *istahar* said to have been published by Govt. was or was not duly published:—*Held*: the publication of the *istahar* must be presumed.—PROBUNO COOMAR ROY v. SECRETARY OF STATE FOR INDIA (1899), 1 L. R. 26 Calc. 792.—IND.

s. —.]—APURBA KRISHNA BOSE v. R. (1907), 1 L. R. 35 Calc. 141.—IND.

t. —.]—Where an act requires the concurrence of an official person, there is a presumption in favour of its due execution.—PURSHOTAM v. HARBHAMJI (1909), 1 L. R. 33 Bom. 443.—IND.

a. —.]—Commission appointing Master in Chancery.]—The commission appointing W. L. Master Extraordinary of the Ct. of Ch., when produced at the trial, had no appearance of the great seal being appended to it:—*Held*: as the commission was produced from the proper place of deposit, & had been acted on, it was to be inferred that it had been a complete instrument.—R. v. EGAN (1850), 2 Ir. Jur. 55.—IR.

b. —.]—Poll v. LORD ADVOCATE (1897), 1 F. (Ct. of Sess.) 823.—SCOT.

c. —.]—Restraining sale of liquor.—Proclamation defining areas.]—Where, under an Act providing for

the definition of areas within districts with the object of restraining the sale of liquor to aboriginal natives within such areas, a Proclamation was issued by the Governor grouping several districts together & declaring the territory comprising those districts to be an area under the Act:—*Held*: the presumption was that, where a person had been convicted of a contravention of the Act within the area, the locality of such contravention had been properly included.—R. v. MATHEBUS (1903), 20 S. C. 403.—S. AF.

d. —.]—In 1876 & 1878 respectively, the Municipality of W. granted pieces of land to the Govt. in an action brought in 1909 by the Municipality to eject the Govt. from both pieces of land it was contended by plff. that notice in writing to the inhabitants & consent of the Governor in terms of Ord. 8 of 1848, both being required if the alienations were to be valid, had never been given:—*Held*: in the absence of clear proof that the notice had not been given & the consent not obtained, the presumption *omnia presumuntur rite esse acta* should prevail.—WORCESTER MUNICIPALITY v. COLONIAL GOVERNMENT (1909), 3 Buch. A. C. 638; 19 C. T. R. 801.—S. AF.

e. As to transference of shares.]—A shareholder transferred his shares & procured registration of a transfer to John Smith, L. St., M., which purported to be accepted & signed by him. On the winding-up of the co., John Smith could not be found or heard of in L. St.:—*Held*: it was not to be presumed he was a fictitious person.—SIMPSON v. MULLALLY (1871), 2 V. R. (Law) 56.—AUS.

f. As to postal delivery.]—The presumption that a letter properly addressed, stamped & posted, & not returned to the writer, arrived at its destination, is conclusive if not denied.—CUSHING v. LADY BARKLY GOLD

part of the grantors, & acted upon for upwards of thirty years.—DELA RUE v. CHURCH (1851), 20 L. J. Ch. 183; 17 L. T. O. S. 102; 15 Jur. 455.

1542. —.]—Date of notice of intention to stop up way true date.]—Inclosure Act, 1845 (c. 118), s. 63, does not require that an appeal under that sect. shall be actually heard within the four months mentioned in the sect., but that due notice of appeal shall be given within that time.

Upon a preliminary objection, applt. was required to prove the time when the notice of intention to stop up a way, mentioned in the above sect., was fixed to the church door, & it was proved that a notice bearing a certain date had been seen posted on the door:—*Held*: the date borne by the notice was *prima facie* evidence that the notice was first fixed up on that date.—R. v. ESSEX JJ. (1864), 34 L. J. M. C. 41; 11 L. T. 486; 28 J. P. 776; 13 W. R. 186.

See, further, HIGHWAYS.

1543. —.]—Legality of votes cast in election.]—It will not be presumed that the votes given for the candidate next highest on the poll were not legal votes, but the contrary must be shown.—R. v. BRIGGS (1864), as reported in 29 J. P. 423.

See, further, ELECTIONS, Vol. XX., pp. 40–42, Nos. 246–250.

1544. Where transaction completed.]—Where a purchaser has entered into possession, & enjoyed the subject of his contract, the ct. will make every reasonable presumption in favour of the validity of the transaction.—PORT OF LONDON ASSURANCE CO.'S CASE (1854), 5 De G. M. & G. 465; 43 E. R. 951; *sub nom.* Re SEA, FIRE & LIFE ASSURANCE SOCIETY, *Ex p.* PORT OF LONDON SHIP-OWNERS' LOAN & ASSURANCE CO., 24 L. J. Ch.

MINING CO., REGISTERED (1883), 9 V. L. R. 108.—AUS.

g. Obedience to bye-law.]—Licensed Carriages Act, 1864, s. 5 (No. 217), authorises Bye Law 78, s. 16 of the city of Melbourne, which provides that no owner of a licensed carriage shall entrust that carriage to another person as driver except as that owner's servant. Every owner licensed under these bye laws, & employing a driver, is to be presumed, until the contrary is shown, to have obeyed this bye law.—CLUTTERBUCK v. GURRY (1885), 11 V. L. R. 810.—AUS.

h. As to correctness of description in grant.]—The description in a grant will be taken as correct unless proved wrong by the clearest testimony.—DOE d. SMITH v. MEYERS (1832), 2 O. S. 301.—CAN.

k. As to acknowledgment of deed.]—Where some evidence was given to show that the deed had been acknowledged before a judge of this ct.:—*Held*: the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time.—TIFFANY v. MCCUMBER (1856), 13 U. C. R. 159.—CAN.

l. As to genuineness of magistrate's signature & seal.]—The signature & seal of a person affixing the same as chief magistrate to an affidavit proving the due execution of a commission issued from this ct., will be presumed genuine until the contrary is proved.—DOE d. LEMOINE v. RAYMOND (1837), 5 O. S. 337.—CAN.

m. As to document found amongst notary's records.]—A certified copy of a power of attorney to convey lands, etc., from the deposit of notarial records in Lower Canada, under the corporate seal of the Board of notaries of M., is admissible in evidence, it being presumed that such power of attorney,

705; 23 L. T. O. S. 301; 2 W. R. 540, L. JJ.; *reversd.* on other grounds, *sub nom.* ERNEST v. NICHOLLS (1857), 6 H. L. Cas. 401, H. L.

Annotations.—**Mentid.** Hickman v. Cox (1857), 3 C. B. N. S. 523 (see (1860), 8 H. L. Cas. 268); London Dock Co. v. Sinnott (1857), 8 E. & B. 347; Agar v. Athenaeum Life Assce. Soc. (1858), 3 C. B. N. S. 725; Athenaeum Life Assce. Soc. v. Poolcy (1858), 3 De G. & J. 294; *Re* Athenaeum Soc., *Ex p.* Eagle Co. (1858), 4 K. & J. 549; Prince of Wales Assce. v. Harding (1858), E. B. & E. 183; *Re* Athenaeum Assce. Soc., *Ex p.* Prince of Wales Life & Educational Assce. (1859), 28 L. J. Ch. 335; *Re* London & Eastern Banking Corp., *Ex p.* Longworth's Exors. (1859), John. 465; Metropolitan Saloon Omnibus Co. v. Hawkins (1859), 4 H. & N. 87; *Re* Royal British Bank, Nicol's Case (1859), 3 De G. & J. 387; Browning v. Great Central Mining Co. (1860), 5 H. & N. 856; Conybeare v. New Brunswick, etc. Co. (1860), 1 De G. F. & J. 578; *Re* Era Assce. Soc., William's Case, Anchor Case (1860), 2 John. & H. 400; *Re* Magdalena Steam Navigation Co. (1860), John. 690; *Re* National Patent Steam Fuel Co., Baker's Case (1860), 1 Drew. & Sm. 55; *Re* Phoenix Life Assce., *Ex p.* Martin (1860), 2 L. T. 196; Stears v. South Essex Gaslight & Coke Co. (1860), 9 C. R. N. S. 180; *Re* Era Assce., William's Case, Anchor Case (1862), 1 Hem. & M. 672; *Re* Phoenix Life Assce., Burgess & Stock's Case (1862), 2 John. & H. 441; *Re* Saxon Life Assce. Soc., Anchor Assce. Case, Era Assce. Soc. Case, *Re* Era Assce. Soc., William's Case, Anchor Assce. Case (1863), 32 L. J. Ch. 206; *Re* State Fire Insco. (1863), 1 De G. J. & Sm. 634; Kearns v. Leaf, Aldebert v. Leaf (1864), 1 Hem. & M. 681; *Re* State Fire Insco. (1864), 4 New Rep. 458; Fountaine v. Carnarthen Ry. (1868), L. R. 5 Eq. 316; Mahony v. East Holyford Mining Co. (1875), L. R. 7 H. L. 869; *Re* Norwich Equitable Fire Assce. Soc. (1887), 58 L. T. 35.

SUB-SECT. 9.—OMNIA PRÆSUMUNTUR CONTRA SPOLIATOREM.

1545. General rule.—There is a well-known principle that if the persons against whom the claim is made are not willing to bind themselves as to the maximum number of trains, or the weight, or the speed, then the sum must be taken most strongly against their co. upon the principles enunciated in *Armory v. Delamirie*, No. 1550, *post*; & the largest amount of injury which can be sustained would probably be considered to be the amount to be awarded by the tribunal which has to award compensation (LORD CAIRNS).—HAMMERSMITH & CITY RY. CO. v. BRAND (1860), L. R. 4 H. L. 171; 38 L. J. Q. B. 205; 21 L. T.

though not in itself an official document, came officially into the hands of the notary among whose records it was found.—*QUAY v. McMillan* (1856), 5 C. P. 400.—**CAN.**

n. As to lawful erection of bridge sanctioned by statute.—*Held*: by the various Acts referring thereto, the erection of defts.' drawbridge over the D. canal was sanctioned & recognised; & it must be assumed to have been lawfully erected.—*DESJARDINS CANAL CO. v. GREAT WESTERN RY. CO.* (1868), 27 U. C. R. 363.—**CAN.**

o. As to acts of the Crown.—The ct. cannot presume that the Crown will not do right.—*NELSON & FORT SHEPARD RY. CO. v. PARKER* (1897), 6 B. C. R. 1.—**CAN.**

p. As to delivery of insurance policy & payment of premium.—The production from the custody of representatives of the insured of a policy of life insurance raises a presumption that it was duly delivered & the premium paid.—*MUTUAL LIFE ASSURANCE CO. OF CANADA v. GIGUERE* (1902), 22 C. L. T. 276; 32 S. C. R. 348.—**CAN.**

q. As to regularity of transfer of member of benefit association.—Where the constitution of a benefit assocn. provides that members shall not be transferred from one lodge to another unless all dues & assessments have been paid, up to & including those for the month in which the application for

affiliation is made, the fact that, upon such an application, a member was transferred from one lodge to another involves the presumption as against the assocn. that the transfer was regularly made when the member was in good standing & in accordance with the regulations.—*ANCIENT ORDER OF UNITED WORKMEN OF QUEBEC v. TURNER* (1910), 44 S. C. R. 145.—**CAN.**

r. As to appointment of officials of company.—7 Wm. IV. c. 54, incorporating the N. B. M. I. Co., required that policies should be subscribed by the president & countersigned by the secretary.—*Held*: a policy so signed was valid without the seal of the co., & evidence of these persons having acted as president & secretary was *prima facie* evidence of their appointment.—*DIMOCK v. NEW BRUNSWICK MARINE ASSURANCE CO.* (1849), 1 All. 398.—**CAN.**

s. As to acts of private persons.—The maxim *omnia presumuntur rite esse acta* may be recognised in support of solemn acts even of private persons. For instance if an act can only be lawful after the performance of some prior act, due performance of that prior act will be presumed.—*WRIGHT'S EXECUTORS v. KEYSER* (1908), E. D. C. 68.—**S. AF.**

PART III. SECT. 6, SUB-SECT. 9.

t. Giving of secret commission.—Presumption of corruption.—The fact

238; 34 J. P. 36; 18 W. R. 12, H. L.; *reversd.* S. C. *sub nom.* BRAND v. HAMMERSMITH & CITY RY. CO. (1867), L. R. 2 Q. B. 223, Ex. Ch.

Annotations.—**Consd.** Coldman v. Hill, [1919] 1 K. B. 443. **Refd.** Buccleuch v. Metropolitan Board of Works (1872), L. R. 5 H. L. 418; Hopkins v. G. N. Ry. (1877), 2 Q. B. D. 224; A.-G. v. Met. Ry., [1894] 1 Q. B. 384; Rockingham Sisters of Charity v. Ry., [1922] 2 A. C. 315. **Mentid.** City of Glasgow Union Ry. v. Hunter (1870), L. R. 2 Sc. & Div. 78; Smith v. L. & S. W. Ry. (1870), L. R. 6 C. P. 14; R. v. Cambrian Ry. (1871), L. R. 6 Q. B. 422; Smith v. L. & S. W. Ry. (1871), 23 L. T. 678; Clowes v. Staffordshire Potteries Waterworks Co. (1872), 8 Ch. App. 125; Jones v. Stanstead, Sheffield & Chambly Railroad Co. (1872), L. R. 4 P. C. 98; G. W. Ry. v. Smith (1870), 2 Ch. D. 235; Smith v. Mid. Ry. & L. & Y. Ry. (1877), 37 L. T. 224; R. v. Sheward (1880), 9 Q. B. D. 741; Dixon v. Metropolitan Board of Works (1881), 7 Q. B. D. 418; Metropolitan Asylum District v. Hill (1881), 6 App. Cas. 193; Calc. Ry. v. Walker's Trustees (1882), 7 App. Cas. 259; R. v. L. G. Board & Taylor (1882), 52 L. J. M. C. 4; Lea Conservancy Board v. Hordford Corp. (1884), Cab. & El. 299; L. B. & S. C. Ry. v. Truman (1885), 11 App. Cas. 45; Parkdale Corp. v. West (1887), 12 App. Cas. 602; Cowper-Essex v. Acton L. B. (1889), 14 App. Cas. 153; North Shore Ry. v. Pion (1889), 14 App. Cas. 612; Holliday v. Wakefield Corp., [1891] A. C. 81; Sholler v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co. (1891), 64 L. J. Ch. 216; Emsley v. N. E. Ry., [1896] 1 Ch. 418; Kirby v. Harrogate School Board, [1896] 1 Ch. 437; Jordonson v. Sutton, Southcoates & Drypool Gas Co., [1898] 2 Ch. 614; Southwark & Vauxhall Water Co. v. Wandsworth Board of Works, [1898] 2 Ch. 603; Canadian Pacific Ry. v. Parke, [1899] A. C. 535; Long Eaton Recreation Grounds Co. v. Mid. Ry. (1901), 71 L. J. K. B. 74; Canadian Pacific Ry. v. Roy, [1902] A. C. 220; Dawson v. Great Northern & City Ry., [1905] 1 K. B. 260; Edinburgh Water Trustees v. Sommerville (1906), 95 L. T. 217; Dibden v. Skirrow, [1907] 1 Ch. 437; Fletcher v. Birkenhead Corp., [1907] 1 K. B. 205; Toronto Corp. v. Toronto Ry., Toronto Ry. v. Toronto Corp., [1907] A. C. 315; Horton v. Colwyn Bay & Colwyn U. C., [1908] 1 K. B. 327; Price's Patent Candle Co. v. L. G. C., [1908] 2 Ch. 526; West v. Bristol Tram Co. (1908), 77 L. J. Q. B. 684; R. v. Fulham Grdns. (1909), 7 L. G. L. 881; Grand Trunk Pacific Ry. v. Fort William Land Investment Co. [1912] A. C. 224; Board of Agriculture for Scotland v. Mummer, [1916] 1 A. C. 675; Quebec Ry., Light, Heat & Power Co. v. Vandry, [1920] A. C. 662.

1546. Suppression of documents.—Adverse title presumed.—Where a deed or other evidence is suppressed by either party, a ct. of equity will always presume a title against him who suppressed it.—*LEWIS v. LEWIS* (1680), Cas. temp. Finch, 471; 23 E. R. 254, L. C.

1547. ———.]—The suppression of some of

that a secret commission has been given raises the presumption that it was given "corruptly" within Secret Commissions Prohibition Act, 1905, s. 2.—*R. v. SCOTT*, [1907] V. L. L. 471.—**AUS.**

a. Action against carrier for loss of goods.—When presumption will apply.—In an action against a common carrier for the loss of a case of goods the maxim *omnia presumuntur contra spoliatores* will not apply unless it is shown that the goods were in defts.' possession, & that they had an opportunity but omitted to show their value.—*SMITH v. LUNT* (1873), 2 Pug. 64.—**CAN.**

b. Destruction of documents.—When presumption not justified.—St. L. filed a petition of right to recover from the Crown the balance alleged to be due on a contract for certain public works. On the hearing it was shown that certain time-books & the original documents from which his accounts had been made up & also his books of account had disappeared.—*Held*: the rule *omnia presumuntur contra spoliatores* did not justify the learned judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial showing instead that the accounts would have been corroborated.—*ST. LOUIS v. R.* (1896), 25 S. C. R. 649.—**CAN.**

c. ———.]—Presumption that entries

Sect. 6.—Presumptions: Sub-sects. 9 & 10.]

a series of documents relating to a title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavourable to the title of that party.—**JAMES v. BLOU, OWEN v. FLACK** (1826), 2 Sim. & St. 600; 4 L. J. O. S. Ch. 202; 57 E. R. 475. *Annotation:—Mentd.* Flack v. Longmate (1845), 8 Beav. 420.

1548. —[.]—There is a presumption against persons who keep back a document, & against them the evidence is to be taken most strongly.—**A.-G. v. WINDSOR (DEAN & CANONS)** (1858), 24 Beav. 679; 27 L. J. Ch. 320; 32 L. T. O. S. 55; 22 J. P. 592; 4 Jur. N. S. 818; 6 W. R. 220; 53 E. R. 520; *on appeal* (1860), 8 H. L. Cas. 369, H. L. *Annotations:—Mentd.* A.-G. v. Marchant (1866), L. R. 3 Eq. 424; A.-G. v. Wax Chandlers' Co. (1873), L. R. 6 H. L. 1; *Re* Campden Charities (1881), 18 Ch. D. 310; I. R. Comrs. v. Walker, [1915] A. C. 509; Usher's Wiltshire Brewery v. Bruce, [1915] A. C. 433; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135.

— **Presumption as to stamping.**—*See* Part IV., Sect. 10, sub-sect. 6, *post*.

1549. Bundle of documents unsealed & disarranged—Presumption that some documents abstracted.—An account touching a personal estate being decreed, deft. endeavoured to charge pltf. with a great debt due to the estate; but deft. having opened a bundle of papers relating to that demand, which had been sealed up, & left in his hands, & altered them so that it could not be known what papers might have been taken out, deft.'s demand was for that reason disallowed.—**WARDOUR v. BERISFORD** (1687), 1 Vern. 452; 23 E. R. 579, L. C.

Annotation:—Refd. Cowper v. Cowper (1734), 2 P. Wms. 720. **1550. Jewel detained & not produced—Presumed of highest value.**—Where a person who has wrongfully converted property will not produce it it shall be presumed as against him to be of the best description.—**ARMORY v. DELAMIRIE** (1722), 1 Stra. 505; 93 E. R. 664.

Annotations:—Consd. Gray v. Haig, Haig v. Gray (1855), 20 Beav. 219; Wentworth v. Lloyd (1864), 10 H. L. Cas. 589. *Refd.* Lupton v. White, White v. Lupton (1808), 15 Ves. 432; Mortimer v. Cradock (1843), 12 L. J. C. P. 166; Dean v. Thwait (1855), 21 Beav. 621; Williams v. Williams (1863), 33 Beav. 306; Hammersmith, etc. Ry. v. Brand (1869), L. R. 4 H. L. 171; Wilson v. Northampton & Banbury Junction Ry. (1874), 43 L. J. Ch. 503; The Winkfield, [1902] P. 42; Plasycoed Collieries Co. v. Partridge, Jones (1912), 81 L. J. K. B. 723; Goldman v. Hill, [1919] 1 K. B. 443; Smith v. G. W. Ry., [1921] 2 K. B. 237. *Mentd.* Webb v. Fox (1797), 7 Term Rep. 391; Sutton v. Buck (1810), 2 Taunt. 302; Burton v. Hughes (1824), 9 Moore, C. P. 334; Taylor v. Haygarth (1844), 8 Jur. 135; Whitehead v. Harrison (1844), 6 Q. B. 423; Bridges v. Hawkesworth (1851), 21 L. J. Q. B. 75; White v. Mullett (1851), 6 Exch. 713; Broadbent v. Imperial Gas. Co. (1857), 7 De G. M. & G. 436; Ancona v. Marks (1862), 7 H. & N. 686; Chowne v. Baylis (1862), 31 Beav. 351; R. v. Gardner (1862), 1 New Rep. 107; Buckley v. Gross (1863), 3 B. & S. 566; Bourne v. Postbrooke (1865), 18 C. B. N. S.

unfavourable.]—Destruction during the progress of the suit of a book kept by an officer of a trade union at its headquarters, in which were recorded minutes relating to the strike, & non-production of a strike register kept, & of the reports handed in from day to day by members of the union actively engaged in picketing & officially appointed for that purpose, were circumstances that justified the ct. in presuming that they contained entries unfavourable or damaging to the defence.—**COLTER v. OSBORNE, C. R.**, [1911] 1 A. C. 137.—**CAN.**

d. — **Presumption as to admissibility in evidence.**—In a suit brought against a collector to compel him to refrain from preventing pltf. executing his decree against certain land, the only issue being whether the land was the private property of the judgment-

debtors or govt. service land, pltf. alleged that the land had been granted in fee mainly by a *sanad* which he petitioned the *mamladar* of the *pergunnah* to search for & send to the collector; & on reference by the High Ct., the judge found that the collector did destroy the document that purported to be a copy of a *sanad*, such as pltf. petitioned the *mamladar* to send for.—*Held*: it was not competent for deft. to say that the document was not such a one as could be legally admitted in evidence, & that the case came within the rule, *omnia præsumentur contra spoliatores*.—**ARDESHIR DHANJIBHAI v. SURAT (COLLECTOR)** (1866), 3 Bom. A. C. 116.—**IND.**

e. **Wrongful appropriation—Water—Absence of record of amount taken.**—Defts. owned waterworks, & supplied pltf. with water. Pltf. paid for the water according to the amount used, as measured by a meter, but used unmetered water for some years. Pltf. offered to settle for the water that had been used, & assented to pay \$13.778. Payment was made on that basis, by a number of cheques, some of which, amounting to \$6.778, were paid. Payment of the cheques representing the balance was stopped, & pltf. sued to recover the cheques & part of the amount which they had paid.—*Held*: as pltf. had gone on for years deliberately appropriating defts.' water without preserving any record of the quantity so taken, every presumption must be made against defts.—**BRANDON ELECTRIC LIGHT CO. v. BRANDON CITY** (1912), 20 W. L. R. 658; 2 W. W. R. 22; 7 D. L. R. 793; 22 Man. L. R. 500.—**CAN.**

f. — **Gas—Presumption of con-**

515; Taunton Case (1869), 21 L. T. 169; *Mussammat Sundar v. Mussammat Parbati* (1889), 5 T. L. R. 683; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197; *Daniel v. Rogers*, [1918] 2 K. B. 228.

1551. Failure to prove value of goods sold—Presumed of lowest value—In absence of fraud by defendant.—**CLUNNES v. PEZZEY** (1807), 1 Camp. 8, N. P.

Annotation:—Appld. Lawton v. Sweeney (1844), 8 Jur. 964.

1552. Failure to prove value of bank note—Presumed of lowest value.—In an action of debt for money lent, the only evidence was, that deft. having asked pltf. for some money, the latter handed him a note which was believed to be a bank note, but the amount of which did not appear.—*Held*: the jury were rightly directed to presume it to have been a note for £5, as being the smallest note in circulation in this country.—**LAWTON v. SWEENEY** (1844), 8 Jur. 964.

1553. Spoliation of ship's papers.—The permission to hospital ships to have a wireless telegraph installation on board does not justify the sending of messages by a secret code, & if such messages are sent, a record of them should be kept to prove their innocent character. Where documents are purposely destroyed there is a very strong presumption that, if produced, they would have told against the destroyer.—**THE OPHELIA**, [1916] 2 A. C. 206; 85 L. J. P. 169; 114 L. T. 1067; 32 T. L. R. 502; 13 Asp. M. L. C. 377, P. C.

Annotation:—Mentd. Adelaide S.S. Co. v. R. (1922), 127 L. T. 63.

See, also, PRIZE LAW.

1554. Loss by bailee.—An agister of cattle does not discharge himself of his duty as a bailee for reward by proving that they were stolen without his default, if by using reasonable diligence he could have recovered them. If, having failed to use such diligence, he is sued for the loss of the cattle, he must prove, in order to discharge himself, that such diligence would have been unavailing; it is not for the bailor to prove that it would have retrieved the loss.

A farmer accepted certain cattle for agistment. Some of them were stolen without his default. After learning that they were missing he made no effort, whether by informing the owner or the police, or otherwise, to recover them. It was doubtful whether any reasonable attempt on his part would have led to their recovery.—*Held*: he was liable for their loss.—**COLDMAN v. HILL**, [1919] 1 K. B. 443; 88 L. J. K. B. 491; 120 L. T. 412; 35 T. L. R. 146; 63 Sol. Jo. 166, C. A. —[.]—*See* BAILMENT, Vol. III., pp. 74, 75, Nos. 141–144.

1555. Primâ facie proof of conversion.—I have little doubt that once there is a *primâ facie* case of conversion the doctrine *Omnia præsumentur*

contra spoliatorem applies (ATKIN, L.J.).—SMITH, LTD. v. GREAT WESTERN RY. CO., [1921] 2 K. B. 237; 90 L. J. K. B. 644; 125 L. T. 44; 37 T. L. R. 117; 65 Sol. Jo. 172; 26 Com. Cas. 84, C. A.; *on appeal*, [1922] 1 A. C. 178, H. L.

SUB-SECT. 10.—OTHER PRESUMPTIONS.

1556. Receipt of letter—Evidence of possession of enclosure.]—Proof that pltf. wrote a letter to deft. purporting to contain a bill of exchange, with directions how the product should be applied, & that deft. soon afterwards had a bill in his possession which answered the description contained in the letter, affords presumptive evidence, that both the letter & the bill found their way to deft.—KIERAN v. JOHNSON (1815), 1 Stark. 109, N. P.

Contracts made through the post.]—See CONTRACT, Vol. XII., pp. 75 *et seq.*

1557. Receipt of notice—Of dishonour of bill—No objection taken for lack of notice.]—In an Action on a bill of exchange, proof that pltf., on the day on which he himself received notice of dishonour from the holder, wrote & delivered a letter to deft., & proof of notice to produce that letter, as containing notice of dishonour; & that deft., when asked to pay the bill, stated several objections, but did not object that he had not had notice of dishonour, are evidence, on default to produce the letter, that it contained a regular notice of dishonour.—CURLLEWIS v. CORFIELD (1841), 1 Q. B. 814; 1 Gal. & Dav. 489; 6 Jur. 259; 113 E. R. 1343.

Annotation:—*Refd.* Edmonds v. Foster (1875), 45 L. J. M. C. 41.

].—See, further, BILLS OF EXCHANGE, Vol. VI., pp. 270 *et seq.*

1558. —By shareholder.]—In an action for calls, it being necessary to prove notice to deft. of an alteration in the scheme:—*Held*: evidence that notices were sent by post to all the names & addresses upon the list of allottees, which comprised the deft.'s, was sufficient *prima facie* proof of the notice.—CARMARTHEN RY. CO. v. WRIGHT (1858), 1 F. & F. 282, N. P.

].—See, generally, COMPANIES, Vol. IX., pp. 643 *et seq.*; Vol. X., p. 1176.

1559. Authority to act—Joint-stock Company.]—Where deft. has called on pltf. to admit certain letters written by A. as the agent of deft., that fact is evidence of an authority to give verbal directions on the same subject-matter.

Where the writ & declaration are against the Birmingham Plate & Crown Glass Co., & the appearance & plea are by defts. under the same style, that fact is evidence to go to the jury that defts. are a registered joint-stock co., & are rightly sued in their corporate title.

Where it further appears that defts. meet & act as a joint-stock co., that is also evidence that they are entitled so to meet & act.—OFFER v. BIRMINGHAM PLATE & CROWN GLASS CO. (1848), 12 L. T. O. S. 275.

—Public officer.]—See PUBLIC AUTHORITIES.

1560. Non-existence—Manorial custom—Silence

of manorial records.]—In 1605, a deed was executed by certain copyholders of a manor, by which they claimed certain customs set forth in it as the immemorial customs for & concerning the copyhold premises described in a schedule to the deed, & in consideration of a large sum paid to him, the lord ratified them, & consented that they should thenceafter for ever be the customs touching the customary & copyhold tenements, & by a decree in Chancery made in 1607, in a suit for a specific performance, in which the copyholders were pltf.s & the lord deft., the lord confessed this agreement, & consented to a decree "so as only such order & decree, & the customs, should extend only to complainants, their heirs, & assigns, & to their copyhold lands, & to none other, & might not be prejudicial to the lord, concerning any other copyhold lands," which was made accordingly. S. was a party to this deed, & in the schedule the lands held by him were described in such a manner as not to be inconsistent with the fact that a particular tenement conveyed by him in 1607, & subsequently traced to deft., might have been comprised. There was no entry upon the rolls of any admission to this tenement between 1598, & the period of this conveyance, & the anterior rolls were lost:—*Held*: the deed & the decree were evidence against deft. to negative the existence of a custom on the part of the copyholders to take the minerals, such a custom not being included in those instruments.—ANGLESEY (MARQUIS) v. HATHERTON (LORD) (1842), 10 M. & W. 218; 12 L. J. Ex. 57; 6 Jur. 305; 152 E. R. 448.

Annotations:—*Apld.* Portland v. Hill (1866), L. R. 2 Eq. 765. *Refd.* Johnstone v. Spencer (1885), 30 Ch. D. 581. *Mentd.* Salisbury v. Gladstone (1860), 6 H. & N. 123.

1561. —.].—In lands held, by copy of ct. roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord; & in the absence of custom, the *onus* of establishing which lies upon the tenant, the tenant has no right to work the minerals. The existence of a customary, compiled within the period of legal memory, is conclusive evidence against the existence of a custom not mentioned therein.—PORTLAND (DUKE) v. HILL (1866), L. R. 2 Eq. 765; 35 L. J. Ch. 439; 12 Jur. N. S. 286; 15 W. R. 38.

Annotations:—*Refd.* Johnstone v. Spencer (1885), 30 Ch. D. 581. *Mentd.* Morley v. Clifford (1882), 20 Ch. D. 753; Cooto v. Ford (1900), 83 L. T. 482; Heath v. Deane, [1905] 2 Ch. 86.

1562. Acceptance of cheque—Sent in settlement of claim.]—In the present case the draft for 650 rupees which was sent by R. T. to pltf.s. was sent on the terms that they should accept it in full settlement of this claim on the promissory note, & that they should deliver up the note in exchange for it; & pltf.s., with knowledge of these terms, retained the draft & cashed it. In my opinion, the fact that pltf.s. retained & cashed the draft in these circumstances raises a presumption that they entered into an agreement to accept it on the terms on which it was sent (VAUGHAN WILLIAMS, L.J.).—HIRACHAND PUNAMCHAND v. TEMPLE, [1911] 2 K. B. 330; 80 L. J. K. B. 1155; 105 L. T. 277; *sub nom.* PUNAMCHAND SHRICHAND

dealing & not of forfeiture.—CAMERON v. BARNHART (1868), 14 Gr. 661.—CAN.

k. In favour of morality & against immorality.]—The presumption is in favour of moral & against immoral relationship.—YARWOOD v. HART (1888), 16 O. R. 23.—CAN.

l. Presumption as to citizenship.]—The rule laid down in 7 Cyc. 147,

tinuance.—A system for illicitly appropriating gas existed & was used by accused in 1874, & there was nothing to show that matters had been since in any way altered:—*Held*: it was a legitimate inference that the use continued to within six months of May, 1896, when gas was found in the pipe.—OLIVER v. TAYLOR (1896), 15 N. Z. L. R. 449.—N.Z.

PART III. SECT. 6, SUB-SECT. 10.

g. Waiver of statute—Whether presumed.]—Waiver of provisions of Act of Parliament cannot be presumed.—KERR v. BURNS (1860), 4 All. 604.—CAN.

h. Presumption in favour of fair dealing.]—The presumption in a case of doubt must be in favour of fair

Sect. 6.—Presumptions: Sub-sect. 10.]

& Co. v. TEMPLE, 27 T. L. R. 430; 55 Sol. Jo. 519, C. A.

Annotation:—Mentd. Soc. des Hôtels Le Touquet Paris-Plage v. Cummings, [1922] 1 K. B. 451.

Acceptance of offer.]—See CONTRACT, Vol. XII., pp. 67 *et seq.*

Adoption of contract by trustee in bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 935 *et seq.*

Agency.]—See AGENCY, Vol. I., pp. 286 *et seq.*

Authority of agent.]—See AGENCY, Vol. I., pp. 295 *et seq.*, 384.

Auctioneer.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 4 *et seq.*, 16 *et seq.*

Insurance agent.]—See INSURANCE.

Servant.]—See MASTER & SERVANT.

Solicitor.]—See SOLICITORS.

Exercise of due care, skill & diligence.]—See AGENCY, Vol. I., p. 430, No. 1221.

Personal liability of agent—Contract made for foreign principal.]—See AGENCY, Vol. I., pp. 648, 649, Nos. 2678–2685.

Alteration in documents.]—See CONTRACT, Vol. XII., p. 305, Nos. 3039–3042.

Affidavits.]—See Part VII., Sect. 11, sub-sect. 2, *post*.

Deeds.]—See DEEDS, Vol. XVII., p. 226, No. 401.

Wills.]—See WILLS.

Ancient documents.]—See Part IV., Sect. 13, sub-sect. 1, C., *post*.

Appointment or qualification—Presumption from acting—Public officials.]—See PUBLIC AUTHORITIES.

Incumbent.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 406, No. 2394.

Medical practitioner.]—See MEDICINE & PHARMACY.

Officer of limited company.]—See CRIMINAL LAW, Vol. XV., p. 939, Nos. 10346, 10347.

Ship's husband.]—See SHIPPING.

Solicitor.]—See SOLICITORS.

Defamation in way of trade, business, calling or office.]—See LIBEL & SLANDER.

Assent to composition deed.]—See BANKRUPTCY Vol. V., pp. 1128 *et seq.*

To transfer of shares in limited company.]—See COMPANIES, Vol. IX., pp. 372 *et seq.*

Assets in hands of executor.]—See EXECUTORS.

Assignment—Of chose in action.]—See CHOSSES IN ACTION, Vol. VIII., pp. 442 *et seq.*

Of copyright.]—See COPYRIGHT, Vol. XIII., p. 189, No. 247.

Bankruptcy—Intention to delay or defeat creditors.]—See BANKRUPTCY, Vol. IV., pp. 72, 77, Nos. 610, 614, 671, 674.

Of performing rights.]—See COPYRIGHT, Vol. XIII., pp. 195, 196.

Offences.]—See BANKRUPTCY, Vol. V., pp. 1044 *et seq.*

Bastardy.]—See BASTARDY, Vol. III., pp. 358–368, Nos. 1–97.

Bills of exchange—Date.]—See BILLS OF EXCHANGE, Vol. VI., pp. 50–52, Nos. 375–383, 385–387.

Acceptance.]—See BILLS OF EXCHANGE, Vol. VI., p. 62, No. 495.

that, "in the absence of proof to the contrary, every man is considered a citizen of the country in which he may reside," has no place in British jurisprudence.—*Re CLARESHOLM PROVINCIAL ELECTION, McVAUGHT v. MCKENZIE* (1912), 22 W. L. R. 840; 8 D. L. R. 38; 5 Alta. L. R. 286.—**CAN.**

m. Jurisdiction of High Court.]—The High Ct., being a ct. of superior jurisdiction, the want of jurisdiction is not to be presumed, but on the contrary.—*It. v. NABADWIP GOSWAMI* (1868), 1 B. L. R. 15; 15 W. L. R. 71, n.; 17 W. L. R. 36, n.—**IND.**

n. Presumption of intention—To

Consideration.]—See BILLS OF EXCHANGE, Vol. VI., pp. 172–181, Nos. 1076–1130.

Time of negotiation.]—See BILLS OF EXCHANGE, Vol. VI., pp. 191, 192, Nos. 1181–1186.

Payment & satisfaction.]—See BILLS OF EXCHANGE, Vol. VI., pp. 359, 360, Nos. 2371–2375.

Signature common to acceptor & firm.]—See BILLS OF EXCHANGE, Vol. VI., pp. 100, 101, Nos. 704–707.

Bills of sale—Registration.]—See BILLS OF SALE, Vol. VII., p. 83, Nos. 478–483.

Boundaries.]—See BOUNDARIES, Vol. VII., pp. 278 *et seq.*

Particular boundaries.]—See HIGHWAYS; MINES; RAILWAYS; WATERS & WATERCOURSES. Carriers—Negligence.]—See CARRIERS, Vol. VIII., pp. 91 *et seq.*

Modification of common law contract.]—See CARRIERS, Vol. VIII., pp. 38 *et seq.*

Change of domicile.]—See CONFLICT OF LAWS, Vol. XI., pp. 317 *et seq.*

Cohabitation—As evidence of marriage.]—See HUSBAND & WIFE.

Common rights—Existence of.]—See COMMONS, Vol. XI., pp. 32–34.

Abandonment of.]—See COMMONS, Vol. XI., p. 53, Nos. 785–789.

Clubs—Knowledge of rules by member.]—See CLUBS, Vol. VIII., p. 507, No. 16.

Companies—Signature of notices.]—See COMPANIES, Vol. X., p. 1135, No. 7999.

Contract—Presumption of legality.]—See CONTRACT, Vol. XII., pp. 235, 236, Nos. 1939–1948.

Fraud.]—See MISREPRESENTATION & FRAUD.

Undue influence.]—See CONTRACT, Vol. XII., pp. 98 *et seq.*; FRAUDULENT & VOIDABLE CONVEYANCES; GIFTS; MONEY & MONEY LENDING.

Husband & wife.]—See HUSBAND & WIFE.

Salvage contracts.]—See SHIPPING.

Solicitor & client.]—See SOLICITORS.

Consideration—Covenant in restraint of trade.]—See TRADE & TRADE UNIONS.

Copyholds—Enfranchisement.]—See COPYHOLDS, Vol. XIII., p. 154, Nos. 1999–2002.

Corporations—Act of officer done in official capacity.]—See CORPORATIONS, Vol. XIII., p. 314, No. 475.

Custody of books.]—See CORPORATIONS, Vol. XIII., p. 278, No. 86.

Crime.]—See CRIMINAL LAW, Vol. XIV., pp. 366 *et seq.*

Absence of criminal capacity in infants.]—See CRIMINAL LAW, Vol. XIV., pp. 53–55, Nos. 189–217.

Custom—Existence of.]—See CUSTOM & USAGES, Vol. XVII., pp. 19 *et seq.*

Death—Presumption of.]—See Sub-sect. 6, *ante*.

Deeds—Delivery.]—See DEEDS, Vol. XVII., pp. 228, 229, Nos. 434–436.

Date.]—See DEEDS, Vol. XVII., p. 358, Nos. 1679–1687.

Due execution.]—See Sub-sect. 8, *ante*.

Debt—In bankruptcy.]—See BANKRUPTCY, Vol. IV., pp. 323 *et seq.*

bring about a certain result.]—There is no presumption that a person intends what is merely a possible result of his action or a result which, though reasonably certain, is not known to him to be so; but it must be presumed that, when a man voluntarily does an act, knowing at the time that in the

— Of petitioning creditor.]—See BANKRUPTCY, Vol. IV., p. 143, No. 1334.

Easement.]—See EASEMENTS, Vol. XIX., pp. 53–67.

Ecclesiastical Law—Prescriptive rights to tithe—Tithe rentcharge.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 476 *et seq.*

— Prescriptive right to pew.]—See ECCLESIASTICAL LAW, Vol. XIX., pp. 472–474.

— Prescriptive right of presentation.]—See ECCLESIASTICAL LAW, Vol. XIX., p. 370, Nos. 1897–1899.

Education—Medical certificate as to mentally deficient child.]—See EDUCATION, Vol. XIX., p. 569, No. 98.

Elections—Agency of persons helping candidate.]—See ELECTIONS, Vol. XX., pp. 52 *et seq.*

Encroachment—On waste.]—See COMMONS, Vol. XI., pp. 55 *et seq.*

— By tenant.]—See LANDLORD & TENANT.

Equity—Presumption against double portions.]—See EQUITY, Vol. XX., pp. 453–467.

— Notice.]—See CHANCES IN ACTION, Vol. VIII., pp. 459 *et seq.*; EQUITY, Vol. XX., pp. 311–316; MORTGAGE.

— Resulting trusts.]—See TRUSTS & TRUSTEES.

Executors—Documents admitted to probate.]—See EXECUTORS.

— Effects in executor's hands.]—See EXECUTORS.

— Assent to legacies.]—See EXECUTORS.

— Retainer by executor.]—See EXECUTORS.

— Presumption of death for the purposes of probate.]—See EXECUTORS.

Foreign law.]—See Part XI., *post*.

Fraudulent preference by bankrupt.]—See BANKRUPTCY, Vol. V., pp. 861, 862, Nos. 7206–7212.

Gift—Presumption of acceptance.]—See GIFTS.

Highways—Rights in soil.]—See HIGHWAYS.

— Dedication.]—See HIGHWAYS.

— Repair.]—See HIGHWAYS.

Husband & wife—Liability of husband for debts of wife.]—See HUSBAND & WIFE.

— Wife's separate estate.]—See HUSBAND & WIFE.

— Undue influence in contracts between spouses.]—See HUSBAND & WIFE.

— Adultery or impotence.]—See HUSBAND & WIFE.

— Agency of wife.]—See HUSBAND & WIFE.

— Coercion.]—See CRIMINAL LAW, Vol. XIV., pp. 69–74, Nos. 337–415.

Identity.]—See Part II., Sect. 3, sub-sect. 4, B., *ante*.

Ignorantia juris non excusat.]—See Sub-sect. 2, *ante*.

Impossibility of issue.]—See Sub-sect. 7, *ante*.

Innocence.]—See Sub-sect. 3, *ante*.

Insolvency—Trading with knowledge of.]—See BANKRUPTCY, Vol. IV., p. 553, No. 5085–5091.

— Of company.]—See COMPANIES, Vol. X., pp. 819 *et seq.*

Insurance—Underwriters knowledge of trade usage.]—See INSURANCE.

— Date of loss of missing ship.]—See INSURANCE.

Landlord & tenant—Title of lessor.]—See LANDLORD & TENANT.

— Presumptions from occupation & payment of rent.]—See LANDLORD & TENANT.

— Breaches of covenant.]—See LANDLORD & TENANT.

— Assignment of sub-demise.]—See LANDLORD & TENANT.

— Perpetual renewal.]—See LANDLORD & TENANT.

— Fixtures.]—See LANDLORD & TENANT.

— Against forfeiture.]—See LANDLORD & TENANT.

Leave & licence.]—See EASEMENTS, Vol. XIX., pp. 26 *et seq.*; LANDLORD & TENANT.

— Revocation of.]—See COMMONS, Vol. XI., p. 55, Nos. 833–835.

Legitimacy.]—See BASTARDY, Vol. III., pp. 358 *et seq.*

Libel & slander—Malice.]—See LIBEL & SLANDER.

— Publication.]—See LIBEL & SLANDER.

— Liability of proprietor of newspaper.]—See LIBEL & SLANDER.

Licence to perform.]—See COPYRIGHT, Vol. XIII., p. 197, No. 317.

Life.]—See Sub-sect. 5, *ante*.

Limitation of actions—Payment of interest.]—See LIMITATION OF ACTIONS.

— Payment of unbarred debt—No appropriation made by debtor.]—See CONTRACT, Vol. XII., p. 480, Nos. 3926–3931.

— Prescription.]—See, generally, COMMONS, Vol. XI., pp. 30 *et seq.*; EASEMENTS, Vol. XIX., pp. 53 *et seq.*; LIMITATION OF ACTIONS.

Lunatics—Sanity—Continuance of sanity or insanity.]—See LUNATICS.

Malice.]—See LIBEL & SLANDER; MALICIOUS PROSECUTION.

Manor—Existence of.]—See COPYHOLDS, Vol. XIII., p. 11, Nos. 14–18.

— Extent of.]—See COPYHOLDS, Vol. XIII., p. 12, No. 34.

Marriage—Presumption from evidence of reports.]—See HUSBAND & WIFE.

— In matrimonial causes.]—See HUSBAND & WIFE.

— In bigamy.]—See CRIMINAL LAW, Vol. XV., pp. 735 *et seq.*

Master & servant—Service in seduction cases.]—See MASTER & SERVANT.

— Terms of hiring.]—See MASTER & SERVANT.

— Under Workmen's Compensation Acts.]—See MASTER & SERVANT.

— Apprenticeship.]—See MASTER & SERVANT; POOR LAW.

— Ratification of acts of servant.]—See MASTER & SERVANT.

Membership of company.]—See COMPANIES, Vol. IX., pp. 207, 208; Vol. X., pp. 1126, *et seq.*

Mines & minerals—Grant extends to minerals.]—See MINES.

— Boundaries.]—See HIGHWAYS; MINES; RAILWAYS; WATER & WATERCOURSES.

Misrepresentation.]—See MISREPRESENTATION & FRAUD.

Money & money lending—Agreement to pay interest.]—See MONEY & MONEY-LENDING.

Mortgage—Tenancy in common between several mortgagees.]—See MORTGAGE.

— Reconveyance when mortgage paid off.]—See MORTGAGE.

— Intention to keep alive when paid off by strangers.]—See MORTGAGE.

natural course of events a certain result will follow, he intends to bring about that result.—*R. v. LAKSHMAN* (1902), 1 L. R. 26 Bom. 558.—*IND.*

o. State of facts existing—Anterior to date—When shown to exist.—There is no presumption of law that a state of facts has existed for any period

anterior to the date when it is shown to exist.—*L. (MURPHY) v. CORK JJ.*, [1914] 2 L. R. 219.—*IR.*

Sect. 6.—Presumptions: Sub-sects. 10 & 11. Sect. 7: Sub-sect. 1.]

Negligence.—*See* CARRIERS, Vol. VIII., pp. 91 *et seq.*, Nos. 618 *et seq.*

Common employment.—*See* MASTER & SERVANT.

Notice—Of assignment of chose in action.—*See* CHOSSES IN ACTION, Vol. VIII., pp. 466 *et seq.*

Of modification of common law contracts of carriage.—*See* CARRIERS, Vol. VIII., pp. 38 *et seq.*

Of allotment of shares.—*See* COMPANIES, Vol. IX., p. 281.

That shares in company not fully paid.—*See* COMPANIES, Vol. IX., pp. 298, 299.

Novation of contract.—*See* CONTRACT, Vol. XII., pp. 596 *et seq.*

Nuisance.—*See* NUISANCE.

Omnia præsumuntur rite esse acta.—*See* Sub-sect. 8, *ante*.

Omnia præsumuntur contra spoliatores.—*See* Sub-sect. 9, *ante*.

Ownership—Of land.—*See* LANDLORD & TENANT; LIMITATION OF ACTIONS; SALE OF LAND; TRESPASS.

Presumed from acts of ownership & possession—Acts of agents.—*See* AGENCY, Vol. I., p. 354, No. 626.

Trees & timber.—*See* AGRICULTURE, Vol. II., p. 64, No. 402.

Reputed ownership of bankrupt.—*See* BANKRUPTCY, Vol. V., p. 800, No. 6835.

Reversion in copyholds.—*See* COPYHOLDS, Vol. XIII., p. 68, No. 856.

Ecclesiastical property.—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 457, Nos. 3038, 3039.

Fishery.—*See* FISHERIES.

Highways.—*See* HIGHWAYS.

Title freed from mortgage.—*See* MORTGAGE.

Personal property.—*See* PERSONAL PROPERTY.

Real property.—*See* LANDLORD & TENANT; REAL PROPERTY.

Acquisition of fee simple of leasehold property after lapse of time.—*See* REAL PROPERTY.

Title to ship.—*See* SHIPPING.

Title to goods in bill of lading.—*See* SHIPPING.

Title to sustain action for trespass or trover.—*See* TRESPASS; TROVER & DETINUE.

Title to foreshore rights & riparian rights.—*See* WATERS & WATERCOURSES.

Partnership—Authority of partner to bind firm.—*See* PARTNERSHIP.

Patents—Novelty.—*See* PATENTS.

Validity of grant of letters patent.—*See* PATENTS.

Publication.—*See* PATENTS.

Payment.—*See* CONTRACT, Vol. XII., pp. 493, 494, Nos. 4025–4027.

Appropriation of payments—Rule in Claytons Case.—*See* CONTRACT, Vol. XII., pp. 483 *et seq.*

Of rent presumed from continuance of occupation.—*See* LANDLORD & TENANT.

Of consideration for annuity from payment of annuity.—*See* RENTCHARGES & ANNUITIES.

Performance of public duty—Presumption from performance by public authority.—*See* PUBLIC AUTHORITIES.

Prize Law—Animus caplendi.—*See* PRIZE LAW.

Contraband nature of goods.—*See* PRIZE LAW.

Continuance of blockade.—*See* PRIZE LAW.

Spoliation of ships papers.—*See* PRIZE LAW.

Accuracy of register, flag & pass of ship.—*See* PRIZE LAW.

Lessor by treaty—Occupation in time of peace.—*See* PRIZE LAW.

Regularity of ships papers.—*See* PRIZE LAW.

Public officers—Presumption of due appointment.—*See* PUBLIC AUTHORITIES.

Publication of libel.—*See* LIBEL & SLANDER.

Real Property—Tenure—Land in Kent.—*See* REAL PROPERTY.

Lost grant & prescriptive rights.—*See* EASEMENTS, Vol. XIX., pp. 61–67; REAL PROPERTY.

Sale of goods—Time of payment—From course of business.—*See* SALE OF LAND.

Sale by agent—Goods delivered to agent for sale on commission.—*See* SALE OF GOODS.

Seduction—Presumption of service to parent.—*See* MASTER & SERVANT.

Settlement.—*See* POOR LAW.

Provisions for children in pre-nuptial settlement.—*See* POOR LAW.

Stamping.—*See, generally,* REVENUE.

Lost documents & documents not produced after notice.—*See* Part IV., Sect. 10, sub-sect. 6, *post*.

Intention of tenant for life to keep alive charge.—*See* SETTLEMENTS.

Marriage settlement includes whole marriage contract.—*See* SETTLEMENTS.

Sheriff.—*See* SHERIFFS.

Shipping—Regularity of master's acts of navigation.—*See* ADMIRALTY, Vol. I., p. 200, No. 1182.

Seaworthiness & unseaworthiness.—*See* INSURANCE; SHIPPING & NAVIGATION.

Knowledge of Lloyd's list of underwriters.—*See* INSURANCE.

Presumption of ownership from register.—*See* SHIPPING & NAVIGATION.

Fraudulent intent from excessive valuation.—*See* INSURANCE.

Statement in share certificate.—*See* COMPANIES, Vol. IX., pp. 286, 287, Nos. 1775–1778; Vol. X., pp. 1129, 1130, Nos. 7956, 7957.

Superfluous lands.—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., pp. 283 *et seq.*

Testamentary capacity.—*See* EXECUTORS; WILLS.

Time.—*See* TIME.

Trade marks—Fraudulent intent from similarity.—*See* TRADE MARKS.

Undue influence.—*See, generally,* CONTRACT, Vol. XII., pp. 98 *et seq.*; FRAUDULENT & VOIDABLE CONVEYANCES; GIFTS; MONEY & MONEY-LENDING.

Undue preference by carrier.—*See* CARRIERS, Vol. VIII., pp. 165 *et seq.*

Usage—Existence of.—*See* CUSTOM & USAGES, Vol. XVII., pp. 36, 37, Nos. 410–417.

Vicious animals—Proof of sceler.—*See* ANIMALS, Vol. II., pp. 244 *et seq.*

Waters & Watercourses—Rights in soil of or appertaining to foreshore, navigable & non tidal-rivers.—*See* WATERS & WATERCOURSES.

Accretions to land.—*See* WATERS & WATERCOURSES.

Wills—Due execution of.—*See* WILLS.

SUB-SECT. 11.—REBUTTAL OF PRESUMPTION.

1563. By parol evidence.—Parol evidence admissible to rebut a presumption, without regard to the nature of it; as, whether a mere casual conversation with a stranger, or between the parties & upon the subject; or whether at the time of the transaction, previous or subsequent. But those circumstances are very material with reference to the weight & efficacy of it.—*TRIMMER v. BAYNE* (1802), 7 Ves. 508; 32 E. R. 205, L. C.

Annotations:—*Refd.* *Ex p. Pye*, *Ex p. Dubost* (1811), 18 Ves. 140; *Whitaker v. Tatham* (1831), 7 Bing. 628; *Lloyd v. Harvey* (1832), 2 Russ. & M. 310; *Durham v. Wharton* (1836), 3 Cl. & Fin. 146; *Powys v. Mansfield* (1837), 3 My. & Cr. 359; *Pym v. Lockyer* (1841), 5 My. & Cr. 29; *Kirk v. Eddowes* (1844), 3 Hare, 509; *Coventry v. Chichester* (1864), 2 Hem. & M. 149; *Dawson v. Dawson* (1867), L. R. 4 Eq. 504; *Leighton v. Leighton* (1874), L. R. 18 Eq. 458. *Mentd.* *Wharton v. Durham* (1836), 6 L. J. Ch. 15; *Hill v. Collett* (1839), 8 L. J. Ch. 189; *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258; *Stevenson v. Masson* (1873), L. R. 17 Eq. 78.

1564. —[*LUMLEY v. HUDSON* (1837), 4 Bing. N. C. 15; 5 Scott, 238; 7 L. J. C. P. 52; 2 Jur. 48; 132 E. R. 694.]

1565. By contrary presumption.—Proof of possession of land & pendency of the rents is *prima facie* evidence of a seisin in fee of the person. But proof of 40 years' subsequent possession by a daughter while a son & heir lived near & knew the fact is much stronger evidence that the first possessor had only a particular estate.

Nothing can be clearer than this: a presumption may be rebutted by a contrary & stronger presumption: in this case the contrary presumption, arising from the circumstances, is much stronger than the presumption of the seisin in fee (*HEATH, J.*).—*JAYNE v. PRICE* (1814), 5 Taunt. 326; 1 Marsh. 68; 128 E. R. 715.

Annotation:—*Refd.* *Doe d. Carr v. Billyard* (1828), 3 Man. & Ry. K. B. 111.

1566. Presumption establishing a negative—Rebutted by slight circumstances.—To rebut a presumption which goes to establish a negative proposition, slight circumstances may be quite enough (*STUART, V.C.*).—*PHILLIPS v. BARKER* (1853), 1 Sm. & G. 583; 2 Eq. Rep. 795; 23 L. J. Ch. 44; 22 L. T. O. S. 168; 17 Jur. 1146; 2 W. R. 110; 65 E. R. 255.

1567. Conflicting presumptions.—In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, & was on such charge convicted. In 1879 he married C., & in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive:—*Held*: the conviction could not be sustained, as the question should have been left to the jury whether

upon the above facts A. was alive or not when W. married C.

It is said, & I think rightly, that there is a presumption in favour of the validity of this latter marriage, but prisoner showed that there was a valid marriage in 1864, & that the woman he then married was alive in 1868. He thus set up the existence of a life in 1868, which, in the absence of any evidence to the contrary will be presumed to have continued to 1879. It is urged, in effect that the presumption in favour of innocence, a presumption which goes to establish the validity of the marriage of 1879, rebuts the presumption in favour of the duration of life. It is sufficient to raise a question of fact for the jury to determine. It was for the jury to decide whether the man told & acted a falsehood for the purpose of marrying in 1879, or whether his real wife was then dead (*COLERIDGE, C.J.*).—*R. v. WILSHIRE* (1881), 6 Q. B. D. 366; 50 L. J. M. C. 57; 44 L. T. 222; 45 J. P. 375; 29 W. R. 473; 14 Cox, C. C. 541, C. C. R.

Annotations:—*Refd.* *Re Porton*, *Pearson v. A.-G.* (1885), 53 L. T. 707. *Mentd.* *R. v. Lindsay* (1902), 18 T. L. R. 761.

SECT. 7.—INSPECTION.

SUB-SECT. 1.—OF PERSONS.

1568. To determine age.—*WOOD v. WAGEMAN* (1885), Toth. 72; 21 E. R. 126.

1569. —[—]—On information against a person for encouraging a child to beg, the magistrate is justified in disregarding the statement made by the child that he was sixteen years of age, that being the only evidence as to age, if his appearance warrants a belief that he is a child under the age of fourteen, the question of age being one of fact entirely for the magistrate.—*R. v. VIASANI* (1866), 15 L. T. 240; 31 J. P. 260.

1570. —[—]—[Upon a charge of being a habitual criminal, inserted in an indictment] it must be proved to the satisfaction of the jury that the accused was over sixteen years of age when the first statutory conviction took place, but such proof may consist in their view of the accused.—*R. v. TURNER*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 26 T. L. R. 112; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103; *sub nom.* *R. v. TURNER*, *R. v. WALLER*, 74 J. P. 81; 54 Sol. Jo. 164, C. C. A.

Annotations:—*Refd.* *R. v. Johnson* (1909), 3 Cr. App. Rep. 168; *R. v. Fawcett* (1910), 74 J. P. 444; *R. v. Marshall* (1910), 74 J. P. 381; *R. v. Waller*, [1910] 1 K. B. 364; *R. v. Harris*, [1922] 2 K. B. 543. *Mentd.* *R. v. Condon* (1910), 4 Cr. App. Rep. 109; *R. v. Moran* (1910), 5 Cr. App. Rep. 219; *Browne v. Black*, [1911] 1 K. B. 975; *R. v. Summers* (1914), 10 Cr. App. Rep. 11; *R. v. Coney* (1923), 92 L. J. K. B. 915; *R. v. Dean* (1924), 18 Cr. App. Rep. 21.

PART III. SECT. 6, SUB-SECT. 11.

1563 i. By parol evidence.—The presumption that a freehold title will be shown by vendor may be rebutted by parol evidence.—*RADUM HILL CO. (No LIABILITY) v. MORELAND METAL CO.* (1916), 16 S. L. T. N. S. W. 631; 33 N. S. W. N. 155.—*AUS.*

1563 ii. —[—]—Although where land is sold subject to an outstanding mtge., there arises a presumption or supposed intention in equity on the part of purchaser to indemnify the vendor against the mtge., yet this presumption may be rebutted by parol evidence.—*CORBY v. GRAY* (1888), 15 O. R. 1.—*CAN.*

1563 iii. —[—]—Although, when a parent acquires a property & has it registered in his child's name, there is a strong presumption that he intended

to benefit the child, yet this presumption, which is not *juris et de jure*, may be rebutted by evidence manifesting a clear intention that the child should only take as a trustee.—*CONAT v. CONAT* (1912), R. D. L. 63.—*S. AF.*

p. Legacy given to executor—*In character of executor only.*—*NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. DOYLE* (1898), 24 V. L. R. 626.—*AUS.*

q. By admission on record.—The admission on the record that parties are alive, precludes the presumption of their death, arising from continued absence.—*DOANE v. MCKENNY* (1854), James, 328.—*CAN.*

PART III. SECT. 7, SUB-SECT. 1.

r. To determine nature & extent

of injuries.—*Pltf.* In an action for bodily injuries may exhibit them to the jury for the purpose of having the nature & extent of the injuries explained by a medical witness. The exhibition of injuries which have happened to another person, for the purpose of contradicting evidence given on behalf of *pltf.* in such an action, is not permissible unless competent evidence is forthcoming to explain their nature.—*SOINBERGER v. CANADIAN PACIFIC RY. CO.* (1897), 24 A. R. 263.—*CAN.*

s. To judge as to condition of injury.—In an action to recover damages for alleged malpractice *pltf.* is not entitled to show to the jury the part of the body in question for the purpose of enabling them to judge as

Sect. 7.—Inspection: Sub-sects. 1, 2 & 3, A. & B.]

Confrontation in matrimonial causes.]—See HUSBAND & WIFE.

In suits for nullity of marriage.]—See HUSBAND & WIFE.

Writ de ventre inspiciendo.]—See DESCENT, Vol. XVIII., pp. 11, 12, Nos. 90–97.

Medical inspection of bankrupt.]—See BANKRUPTCY, Vol. IV., p. 233, Nos. 2185, 2186.

Medical inspection of person injured in railway accident.]—See Regulation of Railways Act, 1868 (c. 119), s. 26; RAILWAYS.

Medical inspection of prisoner.]—See CRIMINAL LAW, Vol. XIV., p. 456, No. 4824; Vol. XV., p. 825, No. 9022.

Searching prisoner after arrest.]—See CRIMINAL LAW, Vol. XIV., pp. 174, 175, Nos. 1512–1528.

SUB-SECT. 2.—OF PLACES.

See, now, R. S. C., Ord. 50, rr. 3, 4, 5.

1571. In civil cases—When title is in question.]

—A view cannot be granted unless the title comes in question.—*KEMPSTER v. DEACON* (1690), 1 *Ld. Raym.* 76; 2 *Salk.* 665; 91 *E. R.* 947.

1572. — Duties of shewer.]—GOODTITLE d. SYMONS v. CLARK (1746), *Barnes*, 457; 94 *E. R.* 1002.

1573. — Action for work done upon premises.]

—Deft. being sued in *assumpsit*, for work done by pltf. to deft.'s house, applied to pltf. to appoint a shewer on his part, for the purpose of a view by the jurors; &, on pltf.'s refusal, obtained a side-bar rule for a view which contained the name of deft.'s shewer only, with blanks for the time & place of the meeting of the jurors:—*Held*: (1) this was not a case for a view, & the side-bar rule must be set aside; (2) *semble*: the rule was irregular in not containing the names of both shewers, & the time & place of the meeting of the jurors.—*STONES v. MENHEM* (1848), 2 *Exch.* 382; 17 *L. J. Ex.* 215.

1574. — Action for dilapidations.]—Upon an appeal from the decision of a county ct., in an action for dilapidations, the case, without saying what the evidence given was, stated that the judge told the jury that it was not like an action for goods sold & delivered, & that pltf. might rest upon the general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises, with the particulars in their hands, & would therefore be able to judge whether & to what extent pltf. had made out his case:—*Held*: there must be a new trial.—*SMITH v. DOUGLAS* (1855), 16 *C. B.* 31; 3 *C. L. R.* 752; 139 *E. R.* 665; *sub nom.* *DOUGLAS v. SMITH*, 25 *L. T. O.* S. 69.

1575. — By Judge—Action for nuisance.]—MANSER v. BOWERS, [1872] *W. N.* 163.

to its condition.—*LAUGHLIN v. HARVEY* (1897), 24 *A. R.* 438.—*CAN.*

t. Medical inspection of plaintiff—In action for damages for injuries.]—In an action for damages for injuries alleged to have been caused by the alleged defective condition of a crane operated by defts. in connection with which pltf. was employed:—*Semle*: pltf. should submit to a physical examination by a surgeon on behalf of defts.—*PROCTOR v. PARSONS BUILDING CO.* (1913), 23 *W. L. R.* 535, 716; 4 *W. W. R.* 48; 10 *E. L. R.* 30; 6 *Sask. L. R.* 123.—*CAN.*

PART III. SECT. 7, SUB-SECT. 2.

a. In civil cases—By judge.]—FREEMANTLE MUNICIPAL TRAMWAYS & ELECTRIC LIGHTING BOARD v. WILLIS (1911), 13 *W. A. L. R.* 110.—*AUS.*

b. —.]—A judge with a view to a better understanding of the evidence in a case & to clear up some doubtful points, made a local inspection without giving any notice to the parties. The result of the investigation he did not place upon the record, but he did so in his judgment:—*Held*: a judge is at liberty himself to inspect

the property in dispute & inform himself by the observation of his senses of matters which may help in understanding the evidence & in deciding the case, especially such matters which do not require scientific knowledge.

There is no law, which requires a judge to give notice to the parties or to give them an opportunity of being heard either during or after the inspection. It is generally desirable that a judge should place upon record the result of his investigation.—MORAN v. BHAGBAT LAL SAHA (1905), 1 *L. R.* 33 *Cal.* 133.—*IND.*

By parties or their agents.]—See PRACTICE. In criminal cases—By jury.]—See CRIMINAL LAW, Vol. XIV., p. 304, Nos. 3196–3201; CROWN PRACTICE, Vol. XVI., pp. 411, 412, Nos. 2686–2692.

SUB-SECT. 3.—OF

A. In General.

See, now, R. S. C., Ord. 50, rr. 3, 4, 5.

1577. By chemical experiment.]—A bill was filed to enforce an agreement for work at a stated price. Pltf., on a motion, swore that the price had been obliterated from the agreement by chemical agency, & asked that the paper might be submitted to chemical tests to ascertain whether that had been done:—*Held*: motion refused.—*TWENTYMAN v. BARNES* (1848), 2 *De G. & Sm.* 225; 12 *Jur.* 743; 64 *E. R.* 101.

1578. —.]—A. filed a bill against deft. to restrain the latter from causing a nuisance to pltf. by means of sulphuretted hydrogen emitted from deft.'s works. Deft. adduced scientific evidence that asphaltum, which it was admitted that pltf. employed in manufacturing varnish, also emitted sulphuretted hydrogen, & an experiment was made in ct. showing that such gas was emitted from mineral asphaltum in a heated state. Pltf. applied for leave to adduce evidence in reply to prove that the only asphaltum used by him was vegetable asphaltum, which did not emit sulphuretted hydrogen:—*Held*: this evidence ought to have been admitted, on the ground that it was never too late to adduce fresh evidence to show that confusion & error have arisen from two things passing by the same name, & the evidence was accordingly admitted on the appeal.—*BIGSBY v. DICKINSON* (1876), 4 *Ch. D.* 24; 46 *L. J. Ch.* 280; 35 *L. T.* 679; 25 *W. R.* 89, *C. A.*

Annotation:—Mentd. Re Caerphilly Colliery Co., Pearson's Case (1877), 46 *L. J. Ch.* 339.

Inspection of documents.]—See, generally, DISCOVERY, Vol. XVIII., pp. 172 *et seq.*

— Election papers.]—See ELECTIONS, Vol. XX., p. 161, Nos. 1337–1344.

*B. Infringement of Trade Marks and Designs.**See, generally, TRADE MARKS.*

1579. Similarity in design.—Now, in the case of those things as to which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things, whether, therefore, there be piracy or not is referred at once to an unerring judge, namely, the eye, which takes the one figure & the other figure, & ascertains whether they are or are not the same (LORD WESTBURY).—*HOLDSWORTH v. M'CREA* (1867), L. R. 2 H. L. 380; 36 L. J. Q. B. 297; 16 W. R. 226, H. L.; *affg.* S. C. *sub nom.* *M'CREA v. HOLDSWORTH* (1866), L. R. 1 Q. B. 264, Ex. Ch.

Annotations.—*Fold.* Hecla Foundry Co. v. Walker, Hunter (1889), 14 App. Cas. 550. *Consd.* Bourne v. Swan & Edgar, *Re Bourne's Trade Mks.*, [1903] 1 Ch. 211. *Refd.* Hothersall v. Moore (1891), 9 R. P. C. 27; *Re Clarke's Design*, [1896] 2 Ch. 38. *Mentd.* *Re Le May's Registered Design*, *Le May v. Welch* (1884), 28 Ch. D. 24; *Saunders v. Wiel*, [1893] 1 Q. B. 470; *Sachett & Barnes v. Clozenberg* (1909), 27 R. P. C. 104; *Dover v. Nürnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25.

1580.—*]*—Pursuers registered a design for the shape of a range fire-door with a moulding on the top which had the effect of closing the range to cold air. Defenders manufactured a range fire-door with a moulding on the top which had the same effect.

It seems to me that the eye must be the judge in such a case as this, & that the question must be determined by placing the designs side by side, & asking whether they are the same, or whether the one is an obvious imitation of the other (LORD HERSHELL).—*HECLA FOUNDRY CO. v. WALKER HUNTER & CO.* (1889), 14 App. Cas. 550; 59 L. J. P. C. 46; 61 L. T. 738; 6 R. P. C. 551, H. L.

Annotations.—*Consd.* *Moody v. Tree* (1892), 40 W. R. 558; *Saunders v. Wiel* (1892), 68 L. T. 183. *Fold.* *Re Clarke's Design*, [1896] 2 Ch. 38; *Harper v. Wright & Butler Lamp Manufacturing Co.*, [1896] 1 Ch. 142. *Consd.* *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Gramophone Co. v. Magazine Holder Co.* (1910), 102 L. T. 409. *Refd.* *Hothersall v. Moore* (1891), 9 R. P. C. 27; *Re Bayer's Design* (1906), 23 R. P. C. 553; *Allen West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157. *Mentd.* *Werner Motors v. Gamago*, [1904] 2 Ch. 580; *Dover v. Nürnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25.

1581.—*]*—Here the two designs have been placed side by side & the eye has been left to judge & the impression produced upon all the members of the ct. has been this, that one design is an obvious imitation of the other, that in all their essential features they are alike & that in those essential features they differ, both of them, from anything that had been previously known. Better proof than that that the one design is an obvious imitation of the other it seems to me it would be impossible to give (LORD HERSHELL).—*HARPER (J.) & CO., LTD. v. WRIGHT & BUTLER LAMP MANUFACTURING CO., LTD.*, [1896] 1 Ch. 142; 65 L. J. Ch. 161; 73 L. T. 486; 44 W. R. 274; 12 T. L. R. 53; 12 R. P. C. 483, C. A.

Annotations.—*Consd.* *Werner Motors v. Gamago* (1904), 73 L. J. Ch. 770. *Mentd.* *Re Clarke's Design*, [1896] 2 Ch. 38; *Heath v. Rollason* (1898), 67 L. J. Ch. 565; *Dover v. Nürnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25; *Pilkington v. Abrahams* (1914), 32 R. P. C. 61; *Phillips v. Harbro Rubber Co.* (1919), 36 R. P. C. 79; *Repetition Woodwork Co. & Hilton v. Briggs* (Trading as Lifford Office Equipment Manufacturing Co.) (1924), 131 L. T. 556.

1582.—*]*—C. registered a design for a "lamp for electric lighting applicable for its shape." It was in fact a design for a lamp-shade consisting of a reflecting screen which had been commonly used for gas lights & a ventilating top not materially differing from those which had been used before for gas except that a chimney which was required for gas lights but not for electric lights was omitted.

The truth must be ascertained by looking at the shapes of lamps or shades previously known. This method of determining such a question is not only dictated by good sense but warranted by decided cases (LINDLEY, L.J.).—*Re CLARKE'S DESIGN*, [1896] 2 Ch. 38; 65 L. J. Ch. 629; 12 T. L. R. 397; 40 Sol. Jo. 498; *sub nom.* *Re CLARKE'S REGISTERED DESIGN, CLARKE v. SAX & CO., LTD.*, 74 L. T. 631; 13 R. P. C. 351, C. A.

Annotations.—*Mentd.* *Re Rollason's Registered Design*, [1898] 1 Ch. 237; *Dover v. Nürnberger Celluloidware Fabrik Gebrüder Wolff*, [1910] 2 Ch. 25; *Allen West v. British Westinghouse Electric & Manufacturing Co.* (1916), 33 R. P. C. 157.

1583. Similarity in name—Question for court.]

—The M. Brewery Co., Ltd., had carried on business under that name for years. Appls. bought an old business called "The N. C. Brewery Co., Ltd.," & then, without intending to deceive, got themselves incorporated & registered under the name, "The N. C. & M. Brewery Co., Ltd.":—*Held*: as a matter of fact the name of applt. co. was calculated to deceive & appls. must therefore be restrained by injunction in the usual way.

Upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another, as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, & for this reason, that that is the very question your Lordships have to decide (LORD HALSBURY, C.).—*NORTH CHESHIRE & MANCHESTER BREWERY CO. v. MANCHESTER BREWERY CO.*, [1899] A. C. 83; 68 L. J. Ch. 74; 79 L. T. 645; 15 T. L. R. 110, H. L.; *affg.* S. C. *sub nom.* *MANCHESTER BREWERY CO., LTD. v. NORTH CHESHIRE & MANCHESTER BREWERY CO., LTD.*, [1898] 1 Ch. 539, C. A.

Annotations.—*Distd.* *London General Omnibus Co. v. Lavell*, [1901] 1 Ch. 135. *Apld.* *Lambert & Butler v. Goodbody* (1902), 18 T. L. R. 394. *Fold.* *Bourne v. Swan & Edgar, Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; *Royal Warrant Holder's Asscn. v. Deane & Beal*, [1912] 1 Ch. 10. *Refd.* *Randall v. British American Shoe Co.* (1902), 18 T. L. R. 611; *Dowden & Pook v. Pook* (1903), 73 L. J. K. B. 38; *Hennessey v. Keating* (1908), 24 R. P. C. 484; *Onvah Ceylon Estates v. Uva Ceylon Rubber Estates* (1910), 103 L. T. 416. *Mentd.* *Cooper & McLeod v. MacLachlan* (1901), 18 R. P. C. 380; *Aerators v. Tollitt*, [1902] 2 Ch. 319; *Daimler Motor Co. (1904), Ltd. v. London Daimler Co.* (1907), 24 R. P. C. 379; *Pine Cotton Spinners & Doublers Asscn. v. Harwood Cash* (1907), 76 L. J. Ch. 67; *Gramophone Co. v. Magazine Holder Co.* (1910), 102 L. T. 409; *Teofani v. Teofani, Re Teofani's Trade Mk.*, [1913] 2 Ch. 545; *Albion Motor Car Co. v. Albion Carriage & Motor Body Works* (1917), 34 R. P. C. 257.

1584. Whether similarity calculated to deceive—Question for court—On inspection & consideration of evidence.]—Whether a customer would be likely to be deceived is not a proper question to put to a witness, for it is for the ct., & not for the witness, to decide, after inspection of the exhibits & paying regard to the evidence, whether a customer would be likely to be deceived by the make-up of goods.—*PAYTON & CO. v. SNEILING*,

it was alleged that the apparatus used by the Commonwealth for wireless telegraphy was an infringement of pltf.'s patent. Inspection was opposed as the Postmaster General was of opinion that inspection would be prejudicial to the welfare of the Commonwealth:—*Held*: there was

PART III. SECT. 7, SUB-SECT. 3.—B.

c. Where possibility of disclosure of State secret.—When a claim is made by the Crown that inspection of a thing should not be granted on the ground that in the opinion of a Minister of the Crown, such inspection would

be detrimental to public welfare, it is not the ct.'s duty to concede such claim without any inquiry but first to ascertain the nature of the State secret if inspection would really be to the prejudice of public welfare.

In an action against the Commonwealth for infringement of patent

it was alleged that the apparatus used by the Commonwealth for wireless telegraphy was an infringement of pltf.'s patent. Inspection was opposed as the Postmaster General was of opinion that inspection would be prejudicial to the welfare of the Commonwealth:—*Held*: there was

7.—*Inspection: Sub-sect. 3, B. & C. Sect. 8.]*

LAMPARD & Co., [1901] A. C. 308; 70 L. J. Ch. 644; 85 L. T. 287; 17 R. P. C. 628, H. L.

Annotations.—*Consd.* Lambert & Butler v. Goodbody (1902), 18 T. L. R. 394; *Re Bourne's Trade Mks.*, Bourne v. Swan & Edgar, [1903] 1 Ch. 211; Weingarten v. Bayer (1903), 88 L. T. 168; Ouwah Ceylon Estates v. Uva Ceylon Rubber Estates (1910), 103 L. T. 16. *Refd.* Alaska Packers Assn. v. Crooks (1901), 18 R. P. C. 129; Hennessy v. Keating (1907), 24 R. P. C. 484; Spalding v. Gamage (1914), 84 L. J. Ch. 449; Universal Winding Co. v. Hattersley (1915), 32 R. P. C. 479. *Mentd.* Imperial Tobacco Co. (of Great Britain & Ireland) v. Purnell (1904), 21 R. P. C. 368; Schweppe v. Gibbens (1904), 22 R. P. C. 113; Edge v. Nicolls, [1911] 1 Ch. 5; Perry v. Hessin (1912), 56 Sol. Jo. 572; Thorne v. Sandow & Sandow, *Re Health Trade Mks.* (1912), 29 R. P. C. 440; *Re Crook's Trade Mks.* (1914), 110 L. T. 474; Goddard v. Watford Co-op. Soc. (1924), 41 R. P. C. 218; Young v. Grierson, Oldham (1924), 41 R. P. C. 548.

1585. ————]—In an action for deceit brought on the ground that a particular article used by deft. is a colourable imitation of pltf.'s, the conclusion of the judge, on a view by him of the two articles, that deft.'s article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.—LONDON GENERAL OMNIBUS CO., LTD. v. LAVELL, [1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; 17 T. L. R. 61; 18 R. P. C. 74, C. A.

Annotations.—*Consd.* Bourne v. Swan & Edgar, *Re Bourne's Trade Mks.*, [1903] 1 Ch. 211; R. v. De Grey, *Ex p.* Fitzgerald (1913), 109 L. T. 871. *Refd.* Alaska Packers Assn. v. Crooks (1901), 18 R. P. C. 129; Hennessy v. Keating (1907), 24 R. P. C. 484.

1586. ————]—The question whether there is such a resemblance between two designs, or names, or the "get up" of two articles, or the like, as is calculated to deceive customers, is not to be determined by the testimony of the witnesses, but is a question for the judge himself, viewing the exhibits or considering the names, in the light of the evidence as to the circumstances in which they are used.—BOURNE v. SWAN & EDGAR, LTD., *Re Bourne's Trade-Marks*, [1903] 1 Ch. 211; 72 L. J. Ch. 168; 51 W. R. 213; 19 T. L. R. 59; 47 Sol. Jo. 92; 20 R. P. C. 105.

Annotations.—*Refd.* Weingarten v. Bayer (1903), 19 T. L. R. 239; Hennessy v. Keating (1907), 24 R. P. C. 484; Royal Warrant Holders' Assn. v. Deane & Beal, [1912] 1 Ch. 10. *Mentd.* Todd v. N. E. Ry. (1903), 51 W. R. 333; Nocton v. Ashburton, [1914] A. C. 932.

See, further, TRADE MARKS.

C. Other Cases.

1587. In action for trover.]—EVERARD v. LATHURRY (1743), Bull. N. P. 49.

1588. Comparison of forged with genuine bank-note.]—Prisoner was tried & convicted on an indictment for engraving upon a plate part of a promissory note, purporting to be part of the note of a banking co. It was proved in evidence that prisoner had procured to be engraved upon a plate the royal arms of Scotland & the Britannia, the arms & the Britannia being respectively placed

upon the plate in the same position as that in which they would be found in a complete note of the co.:—*Held*: (1) in order to ascertain whether that which was engraved on the plate "purported" to be part of the note, extrinsic evidence was admissible; (2) for that purpose, the jury might compare the plate with a genuine note of the co.—R. v. KEITH (1855), Dears. C. C. 486; 3 C. L. R. 692; 24 L. J. M. C. 110; 25 L. T. O. S. 118; 19 J. P. 293; 1 Jur. N. S. 454; 3 W. R. 412; 6 Cox, C. C. 533, C. C. R.

1589. ————]—On an indictment under Forgery Act, 1913 (c. 27), s. 9 (a), for being in possession of paper intended to resemble & pass as special paper such as is used in the production of bank notes it is not necessary that a bank note should be produced so that the jury may make an immediate comparison.—R. v. Woods (1922), 91 L. J. K. B. 728; 127 L. T. 160; 86 J. P. 132; 38 T. L. R. 493; 66 Sol. Jo. 524; 27 Cox, C. C. 223; 16 Cr. App. Rep. 129, C. C. A.

1590. Of models.—In action for infringement of patent.]—I have been considering whether a proceeding might not be adopted in this case, which cannot be in a case where there is very complicated machinery & conflicting evidence. In this case I think the questions of the validity of the patent & the infringement will depend upon a comparison of pltf.'s specification with the specifications & the models showing what machines were in use before the date of the patent & the apparatus which defts. have used; & what I propose is, to reserve for the ct. all questions of law, & to leave the ct., upon the consideration & examination of these models & the specifications to say how the verdict should be entered upon the issues. I think, by adopting this course, the ct. would come to a more satisfactory conclusion as to the validity of the patent & the infringement of it, than by proceeding in the usual manner, which is often necessary, but which in this case does not apply (LORD CAMPBELL, C.).—NALDER v. CLAYTON & SHUTTLEWORTH (1859), Mact. 371; 33 L. T. O. S. 184.

1591. Of railway carriage.—In action for negligence.]—ROBERTS v. GREAT EASTERN RY. CO. (1872), 36 J. P. Jo. 52.

1592. Of ship.—In dock abroad.—Jurisdiction of court to order return for inspection.—R. S. C., Ord. 50, r. 3.]—In an action by shipowners claiming under a policy of marine insurance in respect of an alleged constructive total loss of their ship, defts. applied for an order that the ship which was lying unrepaid in Singapore harbour, be brought to England before the trial of the action, at defts.' risk & expense, on the grounds that it was necessary for the preservation & inspection of the ship:—*Held*: the ct. had power under above rule to make the order, & in the circumstances it was right that the order should be made.—STEAMSHIP NEW ORLEANS CO. v. LONDON & PROVINCIAL MARINE & GENERAL INSURANCE CO., [1909] 1 K. B. 943; 78 L. J. K. B. 473; 100 L. T. 595; 53

nothing to warrant even conjecture that inspection would disclose anything reasonably called secret & a *prima facie* case of infringement being made out inspection should be allowed.—MARCONI'S WIRELESS TELEGRAPH CO., LTD. v. THE COMMONWEALTH (1913), 16 C. L. R. 178.—AUS.

PART III. SECT. 7, SUB-SECT. 3.—C.

d. Of specimens.—In sale of goods by sample.]—In a written contract for the sale of goods, the goods were described by words & letters which

were unintelligible to an ordinary person with an ordinary knowledge of the English language. There was no mention in the contract of any sample, but at the time the contract was made specimens of the goods were exhibited to the purchasers:—*Held*: the evidence of the exhibitions of the specimens was admissible to show the kind of things denoted by the words of description used by the parties.—SHARP v. THOMSON (1915), 20 C. L. R. 137.—AUS.

e. Of posts.—In disputes as to

notices thereon.]—Posts may be brought into ct. in case of disputes as to notices thereon or the size thereof.—RUTHERFORD v. MORGAN, 2 M. M. Cas. 214.—CAN.

f. Of machinery.—To assess value.]—In an action of reduction of a *mortis causa* trust-settlement & codicil on the ground of facility & circumvention, the ct. granted a warrant ordaining defenders to allow an inspection of the plant, machinery, & working plans of certain collieries, a large share in which belonged to the trust estate, the object

Sol. Jo. 286; 11 Asp. M. L. C. 225; 14 Com. Cas. 111, C. A.

By Trinity Masters.]—See ADMIRALTY, Vol. I., pp. 201, 202, Nos. 1199, 1200, 1215.

Of dog—To prove disposition.]—See ANIMALS, Vol. II., p. 245, No. 284.

SECT. 8.—WEIGHT OF EVIDENCE.

1593. General rule—Affirmative preferred to negative.]—THE GLENALBYN (1849), 6 L. T. 581.

1594. ———.]—THE BATAVIER (1854), 1 Ecc. & Ad. 378; 164 E. R. 218; sub nom. THE ANN v. THE BATAVIER, 6 L. T. 581; affd. sub nom. NETHERLANDS STEAM BOAT CO. v. STYLES, 9 Moo. P. C. C. 286, P. C.

1595. Matters affecting weight—Circumstances of case.]—BEVAN v. WILLIAMS (1776), 3 Term Rep. 635, n.; 100 E. R. 775.

Annotations:—Consd. Radford v. McIntosh (1790), 3 Term Rep. 632. Rejd. Smith v. Taylor (1805), 1 Bos. & P. N. R. 196; Pearce v. Whale (1826), 5 B. & C. 38.

1596. ——— Conversation overheard by concealed witness.]—(1) A single witness cannot prevail against the answer, unless confirmed by circumstances.

(2) Answer read as evidence, contrasted with the other evidence, not for the purpose of discrediting it.

(3) Evidence of conversation overheard by a witness, placing himself behind wainscot, etc., received with great caution.—SAVAGE v. BROCKSOPP, BROCKSOPP v. LUCAS (1811), 18 Ves. 335; 34 E. R. 344, L. C.

being to obtain evidence of their value for the purposes of pursuer's case.—**BELL v. HAMILTON'S TRUSTEES (1889), 16 R. (Ct. of Sess.) 1001; 26 Sc. L. R. 679.—SCOT.**

PART III. SECT. 8.

1593 i. General rule—Affirmative preferred to negative.]—Where a party negotiating between two persons, the one desiring to sell, the other to buy, certain land, gave the former to understand that he was acting in her interest, there being a conflict as to what had passed in the conversation, & no other witness of them being produced, it was —Held: other things being equal, the version of the deceived party should be accepted in preference to that of the other party.—WRIGHT v. HANKIN (1871), 18 Gr. 625.—CAN.

1593 ii. ———.]—In the estimation of the value of the evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.—LEFEUNTEUM v. BEAUDOIN (1897), 28 S. C. R. 89.—CAN.

1593 iii. ———.]—Where there are two persons of equal credibility, & one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is that the words were spoken & that the person who denies it has forgotten the circumstances.—It. v. STEWART (1902), 32 S. C. R. 483.—CAN.

1593 iv. ———.]—Where in an action against the indorser of a promissory note, a defence of failure to present for payment & to give notice of dishonour is admitted, but pltf. relies on an alleged admission of liability by deft., the burden of proof is on pltf.; & the case is not one where the rule as to the adoption of the positive evidence of one witness against the

negative evidence of another can be properly applied.—**HART v. TAYLOR (1904), 37 N. S. R. 155.—CAN.**

1593 v. ———.]—Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to one who remembers what happened than to one who denies, probably because he does not remember.—KASTOR ADVERTISING CO. v. COLEMAN (1905), 11 O. L. R. 262; 6 O. W. R. 791.—CAN.

1593 vi. ———.]—Where a conversation over the telephone was relied on as proof of notice, the evidence of the party asserting that it took place, & giving the substance of it in detail, must prevail over that of the other party who states only that he does not recollect it.—UNION BANK OF HALIFAX v. INDIAN & GENERAL INVESTMENT TRUST (1908), 40 S. C. R. 510.—CAN.

1593 vii. ———.]—Held: in estimating the value of evidence the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who swears it did not.—WATT v. WATT (1909), 10 W. L. R. 699; 2 Sask. L. R. 141.—CAN.

1593 viii. ———.]—In estimating the value of evidence a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative; because he who testifies to a negative may have forgotten a thing that did happen, but it is not possible to remember a thing that never existed.—CHARLTON v. It. (1912), 11 E. L. R. 284 14 Exch. C. It. 41.—CAN.

1593 ix. ———.]—The testimony of a person who swears positively that a certain conversation took place is to be believed in preference to the testimony of a person who swears positively that it did not take place,

1597. ——— Witness's means of knowledge.]—R. v. HARDWICK (INHABITANTS), No. 1141, ante.

1598. ——— Illiteracy of witness—Evidence by affidavit.]—Observations on traditional evidence in pedigree cases, & its fallibility. It is not to be wholly rejected because error is proved as to part.

The veracity, or even accuracy, of an ignorant & illiterate person, is not to be conclusively tested by comparing an affidavit made by him, with his *viva voce* testimony; discrepancies between them is not conclusive against his testimony.

Observations on the value of testimony given by affidavit. When the witness is illiterate & ignorant, the language is not his own, but that of the person preparing the affidavit; being taken *ex parte*, it is almost always incomplete, & often inaccurate.

In cases where the whole evidence is traditional, when it consists entirely of family reputation or of statements of declarations made by persons who died long ago, it must be taken with such allowances, & also with such suspicions as ought reasonably to be attached to it. When family reputation or declarations of kindred made in a family are the subject of evidence, & the reputation is of long standing or the declarations are of old date, the memory as to the source of the reputation or as to the persons who made the declarations can rarely be characterised by perfect accuracy (LORD LANGDALE, M.R.).—**JOHNSTON v. TODD (1843), 5 Beav. 597; 49 E. R. 710.**

1599. ——— Evidence opposed to probabilities.]—Evidence of illiterate witnesses as to acts not affecting themselves, or in their line of business, when opposed to the probable acts of an educated man, to be received with great

assessing both persons to be of equal credibility.—**DUNPHY & ROLPH v. CARIBBOO TRADING CO. (1914), 29 W. L. R. 735; 7 W. W. R. 326.—CAN.**

g. ——— Whether where affirmative evidence vague & doubtful.]—Vague & extremely doubtful evidence of a remark having been made in the presence of a solr. while he was busily engaged upon, & his attention occupied by, the details of an important transaction quite distinct from the matter concerning which the remark was made, is not sufficient to fix the solr. with notice in opposition to the denial of the solr. having received it.—CHALMERS v. MACHRAY (1916), 33 W. L. R. 656; 9 W. W. R. 1435; 26 Man. L. R. 105; affd., 55 S. C. R. 612.—CAN.****

1595 i. Matters affecting weight—Circumstances of case.]—Where a physician improperly gives a certificate as to testamentary incapacity of his patient, it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto.—McHUGH v. DOOLEY (1903), 10 B. C. R. 537.—CAN.****

1595 ii. ———.]—In an action for malicious prosecution in which the verdict of the jury was in favour of pltf., the case centred on what took place at a certain interview between pltf. & deft., at which deft. promised to give pltf. a certain sum of money, namely, whether the money was promised voluntarily or in consequence of pltf.'s threats. Deft.'s evidence was corroborated by a witness, who overheard what took place at the interview, & by pltf.'s admissions at the time of his arrest. The surrounding circumstances also appeared to favour the truth of deft.'s story:—Held: the verdict of the jury should be set aside & a new trial ordered.—DICKINSON v. HARVEY (1913), 18 B. C. R. 461; 12 D. L. R. 129.—CAN.****

EVIDENCE.

Sect. 8.—Weight of evidence. Part IV. Sect. 1.]

caution.—*COOPER v. BOCKETT* (1846), 4 Moo. P. C. C. 419; 4 Notes of Cases, 685; 10 Jur. 931
13 E. R. 385. P. C.; *reusg.* (1843), 3 Curt. 648.

Annotations:—*Reid. Jones v. Godrich* (1845), 5 Moo. P. C. C. 16. *Mentd. Pennant v. Kingscote* (1843), 3 Curt. 642; *Bayliss v. Sayer* (1844), 3 Notes of Cases, 22; *Anon.* (1846), 8 L. T. O. S. 174; *In the Goods of Bradley* (1846), 5 Notes of Cases, 95; *Gregory v. H.M.'s Proctor* (1846), 4 Notes of Cases, 620; *Birch v. Birch* (1848), 1 Rob. Eccl. 675; *Lushington v. Onslow* (1848), 6 Notes of Cases, 183; *Doe d. Shallcross v. Palmer* (1851), 16 Q. B. 747; *Doe d. Tatum v. Catmore* (1851), 16 Q. B. 745; *Greville v. Tyloe* (1851), 7 Moo. P. C. C. 320; *Simmons v. Rudall* (1851), 1 Sim. N. S. 115; *Gann v. Gregory* (1854), 3 De G. M. & G. 777; *In the Goods of Foley* (1855), 25 L. T. O. S. 311; *Gwillim v. Gwillim* (1859), 3 Sw. & Tr. 200; *In the Goods of Streaker* (1859), 4 Sw. & Tr. 192; *In the Goods of Huckvale* (1867), L. R. 1 P. & D. 375; *In the Goods of Cadge* (1868), L. R. 1 P. & D. 543; *Beckett v. Howe* (1869), 39 L. J. P. & M. 1; *Pearson v. Pearson & Pearson* (1871), 40 L. J. P. & M. 53; *In the Goods of Sykes* (1873), L. R. 3 P. & D. 26; *Re Sanderson, Wright v. Sanderson* (1884), 53 L. J. P. 49; *Wright v. Sanderson* (1884), 9 P. & D. 149.

1600. — Age of witness.]—The evidence of a servant who was only nine years of age at testator's death, but lived three or four years afterwards in the house, was allowed to prove the furniture then standing, 13 years after, tho' she had never taken any memorandum of it.—*DAVY v. SEYS* (1728), Mos. 71; 25 E. R. 277, L. C.

1601. — Evidence of single witness—With corroboration.]—The evidence of one witness corroborated by a letter of deft.:—*Held*: sufficient to contradict deft.'s answer.—*KEYS v. WILLIAMS* (1838), 3 Y. & C. Ex. 55; 7 L. J. Ex. Eq. 59; 2 Jur. 611; 160 E. R. 612.

1602. — Inconsistent with previous conduct.]—Where any question of fact depends upon the testimony of a single witness, & any inconsistency is apparent between such testimony & the previous conduct of the witness, the ct. will look rather to the acts done by him at the time than to his statements when called as a witness.—*Re BARR'S TRUSTS* (1858), 4 K. & J. 219; 27 L. J. Ch. 548; 32 L. T. O. S. 9; 4 Jur. N. S. 1013; 6 W. R. 424; 70 E. R. 92.

Annotations:—*Mentd. Re Coombe's Trusts* (1859), 1 Giff. 91; *Re Vickress's Trusts* (1859), 7 W. R. 542; *Webb's Policy* (1867), 36 L. J. Ch. 341; *Re Currie* (1871), 41 L. J. Bey. 55; *Semphill v. Queensland Sheep Investment Co.* (1873), 29 L. T. 737; *Palmer v. Locke* (1881), 18 Ch. D. 381; *Mercer v. Vans Collina* (1897), 67 L. J. Q. B. 424.

1603. — Where evidence directly conflicting—Possibility of mistake.]—*THE HIND v. THE EVANGELISMOS* (1858), 6 L. T. 581.

1604. — Circumstances compelling disbelief.]—Pltf. lived with deft., as his mistress passing by his name as his wife. By her affidavit & *vidd voce* she swore that deft. had promised spontaneously on several occasions to marry her. Letters were written by deft. to pltf. in which he proposed a separation & offered to settle an annuity on her & their child. This pltf. agreed to & a

1604 i. — Where evidence directly conflicting—Circumstances compelling disbelief.]—If the affidavit in support of a motion & that in showing cause are contradictory, greater credence is to be given to the last affidavit, unless there are circumstances in the case to throw discredit on the latter; therefore, on motion of a party for the restitution of certain rooms in a house, supported by affidavits, which were contradicted by affidavits in showing cause, & the probabilities of the case supported the last statement, the motion was dismissed.—*DOE d. JOHNSTON v. ROE* (1847), 3 Kerr, 400.—*CAN.*

h. — Circumstances corroborating one side.]—Where notice of a fraud is denied by the answer, &

directly proved by the evidence of one witness only, if there are circumstances tending to corroborate the oath of the single witness, the ct. will act upon his evidence, although the answer is only directly contradicted by one witness.—*RONALDS v. DUNCAN* (1871), 2 V. R. 65.—*AUS.*

k. — Priority of examination.]—In deciding as to whether a certain mound as a boundary is at one point sworn to by one surveyor or at another point sworn to by another surveyor, where both in the opinion of the ct. are equally honest, impartial & capable, & there is no other deciding factor, the man who made the first examination, the examination which was prior in time & nearest to the date on which the mound was erected,

draft was prepared & approved of by both whereby in consideration of pltf.'s releasing all claims in respect of a promise which she alleged deft. had made to marry her she was to have the annuity. Deft. afterwards declined to execute the deed, & in his evidence *vidd voce* positively denied that he had ever promised to marry pltf.:—*Held*: pltf. was entitled to a decree for the specific performance of this agreement; for, although the onus lay on her to prove the alleged promise & there was oath against oath, yet there were circumstances not in controversy to compel the ct. to disbelieve deft.—*KEENAN v. HANDLEY* (1864), 2 De G. J. & Sm. 283; 10 L. T. 800; 28 J. P. 660; 10 Jur. N. S. 906; 12 W. R. 1021; 46 E. R. 384, L. J.

1605. — Traditional evidence—In pedigree cases.]—*JOHNSTON v. TODD*, No. 1598, *ante*.

1606. — Declarations ante litem motam.]—Anterior [*ante litem motam*] declarations [of deceased members of the family] are little regarded [in pedigree cases] unless corroborated by other circumstances.—*CROUCH v. HOOPER* (1852), 16 Beav. 182; 1 W. R. 10; 51 E. R. 747.

1607. — Recalled post litem motam.]—Slight reliance is to be paid to the declarations of deceased persons, said to have been made before, but remembered after the cause of litigation has arisen. Such evidence is usually given with minute particularity, but is subject to no worldly sanction.—*WEBB v. HAYCOCK* (1854), 19 Beav. 342; 52 E. R. 382.

1608. — (1) Hearsay evidence is admissible in cases of pedigree, being statements of living witnesses as to that which they have heard persons now deceased say with respect to the pedigree of their family; they being proved *abunde* to be members of that family by extrinsic evidence.

(2) Although the ct. will admit hearsay evidence in cases of pedigree, it looks at such evidence with great jealousy, the parties giving it being interested witnesses; but discrepancies may go to confirm the truth of such statements.—*BAUER v. MITFORD* (1859), 7 W. R. 570; *subsequent proceedings*, 29 L. J. Ch. 268.

1609. — Rebutted by conduct of parties.]—*DOE d. GIBSON v. BARTON* (1837), Hubback on Succession 255.

Annotation:—*Reid. Lyle v. Ellwood* (1874), 44 L. J. Ch. 184.

1610. Witness not discredited — Because of interest.]—It is not of necessity to disbelieve or to attribute error to an affidavit because deponent is interested, & because a witness not interested deposes in a different manner; & the ct., believing the whole of the affidavit of an interested deponent, decided the case in his favour, though the testimony of a witness not interested was different.—*Re DIRECT EXETER, PLYMOUTH & DEVONPORT*

is the one whose story should be taken.—*SHUPE & DE SUTTER v. LANGENBURG RURAL MUNICIPALITY*, No. 181, [1920] 3 W. W. R. 706.—*CAN.*

l. — Evidence of unreliable witness.]—Where on a reference to the master pltf. swore that he never received the amount of a legacy to which he was entitled, & deft. swore that he had paid all but \$80, & a witness called by pltf. proved an admission by deft., that the whole legacy was due, but the master reported that the witness was not to be relied on, the ct., in view of all the circumstances, refused to disturb the master's finding.—*COTTER v. COTTER* (1874), 21 Gr. 159.—*CAN.*

m. — Where scientific & unscientific witnesses called.]—In a case

RY. CO., *HALL'S CASE* (1850), 3 De G. & Sm. 214; 19 L. J. Ch. 386; 15 L. T. O. S. 109; 14 Jur. 909; 64 E. R. 450.

Annotation.—*Mentd.* *Re German Mining Co.* (1852), 19 L. T. O. S. 84.

1611. — Because of difference of opinion—Collision.—*THE IDE v. THE KRON PRINS ERNST AUGUSTE* (1856), 6 L. T. 581.

1612. Witness in part discredited—Remainder of evidence corroborated.—Where a witness is in part discredited, reliance may still be placed upon the evidence of that witness where corroborated by other evidence or admissions in interrogatory.—*DAVIDSON v. DAVIDSON* (1856), *Dea. & Sw.* 132; 27 L. T. O. S. 176; 2 Jur. N. S. 517; 4 W. R. 590.

1613. Question for jury.—Where, upon an issue upon a district modus, *pltf.* clearly proved the existence for 150 years of the payment pleaded, & *deft.* produced documentary evidence, which ascribed to the rectory, & to the property in

respect of which the modus was pleaded, values inconsistent with the alleged modus:—*Held*: it was for the jury to say to what weight the documentary evidence was entitled, & they might take into their consideration whether the documentary evidence ascribed to the rectory & the district their real value at the time.—*BECK v. BREE* (1831), 1 Cr. & J. 246; 1 Tyr. 132; 9 L. J. O. S. Ex. 26; 148 E. R. 1410; *sub nom.* *BREE v. BECK*, *You.* 211. *Annotation*.—*Mentd.* *Raine v. Cairns* (1841), 4 Hare, 327.

1614. Discretion of judge in directions to jury.—The due degree of weight to be given by a judge, directing the jury, to particular evidence, which has been properly admitted, must be left to his own discretion, & his direction in that respect will not be revised by the *ct.* above.—*A.-G. v. GOOD* (1825), *McCle. & Yo.* 286; 148 E. R. 421.

Annotations.—*Consd.* *Simpson v. Clayton* (1836), 2 Bing. N. C. 467. *Mentd.* *Re Disputed Adjudication* (1850), 15 L. T. O. S. 8.

Part IV.—Documentary Evidence.

SECT. 1.—IN GENERAL.

1615. Deed altered since execution—Whether still admissible.—A deed of conveyance under which lessor of *pltf.* claims title in ejectment is proved to have been altered in a material part since the execution, it seems that the deed is still admissible in evidence.—*DOE d. BEANLAND v. HIRST* (1821), 3 Stark. 60; 11 Price, 475; 147 E. R. 537.

1616. Document written by one party—Signed by other party—Admissible against party writing.—A paper written by a party is admissible in evidence against that party, though it is signed by a third person.—*ALEXANDER v. BROWN* (1824), 1 C. & P. 288, N. P.

Annotation.—*Mentd.* *Re Farley, Ex p. Danks* (1852), 1 W. R. 57.

1617. Agreement to enter documents as read—Subsequent dispute.—Where, in order to save

time of the *ct.*, it is arranged between the parties, that a great body of documentary evidence shall be entered as read, if on examination by the parties it shall appear to be evidence, & afterwards the parties cannot agree upon the subject, the *ct.* will permit the cause to be again set down for hearing on the subject of that evidence, but will not permit the cause to be again opened, or any discussion to take place on the merits.—*WYLD v. WARD* (1827), 1 Y. & J. 536, Ex. Ch.

1618. — Agreements endorsed on documents—Signed by parties & solicitors—Evidence of registrar as to putting in.—Where at the trial parties agree that a bundle of copy correspondence shall be taken as put in saving all just exceptions, it is desirable that the agreement should be indorsed on the bundle & signed by the parties or their solrs. The registrar ought not to be called upon to say whether the whole of the bundle

where scientific witnesses are called to give evidence & also unscientific ones, great care should be taken in the reception of the same.—*LOHRAINE v. NOKKIE* (1911), 9 E. L. R. 278.—*CAN.*

n. — Witness impeaching own veracity.—The evidence of one who impeaches his own veracity is to be received with the most scrupulous jealousy.—*BALDWIN v. HESSLER* (1916), 38 O. L. R. 172.—*CAN.*

1613i. Question for jury.—The weight to be given to evidence is a matter for the jury under the direction of the *ct.*—*CAIN v. UHLMAN* (1887), 20 N. S. R. (8 R. & G.) 148; 8 C. L. T. 373.—*CAN.*

o. Evidence of facts preferred to opinions.—Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra-judicial statements & municipal reports.—*CRAWFORD v. CITY OF MONTREAL* (1900), 30 S. C. R. 406.—*CAN.*

p. ——In an action of the owner of adjoining property for damages caused by the vibrations of machinery in an electric powerhouse, the evidence was contradictory & the *cts.* below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—*Held*: notwithstanding the concurrent findings of the *cts.* below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of

persons giving opinions based merely upon scientific observations.—*GAREAU v. MONTREAL STREET RY. CO.* (1901), 31 S. C. R. 463.—*CAN.*

q. ——Evidence of facts is to be preferred as against opinions.—*TAIT v. CITY OF NEW WESTMINSTER* (1911), 18 W. L. R. 470.—*CAN.*

r. Evidence of interested witness—Weight of.—Although the law now allows interested parties to give evidence, & makes such evidence admissible, great weight should not be attached to such evidence.—*HASHER v. SUMMERS* (1884), 10 V. L. R. 201.—*AUS.*

s. ——The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.—*LEFEUNTUM v. BEAUDOIN* (1897), 28 S. C. R. 89.—*CAN.*

t. — Where corroborated in essential details.—The objection that important testimony had been given by the wife & son, who were interested parties, lost the force that it would otherwise have had, where their testimony was corroborated in all essential particulars by disinterested witnesses.—*Re FARQUHARSON'S ESTATE* (1900), 33 N. S. L. 261.—*CAN.*

a. Conflicting evidence—Discretion of court.—Where evidence given before a master is conflicting, his judgment on it is, in general, ac-

cepted by the *ct.* as correct; & not to be reversed on appeal.—*DAY v. BROWN* (1871), 18 Gr. 681.—*CAN.*

b. — How investigated.—A rule for dealing with conflicts of evidence (where two witnesses of apparent equal credibility contradict each other) is, to consider what facts are beyond dispute & to examine which account best accords with those facts according to the ordinary course of human affairs & the usual habits of life or business.—*KASTOR ADVERTISING CO. v. COLEMAN* (1905), 11 O. L. R. 262.—*CAN.*

c. ——There is no safer rule for investigating cases of conflicting evidence, where perjury & fraud must exist on the one side or the other, than to consider what facts are beyond dispute, & to examine which of the two cases best accords with those facts according to the ordinary course of human affairs & the usual habits of life.—*MEER USD-OOLAH v. MUSUMAT BEEBY IMAMAN* (1836), 5 W. L. R. 26; 1 Moo. Ind. App. 19.—*IND.*

d. — Necessity for writing.—Where there is conflicting evidence as to retainer (of a solr.) the *ct.* can decide according to the preponderance of evidence without the production of a written retainer.—*SMITH v. BULLER* (1884), 5 N. Z. L. R. 41.—*N.Z.*

PART IV. SECT. 1.

e. Objection to admissibility—Time for objection—When tendered.—An objection to the reading of documents, because they have not been

Sect. 1.—In general. Sect. 2: Sub-sects. 1, 2, 3, 4, 5 & 6.]

is put in.—*PERRY & Co. v. HESSIN & Co.* (1912), 56 Sol. Jo. 345; 29 R. P. C. 101.

1619. Circumstances making document evidence—Not gathered from document—To be proved *alifunde*.]—*DAVIES v. MORGAN*, No. 3040, *post*.

1620. — Document primarily inadmissible—Put in by opponent for other purpose.]—A document otherwise not admissible as evidence for deft. is good evidence for deft. if put in by plff. for another purpose.—*COBBETT v. GREY* (1850), 4 Exch. 729; 19 L. J. Ex. 137; 14 L. T. O. S. 182; 14 J. P. 50; 154 E. R. 1409.

Annotations:—Mentd. *Howard v. Hudson* (1853), 2 E. & B. 1; *Moody v. Corbett* (1866), 7 B. & S. 544.

1621. — Document read by jury—Although not proved.]—*COBHAM v. BALL*, No. 2185, *post*.

1622. Objection to admissibility—Time for objection—To be taken at trial—Copy of deed alleged to be lost.]—A party objecting to the production of a copy, on account of due search not having been made for the original, must make the objection, at the time of the trial distinctly on that ground; if he does not, the ct. will not afterwards entertain it.—*WILLIAMS v. WILCOX* (1838), 8 Ad. & El. 314; 3 Nev. & P. K. B. 606; 1 Will. Well. & H. 477; 7 L. J. Q. B. 229; 112 E. R. 857.

Annotations:—Mentd. *R. v. United Kingdom Electric Telegraph Co.* (1862), 2 B. & S. 648; *Free Fishers & Dredgers Co. of Whitstable v. Gann* (1863), 13 C. B. N. S. 853; *A. G. v. Longdale* (1868), L. R. 7 Eq. 377; *Rolle v. Whyte* (1868), 8 B. & S. 116; *Simpson v. A. G.*, [1904] A. C. 476.

1623. — Not after put in evidence—& part read.]—*LAYBOURN v. CRIST*, No. 2697, *post*.

1624. Documents to be put in formally—& marked by registrar.]—All documents intended to be used in evidence in an action ought to be formally put in at the trial & marked by the registrar.—*WATSON v. RODWELL* (1878), as reported in 11 Ch. D. 150; 48 L. J. Ch. 209, C. A.

1625. Foreign documents in foreign language—Evidence of correct translation insufficient—Proof of signature.]—*R. v. LYNCH*, [1903] as reported in 19 T. L. R. 103.

Annotations:—Mentd. *R. v. Casement*, [1917] 1 K. B. 98; *R. v. Middlesex Regiment Commanding Officer 30th Batt., L. v. Freyberger*, [1917] 2 K. B. 129; *Tingley v. Müller*, [1917] 2 Ch. 144; *Re Chamberlains' Settlement*, [1921] 2 Ch. 533; *Fasbender v. A. G.*, *Kramer v. A. G.*, [1922] 2 Ch. 850.

Obtaining goods by false pretences.]—*See CRIMINAL LAW*, Vol. XV., pp. 1006, 1007, Nos. 11,285–11,288, 11,306–11,309.

SECT. 2.—PROOF OF HANDWRITING.

SUB-SECT. 1.—IN GENERAL.

See Criminal Procedure Act, 1865 (c. 18), s. 8.

1626. In criminal & civil cases—Proof in criminal cases more strict.]—*SEVEN BISHOPS' TRIAL*, No. 1649, *post*.

1627. — Rules same for both.]—*R. v. CATOR*, No. 1747, *post*.

1628. Opinion of the witness—To be formed from handwriting—Not extrinsic circumstances.]—(1) A witness called to prove handwriting, should form his judgment from the handwriting & not from extrinsic circumstances.

(2) The jury may take all circumstances into their consideration, but the witness should form

his opinion from the character of the handwriting only (*LORD KENYON, C.J.*).—*MENDES DA COSTA v. PYM* (1797), Peake Add. Cas. 144, N. P.

1629. — In forgery case—Whether admissible.]—*CAREY v. PITT*, No. 1669, *post*.

1630. — Both negative & positive—No other evidence of handwriting—Credibility of witness left to jury.]—Where a witness to the handwriting of deft., as endorser of a bill of exchange, prevaricated in his evidence, & swore both negatively & affirmatively as to his belief upon the subject, & there was no other evidence of the handwriting, the judge refused to stop the cause, leaving it to the jury to decide what credit was due to the witness.—*BEAUCHAMP v. CASH* (1822), Dow. & Ry. N. P. 3, N. P.

1631. Proof not amounting to evidence—Proof by party alleging writing to be *bonâ fide*—Ledger entries by deceased clerk.]—Where entries have been made by a clerk who is since dead, proof of his handwriting will not make such entries evidence.—*SIKES v. MARSHAL* (1798), 2 Esp. 705, N. P.

1632. —]—The clerk of a solr., who was the solr. of mtgor. & mtgee. in the creation of the security, & who copied the bill of costs of the solr. in the transaction of making an appointment of the estate comprised in the security, & of preparing the mtge. deed, which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document, which proof alone does not make it evidence, but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs in his history of the transaction; & the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. The consent of the personal representative of mtgor., who was one of the clients of the solr., to the admission of the bill of costs in evidence does not make it evidence which can be admitted against the parties claiming under mtgee., the other client.—*CHANT v. BROWN* (1852), 9 Hare, 790; 19 L. T. O. S. 361; 16 Jur. 606; 68 E. R. 735.

Annotations:—Refd. *Ainsworth v. Wilding*, [1900] 2 Ch. 315; *Daily Express* (1908), Ltd. v. Mountain (No. 2) (1916), 60 Sol. Jo. 654.

1633. Letter more than thirty years old—Proof not necessary.]—After thirty years the handwriting of a letter not necessarily proved where the letter affords intrinsic evidence of its authenticity. Where there is no existing direction to such a letter, *prima facie*, it must be intended to have been written to the party amongst whose papers it was found.—*FENWICK v. REED* (1821), 6 Madd. 7; 56 E. R. 991.

See, further, Sub-sect. 3, post.

1634. Nature of evidence receivable—Cross-examination of witness—Disproving evidence of previous witness on same side.]—If a witness, called for plff., in his cross-examination admit that a letter was written by him with the authority of plff., but deny that a second letter is of his handwriting, deft.'s counsel will not be allowed to show both letters to another witness, called for plff., & ask him whether he does not believe that the second letter was written by the same person who wrote the first.—*CLERMONT v. TULLIDGE* (1829), 4 C. & P. 1, N. P.

Annotation:—Refd. *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703.

1635. Proof to be submitted for jury's con-

proved as against the party objecting. must be made when they are tendered, & this rule is equally applicable to the

case of a minor as of an adult deft.—*STROUGHTON v. CROSBIE* (1843), 5 L. Eq. R. 451.—*IR.*

PART IV. SECT. 2, SUB-SECT. 1.

1635 1. Proof to be submitted for jury's consideration.]—It is not misdirection

sideration.]—DOE d. MUDD v. SUCKERMORE, No. 1757, *post*.

1636. Document not written by party—Liability in document acknowledged.]—FORSBURGH v. SHERMAN, No. 1646, *post*.

1637. Proof of mark—In place of signature—Allowable on affidavit.]—An affidavit that P. was a marksman, & that a certain mark was his mark:—*Held*: sufficient proof of his signature.—PEARCY v. DICKER (1849), 13 Jur. 997.

SUB-SECT. 2.—CALLING WRITER.

1638. Evidence as to own handwriting—Prosecution for forgery—Evidence of owner of forged name.]—On an indictment for forging a bank-note, the cashier who signed it "For the Governor & Company of the Bank of England" is competent witness to prove the forgery; for he is not by such a signature personally responsible for the payment of the note.—R. v. NEWLAND (1784), 1 Leach, 311; 2 East, P. C. 1001.

SUB-SECT. 3.—WHEN WRITER INCAPACITATED OR OUT OF JURISDICTION.

1639. Whether other evidence admissible—Writer out of jurisdiction.]—KEY v. GORDON (1701), 12 Mod. Rep. 521; 88 E. R. 1492.

1640. ——— Or dead.]—Where a subscribing witness is resident abroad, evidence of his handwriting is to be given as if he were dead.—HOLMES v. PONTIN (1791), Peake, 135, N. P.

1641. ———.]—DOE d. COUNSELL v. CAPERTON, No. 2028, *post*.

1642. ———.]—*Held*: proof by a father that his son, who had parted from him on bad terms, had enlisted, & that he had inquired at the War Office, & received for answer that the regiment had sailed for India, was sufficient to let in evidence of the son's handwriting, as subscribing witness to an agreement.—WYATT v. BATEMAN (1836), 7 C. & P. 586, N. P.

1643. ——— Writer incapacitated—Wife of interested party.]—Where a witness to an instrument becomes incapacitated, proof of the party's handwriting is admissible.—BUCKLEY v. SMITH (1798), 2 Esp. 697, N. P.

1644. ———.]—It is no sufficient ground for receiving evidence of the handwriting of a witness which would be receivable if he were dead, that he is unable to attend the trial from indisposition, & lies without hopes of recovery.—HARRISON v. BLADES (1813), 3 Camp. 457, N. P.

1645. ——— Writer unable to be found—After diligent search.]—Where it was sworn that a witness was no merely within the jurisdiction, but actually seen on the first day of the trial within convenient distance for service of the subpoena, the *ct.*, on evidence that diligent but

ineffectual search had been made to find him, admitted secondary evidence of his handwriting.—HUMPHREYS v. JONES & PICKERING (1850), 10 L. T. O. S. 88, N. P.

SUB-SECT. 4.—ADMISSION OF PARTY.

1646. Sufficiency of admission—Such as to acknowledge liability—Handwriting may be that of another.]—(1) It is not necessary that handwriting to fix a party should be in his own handwriting, but it is sufficient if there be evidence that he has in any way acknowledged himself liable upon it in other documents.

(2) Suppose these receipts, the writing of which is the same as the writing in the paper which is to substantiate this case, were not actually in the handwriting of S., but suppose the handwriting, whosoever it was, carried his authority, that would do (MAULE, J.).—FORSBURGH v. SHERMAN (1841), 5 Jur. 1087.

1647. — Not if made in party's own interest.]—DOE d. PULKER v. WALKER, No. 1776, *post*.

SUB-SECT. 5.—WITNESS SEEING DOCUMENT WRITTEN OR SIGNED.

1643. Admissible—Affirmation affidavit in Chancery cause—Contrary affidavit by experts.]—Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole attesting witness alive that he knew the persons executing the deed & saw them execute it, & then wrote his own attestation, the fact that persons skilled in handwriting declare their belief formed on inspection, that the handwriting is not genuine, does not call on the *ct.* to grant an issue to try the disputed fact; but it may determine the fact on the opposing affidavits.—NEWTON v. RICKETTS (1861), 9 H. L. Cas. 262; 31 L. J. Ch. 247; 5 L. T. 62; 7 Jur. N. S. 953; 10 W. R. 1; 11 E. R. 731, H. L.

SUB-SECT. 6.—WITNESS WHO HAS SEEN PERSON WRITE.

1649. Whether admissible—Jury not bound to accept evidence.]—(1) The fact that witness discussed with accused the substance of a letter purporting to be written by the accused is not evidence that the accused wrote it.

(2) In criminal matters the proof of handwriting ought to be more strict than in civil matters.

(3) Where a witness swears that he has seen the accused write & that he believes that a document produced is in his handwriting that is some evidence, but even though it is not rebutted, the

to tell the jury that they may use their own observation as to handwriting, nor is such a direction a withdrawal from the jury of the oral testimony given in the matter.—KIBBY v. LEIGHTON (1895), 33 N. B. R. 4.—CAN.

PART IV. (SECT. 2, SUB-SECT. 2.

1. Evidence as to own handwriting—In ordinary course of business.]—The recognition by a witness of his initials affixed to an entry made in the ordinary course of commercial transactions, without any recollection of the transaction, may be given in evidence J.—VOL. XXII.

of the transaction.—MACDONALD v. BANK OF VANCOUVER (1915), 32 W. L. R. 339; 9 W. W. R. 8; 25 D. L. R. 567; 22 B. C. R. 310.—CAN.

g. — Positive knowledge of witness.]—To negative handwriting, it is sufficient evidence if the supposed writer can state his positive knowledge from circumstances, that the writing cannot be his, although he also states that he cannot, even upon his belief, on a mere inspection of the writing, say whether it is his or not.—R. v. WALSH (1824), Jebb, Cr. & Pr. Cas. 38.—IR.

h. — Drawer of cheque.]—To

support a plea of intoxication as a defence to an action on a negotiable instrument in the hands of the payee or a person who receives it with knowledge, there must be some evidence that the drawer signed the cheque when incapable of forming a rational judgment of what he was doing, & of the effect on his interest. The drawer's own evidence is the best on this point, but, if this evidence is not available, the jury may infer the fact from surrounding circumstances.—GOODISSON v. SUTTON (1883), 1 N. Z. L. R. 389 (S. C.).

Sect. 2.—Proof of handwriting: Sub-sects. 6 & 7.] jury are not bound to accept it.—**SEVEN BISHOPS' TRIAL** (1688), 12 State Tr. 183.

Annotations:—As to (1) **Refd.** R. v. Burdett (1820), 4 B. & Ald. 95. As to (2) & (3) **Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. **Generally, Mentd.** R. v. Wilkes (1763), 2 Wils. 151; Entick v. Carrington (1765), 2 Wils. 275; R. v. Shipley (1784), 4 Doug. K. B. 73; R. v. Johnson (1805), 29 State Tr. 81; Butt v. Conant (1820), 4 Moore, C. P. 195; R. v. Castro, Onslow's & Whalley's Case, Skipworth's Case (1873), L. R. 9 Q. B. 219.

1650. ——[Evidence that a letter is in the handwriting of a party can only be given by one who has seen that party write.—**R. v. CULPEPPER** (1696), Holt, K. B. 293; Skin. 673; 90 E. R. 301.

Annotation:—**Mentd.** R. v. Wilkes (1763), 19 State Tr. 982.

1651. ——[A prisoner's handwriting was allowed to be proved by witnesses who had seen him write.—**R. v. HENSEY** (1758), 1 Burr. 642; 2 Keny. 366; 19 State Tr. 1341; 97 E. R. 489.

Annotations:—**Refd.** R. v. Burdett (1820), 4 B. & Ald. 95. **Mentd.** R. v. Stone (1796), 6 Term Rep. 527.

1652. ——[**BROOKBARD v. WOODLEY**, No. 1697, *post*.

1653. ——**Knowledge acquired only while action depending.]—**(1) Evidence of handwriting from comparison of hands, is not admissible.

(2) A witness shall not be admitted to prove a writing not to be a party's handwriting, from only having seen such party write in his presence, while the action was depending.—**STRANGER v. SEARLE** (1793), 1 Esp. 13, N. P.

Annotations:—As to (1) **Consd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. As to (2) **Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1654. ——**Whether belief must be sworn to—Sufficiency of speculation.]—**In an action on a foreign bill of exchange, to prove the handwriting of deft., it is evidence to go to the jury, that a person who saw him write once, thinks the handwriting alike, though he has no belief on the subject. *Aliter*, if he had never seen the party write; mere comparison of hands would not be admissible evidence.—**GARRELLS v. ALEXANDER** (1801), 4 Esp. 37, N. P.

Annotations:—**Dttd.** Eagleton v. Kingston (1803), 8 Ves. 438. I doubt the authority of the case of *Garrells v. Alexander*; testimony of handwriting must be open to the consideration of circumstances at common law (**LORD ELDON, C.**). **Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1655. ——[Comparison of hands by a person who never saw the party write is not evidence.

The witness must have seen the person write & swear to his belief that the writing produced is his (**LORD ELDON, C.**).—**EAGLETON & COVENTRY v. KINGSTON** (1803), 8 Ves. 438; 32 E. R. 425, L. C.

Annotations:—**Consd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. **Mentd.** Dew v. Clarke (1828), 5 Russ. 163; Ingram v. Wyatt (1832), 1 L. J. Ch. 135; Wyatt v. Ingram (1832), 3 Hag. Eccl. 460; Hickets v. Bodenham (1834), Coop. temp. Brough. 361.

1656. ——[**BEAUMONT v. PERKINS**, No. 1755, *post*.

PART IV. SECT. 2, SUB-SECT. 6.

1653 i. Whether admissible—Knowledge acquired only while action depending.]—For the purpose of proving the execution of deeds, a witness, who was not the witness to the deeds, went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, & who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting:—**Held:** evidence of those admissions & of the belief of the witness, from the know-

ledge of the handwriting thus acquired, that the signatures to the deeds were genuine was good evidence to go to a jury, & in the absence of any contradictory evidence, sufficient to warrant a finding that the deeds had been duly executed upon the respective days upon which they purported to have been executed.—**THOMPSON v. BENNETT** (1872), 22 C. P. 393.—**CAN.**

k. — In criminal causes.]—Evidence of prisoner's handwriting by a witness who had never seen him write, but who swore he was enabled to form a belief from opportunities

1657. ——**Writing only of surname seen—Once only.]—**The acceptance of a bill of exchange, purports to bear the signature of the acceptor's Christian name, as well as surname; proof of the latter by a witness who never saw the acceptor write his Christian name & had seen him write his surname once only, is not sufficient.—**POWELL v. FORD** (1817), 2 Stark. 164, N. P.

Annotations:—**Dttd.** Lewis v. Sapio (1827), Mood. & M. 39. I will not abide by any such decision as *Powell v. Ford*: the witness believes the surname in deft.'s signature on the bill is written by him; it is quite enough (**ABBOTT, C.J.**). **Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1658. ——[The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only.—**LEWIS v. SAPIO** (1827), Mood. & M. 39, N. P.

Annotation:—**Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1659. ——**Making of writer's mark.]—**An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments.—**GEORGE v. SURREY** (1830), Mood. & M. 516, N. P.

1660. ——**Signature to affidavit.]—**A witness formed his opinion of the handwriting of a party from having observed it signed to an affidavit used in the cause by the counsel for the party against whom it was proposed to be proved:—**Held:** this was sufficient.—**SMITH v. SAINSBURY** (1832), 5 C. & P. 196, N. P.

Annotation:—**Refd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1661. ——**Long interval of time—Since person seen to write—Signature only seen.]—**In an action against the acceptor of a bill of exchange, the only proof of the handwriting of deft. was that of a banker's clerk, who stated that two years ago he saw a person calling himself by deft.'s name sign a book, that he had never seen him since, but that he thought the handwriting was the same, & had since seen cheques bearing the same signature:—**Held:** this was evidence to go to the jury.—**WARREN v. ANDERSON** (1839), 8 Scott, 384.

1662. ——**In criminal cause—Evidence of police officer—Having seen prisoner write only once.]—**A policeman who has only once seen a prisoner write, & that since suspicion has been excited against him with reference to the charge upon which he is tried, & upon an opportunity taken by the policeman with the view of being able to speak to his handwriting, is not an admissible witness to prove that a document, the foundation of the charge against the prisoner, is in the prisoner's handwriting.—**R. v. CROUCH** (1850), 4 Cox, C. C. 163, N. P.

Annotations:—**Expld.** R. v. Rickard (1918), 26 Cox, C. C. 318. **Refd.** R. v. Derrick (1910), 5 Cr. App. Rep. 162.

1663. ——[It was contended as one ground of appeal that a letter, purporting to have been written by applt., was not proved in the proper way, & was inadmissible.

The writing was proved by a police-officer who had seen applt. writing in a note-book, & who

which he had of knowing his handwriting independently of comparison:—**Held:** sufficient, without any other evidence that prisoner knew how to write.—**R. v. MARA** (1827), Jebb, Cr. & Pr. Cas. 75.—**IR.**

l. — Writing only once seen.]—Secondary evidence of a letter which it was alleged had been written by pltt. to deft. was received at the trial, subject to pltt.'s objection & also it being understood, that if, on further consideration on the part of the judge, that the same was improperly received, it would be struck out:—**Held:** the

compared the writing there with that of the letter. It was contended that a police-officer was not the proper person to prove handwriting:—*Held*: anyone who had seen him write could give evidence to prove the handwriting.—*R. v. DERRICK*, (1910), 5 Cr. App. Rep. 102, C. C. A.

1664. —[—]—*R. v. O'BRIEN*, No. 1690, *post*.

1665. **Best evidence of handwriting.**—(1) The best, usually perhaps the only proper, evidence of handwriting, is that of persons who have acquired a previous knowledge of the party's handwriting from seeing him write, & who form their opinion from the general character & manner of this, & not from criticising particular letters (*SIR JOHN NICHOLL*).

(2) The opposers of the will have obtruded on the notice of the ct. evidence, if it should be so called, to this part of the case, of a somewhat different species. I mean, the opinions of persons, who, without any previous knowledge of a party's handwriting, think they can judge, from their skill & experience in such matters, whether a signature, for instance, said to be his, be so or not, by comparing it with other, his admitted, signatures; & who also undertake, by certain indications, to determine, from the general appearance of handwriting, whether it be written in a natural or an imitated character. This species of evidence has been constantly held, both subdivisions of it, the lowest & weakest that can possibly be offered (*SIR JOHN NICHOLL*).—*ROBSON v. ROCKE* (1824), 2 Add. 53; 162 E. R. 215.

Annotations:—*As to* (1) *Refd.* *Russell v. Marriott* (1835), 1 Curt. 9; *Wellesley v. Vere* (1841), 1 Notes of Cases, 210.

SUB-SECT. 7.—WITNESS HAVING GENERAL KNOWLEDGE OF THE WRITING.

1666. **Evidence admissible.**—*R. v. HUGHES* (1842), 1 Leach, 311, n.

1667. —[—]—An examined copy of an answer in Chancery, may be identified by a witness who has seen the handwriting of deft. to the original, although the original document is not produced at the time that he speaks to his belief of deft.'s signature to it.—*DARTNALL v. HOWARD* (1824), Ry. & M. 169, N. P.

1668. —[—]—Power of attorney executed in Paris in presence of two witnesses, & authenticated by a notary at Paris, & an affidavit here, verifying the signature of the notary, ordered to be acted upon by the Accountant-General.—*KINNAIRD (LORD) v. SALTOUN (LADY)* (1816), 1 Madd. 227; 56 E. R. 84.

Annotation:—*Refd.* *Filoge v. Stewart* (1834), 4 L. J. Ch. 33.

1669. **Sufficiency of knowledge**—**Inspector of franks at post office**—No other acquaintance with the handwriting.—Handwriting cannot be proved by a person [inspector of franks at post office] who has seen letters from time to time franked by deft., but never corresponded with him or saw him write.

Qu.: how far opinion of a handwriting being genuine or forged is evidence?—*CAREY v. PITT* (1797), Peake, Add. Cas. 130, N. P.

Annotations:—*Refd.* *Eagleton & Coventry v. Kingston* (1803), 8 Ves. 438; *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703.

1670. —[—]—The evidence of a clerk in the Post Office, employed in detecting

the forgery of the franks, but who has no acquaintance with the handwriting of a Member of Parliament, except from seeing his franks pass through the office, is not sufficient proof of such Member's handwriting.—*BATCHELOR v. HONEYWOOD* (1799), 2 Esp. 715, N. P.

1671. —[—]—On a claim to an ancient peerage, a family pedigree produced from the proper custody & purporting to have been made by an ancestor of claimant, before the year 1751, was offered in evidence, on proof of the handwriting by a witness who had been for many years inspector of franks & of official correspondence & who said that, from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting:—

Held: (1) the evidence was inadmissible; (2) claimant's solr., who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for claimant, to examine several deeds & other documents written or signed by the ancestor, & which came to claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree.

(3) A copy of the will produced from the Prerogative office was received after proof of unsuccessful searches for the original, & that the practice in the office at the time of the date of the will was to give out the original wills after taking copies.

(4) An old attested copy of a deed of settlement, produced from the proper custody was received, after proof of unsuccessful searches for the original & that the possession of the estates comprised in the settlement went with it.—*FITZWALTER PEERAGE* (1844), 10 Cl. & Fin. 193, 940; 8 E. R. 716, 997, H. L.

Annotation:—*Generally*, *Mentd.* *Donoughmore Peerage* (1853), 3 H. L. Cas. 822.

1672. — **No personal knowledge of the writing**—**Information from third party.**—It is not necessary in all cases that the witness have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, & it can be made out that the party writing such letters is the same man, that attested a deed, that will entitle a witness to swear to that person's hand, though he never saw him write (*LORD RAYMOND, C.J.*).

If a subscribing witness to a deed lives in the West Indies, whose handwriting is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person written by him to his correspondent in England, because under the special circumstances of that case, there is no other way, or at least, the difficulty will be great, to prove the handwriting of such subscribing witness (*PAGE, J.*).—*FERRERS (LORD) v. SHIRLEY* (1731), Fitz-G. 195; 94 E. R. 716.

Annotations:—*Consd.* *Carey v. Pitt* (1797), Peake, Add. Cas. 130; *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703. *Mentd.* *Bolleau v. Rutlin* (1848), 2 Exch. 665.

1673. —[—]—If a person prove that he has never seen deft. write, & has never

same, though the witness who stated that he had only once seen pltf.'s handwriting, could be received, & the evidence was admissible.—*MANCEY v. PIERCE* (No. 2) (1889), 4 Terr. L. R. 246.—*CAN.*

PART IV. SECT. 2. SUB-SECT. 7.

m. Sufficiency of knowledge.—A deed of conveyance was tendered in evidence which purported to bear the mark of G. as vendor, & which was

duly attested by four witnesses. G., however, denied that she had ever executed the deed, & said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of

Sect. 2.—Proof of handwriting: Sub-sects. 7, 8 & 9, A.]

corresponded with him, but has seen papers in the master's office, which the attorney of the party admitted to be of his handwriting, & the person has acted on these papers so admitted, this is not such a knowledge of the party's handwriting as will enable the person to prove a written document alleged to be in his handwriting.—*GREAVES v. HUNTER* (1826), 2 C. & P. 477, N. P.

1674. ———.]—In an action on a joint & several promissory note against A., B., & C., the only evidence as to the handwriting of C., was a retainer to the attorney to defend the action, bearing the signatures of all three debtors, upon which the attorney had acted, without having ever seen C., or being acquainted with his handwriting:—*Held*: there was no evidence of the writing of C.—*DREW v. PRIOR* (1843), 5 Man. & G. 264; 134 E. R. 564; *sub nom.* *DREW v. BRYER*, 12 L. J. C. P. 144.

1675. ——— Person belonging to same office staff.]—Perjury was assigned on an answer in Chancery to a bill before it was amended:—*Held*: to support the allegations respecting the bill, it was sufficient to put in the amended bill, & prove that the amendments were in the handwriting of a clerk in the Six Clerks' office, whose duty it would be to make them, but that it was not necessary to call the person who wrote the amendments.—*R. v. LAYCOCK* (1830), 4 C. & P. 326, N. P.

1676. ——— Banker.]—*JACOBS v. GRIFFITHS* (1837), Will. Woll. & Dav. 206.

1677. ———.]—*LAXFORD v. GROOMBRIDGE* (1843), 1 L. T. O. S. 56.

1678. ———.]—*MURIETA v. WOLFHAGEN*, No. 1692, *post*.

1679. ——— Family solicitor.]—*FITZWALTER PEERAGE*, No. 1671, *ante*.

1680. ——— Parish clerk — Acquaintance with parish registers.]—A certificate of marriage was produced by an attorney, who received it from E. S. when he was inquiring into a pedigree: it was signed with the name of the person who appeared in the parish register as the officiating curate in 1761. The parish clerk said he had seen the same signature at several places in the original register, & he believed it to be the same from the knowledge so acquired of the handwriting; but there was no evidence of the curate's death, nor any search for witnesses who knew his handwriting:—*Held*: the curate being the proper officer to give out the certificate, there was

sufficient evidence of his handwriting to render the certificate admissible.—*DOE d. JENKINS v. DAVIES* (1847), 10 Q. B. 314; 16 L. J. Q. B. 218; 11 Jur. 607; 116 E. R. 122.

Annotation:—*Mentd.* *Plant v. Taylor* (1861), 7 H. & N. 211.

1681. Acquisition of knowledge—Not to be learnt for occasion.]—*R. v. BARBER*, No. 3144, *post*.

1682. Evidence inadmissible.]—Evidence of handwriting by persons who knew it is not secondary evidence.—*WRIGHT v. COBB* (1885), 1 T. L. R. 555, D. C.

1683. ———.]—Take the case of proof of a man's handwriting: a witness is called who says "I have seen A. B. write & I know his handwriting. The document produced I declare is his handwriting because the writing in it is exactly like his." That kind of evidence is given every day. . . . That is not secondary evidence but original evidence (LORD ESHER, M.R.).—*LUCAS v. WILLIAMS & SONS*, [1892] 2 Q. B. 113; 61 L. J. Q. B. 595; *sub nom.* *LUCAS v. WILLIAMS & SON*, *MENDOZA v. WILLIAMS & SON*, *BERLIN PHOTOGRAPHIC CO. v. WILLIAMS & SON*, 66 L. T. 706; 8 T. L. R. 575, C. A.

Annotation:—*Mentd.* *Hanftaengle v. Baines* (1894), 42 W. R. 681.

SUB-SECT. 8.—WITNESS CORRESPONDING WITH PARTY.

1684. Evidence admissible.]—*FERRERS* (LORD) *v. SHIRLEY*, No. 1672, *ante*.

1685. ——— Although witness never seen person write.]—A correspondent is sufficient evidence to disprove a man's hand, though he has never seen him write.—*GOULD v. JONES* (1762), 1 Wm. Bl. 384; 96 E. R. 216.

1686. ———.]—*CAREY v. PITT*, No. 1669, *ante*.

1687. ———.]—If a person sends letters to S., of P., & receives answers to them, such answers are admissible in evidence against a deft., his name being S., & it being proved by a person who knew the principal resident of P., & knew of no other person named S., this being considered sufficient *prima facie* evidence that they came from him, & if they were not of his handwriting, it lay on him to show that.—*HARRINGTON v. FRY* (1824), 1 C. & P. 289; Ry. & M. 90, N. P.

Annotation:—*Reid.* *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703.

1688. ——— Correspondence acted upon.]—If a party has received letters from another, & has acted on them, it is sufficient to justify him in

one of the attesting witnesses, & who swore that the signature of that witness to the attestation clause of the deed was genuine:—*Held*: deed was admissible in evidence, its execution by G. being sufficiently proved.—*ABDULLA PARI v. GANNIRAI* (1887), 1 L. R. 11 Bom. 690.—*IND.*

n. ———.]—*SHANKARRAO v. RAMJI* (1904), 1 L. R. 28 Bom. 58.—*IND.*

1676 l. ——— Banker.]—Where deft. denied having signed a promissory note purporting to bear his signature as maker, a banker who had discounted other notes made by him was allowed to give opinion evidence as to the signature of deft.—*LANGLEY v. JOUBREY* (1913), 13 E. L. R. 432; 15 D. L. R. 10.—*CAN.*

o. ——— Possession by witness of promissory note signed by party.]—A witness who once had in his possession a promissory note, acknowledged by deft. to have been signed by him, is competent to prove deft.'s handwriting, though his only means of the knowledge of it is the signature to the

note formerly in his possession.—*PETERSON v. GILES* (1831), (1825-1897), N. B. Dig. 358.—*CAN.*

p. ——— Corporation seal.]—Where a witness stated that he had good opportunities, which he described, of observing & knowing the seal of a corps, & that he believed the seal to be their seal, both from the impression itself & from the signature of the party attached to it, with which he was acquainted:—*Held*: sufficient to go to a jury to authenticate the seal.—*DOE d. KING'S COLLEGE v. KENNEDY* (1848), 5 U. C. R. 577.—*CAN.*

q. ——— Recollection of circumstances by solicitor.]—Where the only evidence in support of the genuineness of a signature being that of the solr. who prepared the instruments, who had no recollection of the circumstances, but swore he must have been satisfied, at the time, with the identity of the grantor or he would not have allowed the deed to be executed:—*Held*: the execution of the conveyance had not been proved.—*DUFFY v.*

SMITH (1879), 26 Gr. 428.—*CAN.*

r. ——— Clerk from Lands Titles Office.]—A deed dated 1843 purporting to be signed by J. was tendered in evidence. The deed was not produced from the proper custody. To prove the signature a search clerk from the Lands Titles Office was called, who said that in the course of his duties he had inspected many deeds purporting to be signed by J., & believed the present signature to be his:—*Held*: sufficient proof of the signature.—*HODGSON v. THOMPSON* (1906), 6 S. R. N. S. W. 436; 23 N. S. W. W. N. 128, 156.—*AUS.*

PART IV. SECT. 2, SUB-SECT. 8.

1684 l. Evidence admissible.]—Handwriting of deft. proved by one who had seen him write about two years ago, but who formed his opinion of its being his, more from having received letters from him, than from a recollection of his handwriting.—*R. v. LEDWELL* (circa 1801), Rowe, 665.—*IR.*

swearing as to his belief of the handwriting of such person.—*THARPE v. GISBURNE* (1825), 2 C. & P. 21, N. P.

Annotation.—*Refd.* Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1689. ———.]—(1) A clerk who has seen numerous letters addressed by a party to employer, & has acted on those letters, may prove the handwriting of such party.

(2) An information for a libel stated that prosecutor had received certain anonymous letters, & that of & concerning those letters deft. published a libellous placard. Deft. was proved to have caused the placard to be published. In the placard it was asked if prosecutor had not received certain warning. Prosecutor stated that he understood that to refer to the letters, & that he should not have understood the meaning of the placard if he had not received the letters:—*Held*: the letters might be read in evidence as explanatory of the placard without proof of the handwriting of them.—*R. v. SLANEY* (1832), 5 C. & P. 213, N. P.

1690. ———.]—To prove handwriting, it is necessary that a witness should have either seen the person write, or corresponded regularly with him, or acted upon such a correspondence (LORD COLERIDGE, J.).—*R. v. O'BRIEN* (1911), 7 Cr. App. Rep. 29, C. C. A.

1691. ———.]—*SAYER v. GLOSSOP*, No. 3385, *post*.

1692. ———.]—To prove the handwriting of a deft., named F. W. to a letter, a clerk of a banker stated that a person of that name kept an account with the banker, & had signed his name in a book & drawn cheques, which the witness had paid, & that he believed the letter to be the handwriting of that person. Deft.'s attorney proved that deft. had desired him to address him at No. 12, T. Street; & another witness proved that he had written two letters to "Mr. F. W., 12, T. Street," & had received answers, & that he believed the letter offered in evidence to be of the same handwriting as the answers he had received to his letters:—*Held*: sufficient proof that the letter offered in evidence was in deft.'s handwriting.—*MURIETA v. WOLFIAGEN* (1849), 2 Car. & Kir. 744.

1693. ——— *Witness not an expert.*—The signature of a transferor to a transfer may be proved by the evidence of a person who is not an expert in handwriting, but who has received documents written by the person whose signature is in question.—*Re CLARENCE HOTEL, ILFRACOMBE, LTD.* (1909), 51 Sol. Jo. 117.

SUB-SECT. 9.—BY COMPARISON OF DOCUMENTS.

A. In General.

1694. Whether admissible in evidence—In cases of treason.—Comparison of hands is without doubt good evidence in cases of treason (JEFFREYS, C.J.).—*R. v. HAYES* (1684), 10 State Tr. 307.

Annotation.—*Mentd.* R. v. Lawley (1731), 2 Stra. 904.

1695. ———.]—*Papers found in prisoner's possession.*—*R. v. CROSBY (alias PHILIPS)* (1695), 1 Id. Raym. 39; Holt, K. B. 753; 5 Mod. Rep.

PART IV. SECT. 2, SUB-SECT. 9.—A.

Whether admissible in evidence—Betting books.—The ct. may estimate, by inspection, the force of the evidence relied upon by the justices, afforded by a comparison of the handwriting of entries in books found upon the premises, with corresponding betting tickets found elsewhere.—*JACOBS v. JENKINGS* (1875), 1 V. L. R. 172.—*AUS.*

1698 1. ———.]—*Attesting witnesses all dead.*—Where the witnesses to a deed

are dead, it cannot be proved *videlicet* by a similitude of hands. In this case it must be by an interrogatory. Nor can a letter, or a receipt or any other writing be proved *videlicet* by a similitude of hands as an exhibit. It must be also proved by an interrogatory.—*HOW v. CREAGH* (1748), How. E. E. 461.—*IR.*

t. ———.]—*Telegrams.*—Where telegrams had been obtained by a detective from the Telegraph Dept. & had been admitted by accused to be in his hand-

15; 12 Mod. Rep. 72; 2 Salk. 689; Skin. 578; 12 State Tr. 1291; 91 E. R. 923.

Annotations.—*Refd.* R. v. Davis & Carter (1694), 5 Mod. Rep. 74; The Ville de Varsovie (1817), 2 Dods. 174; R. v. Hinks (1845), 1 Dods. 81. *Mentd.* Re Barber (1850), 15 L. T. O. S. 500.

1698. ———.]—*Attestation of bond.*—Comparison of hands is a good evidence to prove the attestation of a bond.—*OSBOURNE v. HOSIER* (1704), 6 Mod. Rep. 167; Holt, K. B. 191; 87 E. R. 924.

1697. ———.]—I have no doubt to reject this evidence as not admissible, I do not know any case where comparison of hands has been allowed to be evidence at all. No trial can be decided by opinion & speculation, but by evidence. Where a witness has seen the party write, & speaks to his belief of that writing which is produced in evidence being the party's handwriting, that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else, & any two people may think differently. In an indictment for forgery, the evidence of a person who has seen the party write is sufficient. The case now in question is not like a rental, terrier, old title deeds; these are received without evidence of handwriting, because of the place they come from, which gives them authenticity. Suppose some of the jury cannot read or write, how are they to judge of the similitude of hands? (YATES, J.).—*BROOKBARD v. WOODLEY* (1770), Peake, 30, n., N. P.

Annotations.—*Consd.* Eagleton & Coventry v. Kingston (1803), 8 Ves. 438. *Refd.* Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1698. ———.]—*Attesting witnesses all dead.*—*LUDLAM d. HUNT*, No. 1938, *post*.

1699. ———.]—*In civil & criminal cases.*—Comparison of hands is not evidence in civil any more than in criminal cases.—*MACFERSON v. THOYTES* (1790), Peake, 29, N. P.

Annotations.—*Refd.* Eagleton & Coventry v. Kingston (1803), 8 Ves. 438; Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1700. ———.]—*In Ecclesiastical Court.*—*REILLY v. RIVETT* (1792), 1 Phillim. 80, n.; 161 E. R. 920, n.

1701. ———.]—*STRANGER v. SEARLE*, No. 1053, *ante*.

1702. ———.]—*GARRIELLS v. ALEXANDER*, No. 1651, *ante*.

1703. ———.]—*R. v. CATON*, No. 1747, *post*.

1704. ———.]—*Where witness has never seen party write.*—*EAGLETON & COVENTRY v. KINGSTON*, No. 1655, *ante*.

1705. ———.]—*Confirmed by contents of correspondence.*—Comparison of handwriting, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment.—*WADE v. BROUGHTON* (1814), 3 Ves. & B. 172; 35 E. R. 444, L. C.

1706. ———.]—*Motion for commitment—Proof of single letter.*—*WADE v. BROUGHTON*, No. 1705, *ante*.

1707. ———.]—Although comparison of handwriting is not admissible evidence, when the fact to be proved is the handwriting of a particular

writing, & the judge allowed these to be produced by the detective, upon the trial of accused, for the purpose of comparison of the handwriting with that of a telegram which accused was alleged to have wrongfully signed without the authority of the person by whom it purported to have been signed:—*Held*: the telegrams had been rightly admitted.—*R. v. HASSALL* (1904), 23 N. Z. L. R. 776.—*N.Z.*

a. *Comparison with documents not in evidence.*—Deft.'s counsel to get

Sect. 2.—*Proof of handwriting: Sub-sect. 9, A.*

person, whose supposed signature is upon a paper put into the witness's hand, yet, if such witness has a document, to which is affixed the handwriting of that person, as to whose signature the question arises, & which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory, a basis being first laid in his having once seen deft. sign his name, though he had forgotten the character of his handwriting.—*BURR v. HARPER* (1816), 1 Holt, N. P. 420, N. P.

*Annotation:—*Consd. Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

1708. — Comparison by jury—Of documents *prima facie* proved.]—The rule that comparison of handwriting is not evidence, does not extend so far as to prevent the ct. or jury from instituting a comparison of two documents, of which *prima facie* evidence has been given.—*GRIFFITH v. WILLIAMS* (1830), 1 Cr. & J. 47; 148 E. R. 1329.
*Annotations:—*Consd. Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. *Expld.* Doe d. Perry v. Newton (1836), 5 Ad. & El. 514.

1709. — Handwriting of ancient document.]
—The handwriting of an ancient paper may be proved by the opinion of a witness, first comparing it with other authentic old writings at the time of the trial.—*DOE d. TILMAN v. TARVER* (1824), Ry. & M. 141, N. P.

*Annotations:—*Consd. Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703; Fitzwalter Peckage (1843), 10 Cl. & Fin. 193. *Refd.* Monkton v. A.-G. (1831), 2 Russ. & M. 147; Gee v. Ward (1857), 7 E. & B. 509.

1710. — Proof of modern handwriting distinguished.]—*LEWIS v. ADAMS* (1843), 1 L. T. O. S. 359.

1711. ——*R. v. HEMMING* (1908), 1 Cr. App. Rep. 34, C. C. A.

1712. Comparison with documents not in evidence —To test judgment of witness only.]—If a witness, who is called to disprove the signature of deft. to an acceptance, states that he believes the signature is not that of deft., & gives, as his reason for that belief, the absence or presence of certain peculiarities which he says do or do not exist in the genuine signature of deft., the opposite counsel may put into his hand a paper unconnected with the cause, & ask if, in his opinion, that contains a genuine signature of deft., & if he answer in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities, as the case may be, which you have before stated as your reasons that the signature in dispute is not genuine?" *Seemle*: if the witness says it does not, it would be competent to lay that paper before the jury that they might judge of that answer.—*YOUNGE v. HONNER* (1843), 1 Car. & Kir. 51; 2 Mood. & R. 536; 2 L. T. O. S. 213, N. P.

1713. ——*In an action on a bill of exchange, to which deft. pleaded non accepit, the*

from a witness an opinion as to the handwriting of pltf.'s receipt in full to the action, proposed to put into his hands other papers purporting to have been signed by pltf., but in no way connected with the cause:—*Held*: the ct. rightly refused to allow the witness to be examined as to the other writings till he had first, from his own recollection of pltf.'s handwriting, given an opinion upon the signature of the receipt.—*GLEESON v. WALLACE* (1848), 4 U. C. R. 245.—CAN.

PART IV. SECT. 2, SUB-SECT. 9.—B.

1714 I. Document admittedly written

by party.]—A letter signed "Henry Lye," as secretary of deft. co., received by pltf. In due course from the head office of the co., Montreal, on the subject of the insurance, was admitted in evidence for the purpose of proving by comparison Mr. Lye's signature to other letters on the same subject.—*HOWES v. NATIONAL INSURANCE CO.* (1880), 20 N. B. R. 437.—CAN.

1714 II. ——*Where the defence was raised that a certain voucher purporting to be signed by a witness, called for the defence, was a forgery committed by pltf., & the document purporting to be signed by two others*

witnesses for deft. admitted, on cross-examination, that certain documents put into their hands by deft.'s counsel were in the hand of deft., & were more like his usual hand than the acceptance; but they stated that they nevertheless believed the acceptance to be in deft.'s hand:—*Held*: it was competent to deft. to submit these documents to the jury to test the judgment of the witness.

Counsel certainly has no right to put those documents into the hands of the jury as genuine signatures of deft., in order that they may take them & compare them with the bill in question. He may use those documents bearing certain marks or signatures, which the witnesses have sworn to be the same as that in question. I shall tell the jury that they may look at them in order to test the judgment of the witnesses, who stated that they & the bill were all identical. It is put as if they were three ordinary marks on a paper which the witnesses take upon themselves to say are identical. If, on examination & inspection they should appear to be totally dissimilar, that is a result which would go to test the accuracy of the observation of the witnesses. There is no doubt but that the jury may compare the bill & the papers tendered by deft. for that purpose, but not for any other (PARKE, B.).—*HIGGINS v. CARRINGTON* (1848), 11 L. T. O. S. 355, N. P.

—*See, further, Sub-sect. 9, B., post.*

B. With What Documents Comparison made.

See Criminal Procedure Act, 1865 (c. 18), s. 8.

1714. Document admittedly written by party.]—Exhibits in the handwriting of an alleged testator allowed to be pleaded as evidence to show dissimilarity of handwriting.—*MACHIN & TYNDALL v. GRINDON* (1756), 2 Add. 91, n.; 2 Lee, 335; 161 E. R. 360.

*Annotation:—*Refd. Russell v. Marriott (1835), 1 Curt. 9.

1715. ——*ALLESBROOK v. ROACH*, No. 1739, post.

1716. — Signature written in court.]—Deft. was indicted for perjury alleged to have been committed by him on the trial of an action in the county ct., by swearing that the signature to a document was not in his handwriting. The judge of the county ct. made deft. write his name in ct., & impounded the genuine, as well as the alleged forged signature. *Seemle*: on the trial for perjury, the jury might look at & compare the two signatures.—*R. v. TAYLOR* (1852), 6 Cox, C. C. 58.

1717. ——*On an indictment for forgery, it appeared that the prisoner, on the discovery of the forgery being suspected, was asked to write his name for the purpose of comparison, & did so:—Held*: this signature was not admissible on the part of the prosecution for that purpose.—*R. v. ALDRIDGE* (1863), 3 F. & F. 781, N. P.

1718. — & in evidence in cause.]—*R. v. MORGAN* (1831), 1 Mood. & R. 134, N. P.

*Annotations:—*Consd. Doe d. Perry v. Newton (1836), 1 Nev. & P. K. B. 1. *Refd.* Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

as "witnesses to payment," which witnesses pltf. did not produce, pltf.'s counsel was allowed in cross-examination to place before this witness, for the purpose of testing his accuracy, signatures, purporting to be his, of other documents used in the case, but not signatures of extraneous documents.—*WHITE v. PILKINGTON* (1851), 1 S. 107.—S. AF.

1718 I. — (& in evidence in cause.)—Evidence of a witness that a signature purporting to be that of one of the endorsers on the notes was written by the same person who had signed a paper admitted to be genuine, but

1719. ———.]—A jury may judge of a disputed handwriting by comparing it with other documents in evidence for other purposes, & admitted to be the handwriting of the party.—*SOLITA v. YARROW* (1831), 1 Mood. & R. 133, N. P.

Annotation.—*Reid*. *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703.

1720. ———.]—On the trial of an action on a promissory note, in which the question is, whether deft. had endorsed it or not, pltf.'s counsel will not be allowed to give in evidence a number of other notes, bearing deft.'s undoubted signature, with a view of having the jury compare the handwriting of those signatures with the endorsement on the note in question, & the jury will not be allowed to compare anything with the endorsement, except documents otherwise evidence in the case.—*BROMAGE v. RICE* (1836), 7 C. & P. 548, N. P.

Annotation.—*Reid*. *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703.

1721. ———.]—On a question as to the genuineness of handwriting, a jury may compare the document with authentic writings of the party to whom it is ascribed, if such writings are in evidence for other purposes of the cause, but not else.—*DOE d. PERRY v. NEWTON* (1836), 5 Ad. & El. 514; 1 Nev. & P. K. B. 1; Will. Woll. & Dav. 403; 6 L. J. K. B. 1; 111 E. R. 1260.

Annotations.—*Consd*. *Doe d. Mudd v. Suckermore* (1836), 5 Ad. & El. 703. *Fould*. *Waddington v. Cousins* (1836), 7 C. & P. 595. *Apld*. *Griffiths v. Ivery* (1840), 11 Ad. & El. 322. *Reid*. *Hughes v. Rogers* (1841), 8 M. & W. 123; *Keating v. Brooks* (1845), 4 Notes of Cases 253.

1722. ———.]—In an action for a libel, written in a disguised hand, it was proposed to put into the hands of the jury a book, in which were entries, which a witness swore that he saw deft. make at the time, in order that the jury might compare those entries with the libel:—*Held*: (1) it could not be done.

The witness having stated, that he believed the libel to be in the handwriting of deft., although somewhat disguised, a letter, which he also stated to be deft.'s letter, but not disguised, was offered in evidence, on the ground that it referred to some of the subjects mentioned in the libel. It was objected to, on the ground that it would have the same effect, & was evidently offered for the same purpose, as the book which had been rejected:—*Held*: (2) the letter must be received in evidence, & being once in evidence, it could not be withdrawn from the consideration of the jury.—*WADDINGTON v. COUSINS* (1836), 7 C. & P. 595, N. P.

1723. ———.]—On an issue as to deft.'s signature, witnesses were called for him who deposed that they knew his handwriting & did not believe the signature to be his. Pltf. proposed to ask each witness whether a paper, placed on the witness box, was signed by deft., purposing, by such inquiry, to test the knowledge of the witnesses by their agreement or disagreement. The paper was not in evidence for any other purpose:—*Held*: such inquiry was not allowable.

which paper was not then shown to the witness, is admissible.—*HALIFAX BANKING CO. v. SMITH* (1890), 29 N. B. R. 462; *reversd*, 18 S. C. R. 710.—*CAN.*

1718 ii. ———.]—Deft. was tried on a charge of sending a threatening letter to M. The evidence for the prosecution consisted of a letter admitted to have been written by deft., & an admission by deft. in a conversation with B. that he had written M. a letter "that if he would square up

some matter between them all would be well; otherwise he would inform against him." The judge, in charging the jury, after all the evidence was in, allowed them to compare the letter admitted to have been written by deft. with the letter in dispute & to draw their own conclusion from the comparison of the two:—*Held*: (1) he was justified in doing so; (2) all that is necessary to entitle a jury to compare a doubtful or disputed writing with one admitted to be genuine is that the

The objection would not have been removed by independent proof that the paper proposed to be laid before the witnesses was in fact written by deft. (LORD DENMAN, C.J.).—*GRIFFITHS v. IVERY* (1840), 11 Ad. & El. 322; 3 Per. & Dav. 179; 9 L. J. Q. B. 49; 4 J. P. 27; 113 E. R. 437.

Annotations.—*Reid*. *Hughes v. Rogers* (1841), 8 M. & W. 123; *Younge v. Honner* (1843), 1 Car. & Kir. 51; *Keating v. Brooks* (1845), 4 Notes of Cases, 253.

1724. ———.]—For the purpose of proving a document in which a word is spelt in a particular manner, *e.g.* Titchborne for Tichborne, to be in the handwriting of a party, other documents not in evidence in the cause, but proved to be in the handwriting of the party, & in which the word is similarly spelt, are admissible in evidence.—*BROOKES v. TITCHBORNE* (1850), 5 Exch. 929; 20 L. J. Ex. 69; 18 L. T. O. S. 323; 14 Jur. 1122; 155 E. R. 405.

1725. ———.]—Writing connected with depositions.]—(1) Handwriting of a deceased witness, made at the time of his examination by comrs., but not returned with the depositions, is sufficiently in evidence to admit of being produced in ct. for the purpose of comparison with his signature to a deed, the genuineness of which is impeached.

(2) The *onus* of proving the genuineness of a witness to a deed in a civil suit lies on the party setting up the deed, not on the party impeaching it, as in a criminal proceeding; & it is a misdirection in a judge to tell the jury in a civil suit that under such circumstances they must try the question as to whether the deed was forged or not in the same manner as if deft. was on his trial for forgery. Such misdirection will entitle pltf. to a new trial.

(3) A witness to a deed being dead, his daughter, who was called at the trial to prove his handwriting, deposed that the signature to the deed was not her father's handwriting, & in her examination spoke of a letter which she had with her, from her father to her mother, which letter, at the request of the judge, she produced in ct. & the judge handed it to the jury to compare with the witness's alleged signature to the deed:—*Held*: as the letter was not in any way in evidence in the cause it ought not to have been handed to the jury.—*DOE d. DEVINE v. WILSON* (1855), 10 Moo. P. C. C. 502; 14 E. R. 581, P. C.

Annotation.—*Generally*, *Mentd*. *Des Barres v. Shey* (1873), 29 L. T. 592.

1726. ———.]—Letter from writer to relative.]—*DOE d. DEVINE v. WILSON*, No. 1725, *ante*.

1727. ———.]—Tendered under Common Law Procedure Act, 1854 (c. 125), ss. 26, 27.]—In an action on a bill of exchange, the acceptance being denied & alleged to have been a forgery, documents, such as receipts, etc., not relevant to the issue, but proved to be in the handwriting of deft., were allowed to be put in evidence for the purpose of comparison, under sect. 27 of the above Act.—*BIRCH v. RIDGWAY* (1858), 1 F. & F. 270, N. P.

1728. ———.]—In an action for libel to prove that the libels declared on were written by deft., certain documents admitted to be in her

two writings should be in evidence for some purpose in the cause.—*R. v. DIXON* (1897), 29 N. S. R. 462.—*CAN.*

b. *Confined to documents in evidence in cause*.—*Compared with documents not in evidence*.—*R. v. TOWER* (1880), 20 N. B. R. 168.—*CAN.*

c. *Only documents in court*.—*Documents whose authenticity doubtful*.—On an inquiry whether a signature is genuine or not, it should not be compared with a document not before the

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handwriting were used as standards of comparison; & pltf. called several witnesses, & to support & strengthen such evidence he produced seven anonymous letters, generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice, & they were also used as a comparison of the handwriting in dispute [under sect. 27 of the above Act], & no objection was made by deft.'s counsel:—*Held*: the seven anonymous letters were admissible; they were relevant to the issue to show malice; but if a proper objection had been made at the time of the trial, they could not have been received as evidence of handwriting.—*HUGHES v. DINORBEN (LADY) (1850)*, 32 L. T. O. S. 271.

1729. ———.]—In cross-examination of an attesting witness to a codicil, he denying that it was in his handwriting; other documents admitted by him to be in his writing were allowed to be submitted to the jury for the purpose of comparison of handwriting, under sect. 27 of the above Act.—*CHESWELL v. JACKSON (1860)*, 2 F. & F. 24, N. P.; *subsequent proceedings (1864)*, 4 F. & F. 1, N. P.

1730. ———.]—The question being whether a memorandum was in the handwriting of deft., & he having, in the course of cross-examination been got to write something, on a piece of paper, this was allowed to be shown to the jury, for the purpose of comparison of handwriting, under sect. 26 of the above Act.—*COBETT v. KILMINSTER (1865)*, 4 F. & F. 490, N. P.

See, new, Criminal Procedure Act, 1865 (c. 18), s. 8.

1731. Confined to documents in evidence in cause.]—Where a witness, called to prove the signature of the attesting witness to a bond, swore that the signature was not in the supposed attesting witness's handwriting, another paper, not in evidence in the cause, was put into his hand, which he also stated was not that person's writing:—*Held*: pltf. was not at liberty to prove, for the purpose of contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond.—*HUGHES v. ROGERS (1841)*, 8 M. & W. 123; 10 L. J. Ex. 238; 5 Jur. 323; 151 E. R. 675; *previous proceedings*, 5 Jur. 225, N. P.

1732. ———.]—*R. v. SHEPHERD*, No. 1759, *post*.

1733. ———.]—*FARWIG v. COOPER (1845)*, 4 L. T. O. S. 474, N. P.

1734. ———.]—On the cross-examination of a witness as to his knowledge of handwriting, a paper not in evidence may be put into his hand, & he may be asked whether it is in deft.'s handwriting, in order to comment upon the difference, if any, between his answer & the answers of the

other witnesses to the same question; but not for the purpose of asking him whether, having looked at such paper, he still persists in saying that the acceptance in question is not in deft.'s handwriting.—*STURMY v. EVANS (1850)*, 16 L. T. O. S. 65, N. P.

— *Comparison with documents not in evidence* — *To test judgment of witness.*—*See* Nos. 1712, 1713, *ante*.

1735. Parish register—Entries by clergyman.]—*Held*: evidence of a rector's handwriting to receipts by comparison with his signature in the registrar's books, the entries in which it was his duty to sign, was sufficient.—*TAYLOR v. COOK (1820)*, 8 Price, 650; 146 E. R. 1325.

Annotation:—*Held*. *Doe d. Mudd v. Suckermore (1836)*, 5 Ad. & El. 703.

1736. ———.]—*DOE d. JENKINS v. DAVIES*, No. 1680, *ante*.

1737. Minute book of kirk session—Church of Scotland—Signature of minister.]—*R. v. BARBER*, No. 3144, *post*.

1738. Documents alleged to be forged—Cheques.]—*WILSON v. THORNBURY*, No. 2347, *post*.

C. By Whom Comparison made.

1739. Jury.]—Where the defence to a bill of exchange is forgery, the jury shall be allowed to decide on comparison of hands, by comparing the bill in question with other acceptances admitted to be deft.'s.—*ALLESBROOK v. ROACH (1795)*, 1 Esp. 351; *Peake, Add. Cas.* 27, N. P.

Annotations:—*Distd.* *Doe d. Perry v. Newton (1836)*, 5 Ad. & El. 514. *Consd.* *Doe d. Mudd v. Suckermore (1837)*, 5 Ad. & El. 703.

1740. ———.]—*MENDES DA COSTA v. PYM*, No. 1628, *ante*.

1741. ———.]—*FARWIG v. COOPER (1845)*, 4 L. T. O. S. 474, N. P.

1742. ———.]—In an action on a bill of exchange against the acceptor there was a plea traversing the acceptance. No evidence was offered by pltf. on this point, but the bill & a letter were produced at the trial in accordance with a notice by deft. to produce, in which notice the bill was described as the bill accepted by deft., & the letter as being a letter of deft.'s:—*Held*: as the jury had an opportunity of comparing the handwriting if they had thought it necessary, there was some evidence to go to the jury of deft.'s handwriting.—*SCARD v. JACKSON (1875)*, 34 L. T. 65, n.; 24 W. R. 159.

Annotations:—*Mentd.* *Harvey v. Cane (1876)*, 34 L. T. 64; *Carter v. White (1882)*, 20 Ch. D. 225; *Herdman v. Wheeler*, [1902] 1 K. B. 361.

1743. Witness.]—*MENDES DA COSTA v. PYM*, No. 1628, *ante*.

1744. Persons appointed by court—Registrars.]—*HEATH v. WATTS (1798)*, 1 Phillim. 82, n.; 101 E. R. 921, n.

Annotations:—*Consd.* *Beaumont v. Perkins (1809)*, 1 Phillim. 78. *Mentd.* *Dow v. Clark & Clark (1826)*, 3 Add. 79.

et., or with one of which the authenticity is doubtful.—*GURUMURTI NAYUDU v. PAPPANAYUDU (1862)*, 1 Mad. 164.—*IND*.

d. Facsimiles made by lithographic engraver.]—A lithographic engraver having stated that he had paid minute attention to the writing, & made a facsimile of particular words & letters, it was proposed to produce these to the jury:—*Held*: juxtaposition of writing was admissible evidence, but original letters of the party ought to be produced, & compared with the anonymous letters.—*KINGAN v. WATSON, ETC. (1828)*, 4 Murr. 435.—*SCOT*.

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1739 i. Jury.]—Pltf. put in a bond admitted to have been signed by deft.,

& called no witnesses, contending that the jury might compare the two writings, & find their verdict thereon:—*Held*: this could not be done.—*KING v. KING (1870)*, 30 U. C. R. 26.—*CAN*.

e. Judge & jury.]—It is competent for a judge & jury to compare the handwriting of a disputed document with others which are in evidence in the cause & which are admitted or proven to be in the handwriting of the supposed writer.—*ROHOPEL v. DARWISH, [1918]* 1 W. W. R. 627; 13 Alta. L. R. 180.—*CAN*.

f. Judge.]—If on a *ried voce* hearing before a judge there is conflicting evidence of the handwriting of a witness, the judge has a right to compare the disputed writing with an

admitted signature of the witness, in order to determine whether it is his signature.—*HANINGTON v. HARSHMAN (1873)*, N. B. Dig. 1086.—*CAN*.

g. ———.]—In an action on a promissory note against the personal representatives of the maker, tried by a judge without a jury, a duplicate registered mtge. purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature of the note:—*Held*: the judge was entitled to compare the signatures, & act on his own conclusion as to their identity, & having found them identical, the corroboration was sufficient.—*THOMPSON v. THOMPSON*

1745. Judicial Committee of Privy Council—Appeal from Court of Lower Canada.—The cts. in Canada examined witnesses, & compared the handwriting of two other documents put in evidence & admitted to be genuine. In such circumstances the Judicial Committee upon petition for that purpose, ordered the ct. in Canada to transmit the originals for the purpose of inspection & comparison at the hearing of the appeal from the judgment of the ct. in Lower Canada.—*M'CARTHY v. JUDAH* (1858), 12 Moo. P. C. C. 47; 33 L. T. O. S. 51; 14 E. R. 829, P. C.

Annotation.—**Consd.** Vencataswara Yettiapah Naicker v. Alagoo Moottoo Servagaren (1861), 8 Moo. Ind. App. 327.

Court of Criminal Appeal.—See CRIMINAL LAW, Vol. XIV., p. 511, Nos. 5683, 5684.

SUB-SECT. 10.—EVIDENCE OF EXPERTS.

See Criminal Procedure Act, 1865 (c. 18), s. 8.

See, generally, Part VI., post.

1746. Evidence admissible.—*REILLY v. RIVETT* (1792), 1 Phillim. 80, n.; 161 E. R. 920, n.

1747. —.—(1) There is no difference, in point of evidence, whether the case be a criminal or civil case; the same rules must apply to both (HOTHAM, B.).

(2) Two persons have been called, who, having looked at these libels, have spoken, without any doubt, of their being the handwriting of the party accused. As far as that goes, there is no objection to it. Then comes the inspector of franks, from the post office; he has these libels put into his hands. Now, I do not know how that gentleman could speak to the handwriting, unless he could say he had seen the party write, or unless he had been in the habit of correspondence with him, excepting that he is called to speak as a man of science to an abstract question. In that light he has been called, & his evidence has been admitted. He is shown these papers; & he is asked to look at them, & without inquiring who wrote them, or for what purpose. He is asked, "From your knowledge of handwriting in general, do you believe that writing to be a natural or fictitious hand?" His science, his knowledge, his habit, all entitle him to say, I am confident it is a feigned hand. To that there is no objection; & so far as that goes, I see no reason for rejecting that evidence (HOTHAM, B.).—*R. v. CATOR* (1802), 4 Esp. 117, N. P.

Annotations.—As to (2) **Consd.** Eagleton & Coventry v. Kingston (1803), 8 Ves. 438; Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. **Refd.** Burr v. Harper (1816), Holt, N. P. 420.

1748. —.—*SPEAR v. BONE* (1816), cited 5 Ad. & El. 708; 111 E. R. 1334; *sub nom.* BONE & NEWSAM v. SPEAR, 1 Phillim. 345.

Annotations.—**Consd.** Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703. **Menid.** Torre v. Castle (1836), 1 Curt. 303; Whyte v. Pollok (1882), 7 App. Cas. 400; Godman v. Godman, [1920] P. 261.

1749. —.—[On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested had been written over

pencil marks which had been rubbed out:—*Held*: the evidence of an engraver, who had examined the paper with a mirror & traced the pencil marks, was admissible on the part of the prosecution.—*R. v. WILLIAMS* (1838), 8 C. & P. 434.

1750. —.—[A person skilled in examining writings deposed to the original words erased from a will, & also that a legacy at the end of one of the pages had been written at a different time from the rest of the will. On motion, the ct. refused to strike out the legacy.—*In the Goods of RUSHOUT* (1849), 13 L. T. O. S. 264; 13 Jur. 458.

1751. —.—**On affidavit.**—Affidavit of expert admitted as proof of a deceased attesting witness to execution of will & identity of testator.—*In the Goods of FIELDER* (1864), 4 New Rep. 413.

1752. —.—[Some trifling alterations & inter-lineations appeared on the face of a holograph will, & there was no evidence whether they were written before or after the execution, except the affidavit of an expert, that in his opinion they were written at the same time as the rest of the will. On that evidence the ct. admitted them to probate.—*In the Goods of HINDMARCH* (1866), L. R. 1 P. & D. 307; 36 L. J. P. & M. 24; 15 L. T. 391; 31 J. P. 41.

1753. —.—[Words beneath obliterations, erasures, or alterations on a testamentary document are "apparent" within Wills Act, 1837 (c. 26), s. 41, if experts using magnifying glasses, when necessary, can decipher them & satisfy the ct. that they have done so; but it is not allowable to resort to any physical interference with the document, so as to render clearer what may have been written upon it.

Slips of paper which could have been removed, leaving the document intact, were, after the execution of a will, pasted over certain words in it. These words could be read by an expert in writing, on placing a piece of brown paper round them, & holding the document against a window-pane:—*Held*: such concealment amounted to an "obliteration" of the words, but that as they could be read by an expert in writing using the above means, they were "apparent" within the meaning of above sect.—*FINCH v. COMBE*, [1894] P. 191; 63 L. J. P. 113; 70 L. T. 695; 10 T. L. R. 358; 6 R. 545.

1754. —.—[Testator left a will containing three bequests. The Christian names of legatees has been written over erasures. Expert evidence showed that traces of another name could be read under the superimposed names:—*Held*: administration with the will annexed might be granted with this name substituted in each case for the superimposed names.—*In the Goods of BRASIER*, [1899] P. 36; 79 L. T. 476; *sub nom.* *In the Goods of BRAZIER*, 68 L. J. P. 2; 47 W. R. 272.

1755. —.—**Whether expert must have seen party write.**—An article of an allegation pleading comparison of handwriting by persons who had seen deceased write, & also by persons skilled in handwriting who had not seen him write was

(1902), 4 O. L. R. 442; 1 O. W. R. 431.—**CAN.**

h. —.—[Where deft. had been found guilty of publishing a libel:—*Held*: the trial judge should not have compared the style of letters, written by accused, but not to the person libelled, with the libellous letters, there having been no evidence expert or otherwise on that question.—*R. v. LAW* (1909), 12 W. L. R. 475.—**CAN.**

k. —.—[*KALMET v. KRISER*

(1910), 13 W. L. R. 94.—**CAN.**

1. Skilled persons — Not police inspector.—[The prosecution proposed to examine sub-inspector M. who had compared the writing in the threatening letter with the writing in certain books found in prisoner's house, & which prisoner had admitted to be in her handwriting. The ct. refused to receive the evidence, & said that this class of evidence should be given by witnesses skilled in deciphering hand-

writing.—*It. v. WILBAIN & RYAN* (1863), 9 Cox, C. C. 448.—**IR.**

PART IV. SECT. 2, SUB-SECT. 10.

1746 i. Evidence admissible.—[The evidence of a handwriting expert upon the question of whether the interest clause (in a note) was written in before, at the time of, or after the signature & indorsement of the note, was admitted.—*BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD. v. ELLIS* (1897), 6 B. C. R. 82.—**CAN.**

Sect. 2.—Proof of handwriting: Sub-sect. 10. Sect. 1.]

admitted.—**BEAUMONT v. PERKINS** (1809), 1 Phillim. 78; 161 E. R. 919.

1756. ———. —[An issue having been directed to satisfy the ct. as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, & to the ct., upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not genuine, but an imitation. This evidence having been rejected, the ct. refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight, & that the issue being to satisfy the ct., a new trial ought not to be granted, unless for the rejection of evidence which might reasonably have altered the verdict. *Qu.*: if such evidence be admissible at all.—**GURNEY v. LANGLANDS** (1822), 5 B. & Ald. 330; 106 E. R. 1212.

Annotation:—**Refd.** *Doe d. Mudd v. Suckermore* (1837), 5 Ad. & El. 703.

1757. ———. —[Or corresponded with him.]—(1) In ejectment, to try the validity of a will, one of the attesting witnesses having sworn that the signature to the will was in his handwriting, also admitted certain other signatures then shown to him to be his. A person skilled in the knowledge of handwriting, having never seen the attesting witness write, nor corresponded with him, examined these different signatures, & on the next day having declared that he had by such examination acquired a knowledge of the character of the handwriting, was asked, whether he believed the attestation to be genuine, but the judge at the trial refused to allow the question to be answered:—**Held**: (**LORD DENMAN, C.J., WILLIAMS, J.**) the evidence was improperly rejected; (**PATTISON, J., COLERIDGE, J.**), it was not admissible.

(2) That proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear (**WILLIAMS, J.**).—**DOE d. MUDD v. SUCKERMORE** (1837), 5 Ad. & El. 703; 2 Nev. & P. K. B. 16; Will. Woll. & Dav. 405; 7 L. J. Q. B. 33; 111 E. R. 1331.

Annotation:—**As to** (1) **Refd.** *Hughes v. Rogers* (1841), 8 M. & W. 123.

1758. Nature of evidence admissible.—[A clerk of the Post Office, accustomed to inspect franks for the detection of forgeries, may be examined as a witness to prove that the handwriting of an instrument is an imitated, & not a natural hand, & also to prove that two writings, suspected to be imitated hands, were written by the same person.—**GOODTITLE d. REVETT v. BRAHAM** (1792), 4 Term Rep. 497; 100 E. R. 1139.

Annotations:—**Expld.** *Carey v. Pitt* (1797), Peake, Add. Cas. 130. **N.F.** *R. v. Cator* (1802), 4 Esp. 117. **Consd.** *Doe d. Mudd v. Suckermore* (1837), 5 Ad. & El. 703. **Mentd.** *Jackson v. Hesketh* (1819), 2 Stark. 518; *Doe d. Warren v. Bray* (1828), Mood. & M. 166; *Doe d. Pille v. Wilson* (1834), 6 C. & P. 301; *Doe d. Bather v. Brayne* (1848), 5 C. B. 655.

1759. ———. —[The jury cannot inspect writings which are not writings in the cause, for the purpose of ascertaining if the handwriting of a paper in issue is the same as in such writings.

(2) A scientific inspector of writings will not

be allowed to inspect such paper, & other writings in the cause, for the purpose of proving by the comparison that they are both written by the same person.

(3) He may be called to disprove by comparison the writing at issue from being the writing of the party whose writing it is said to be, but not to affirm it. He may be asked as a scientific witness, as to his belief of the writing being in a natural or feigned hand; but if he says it is in a feigned hand, he cannot be asked as to his belief of its being written by the same party as wrote another piece of writing shown to him (**ERLE, J.**).—**R. v. SHEPHERD** (1845), 5 L. T. O. S. 434; 1 Cox, C. C. 237.

1760. ———. —[On a trial for forgery of a bill of exchange, an expert cannot be asked whether, on comparing the signatures of the drawer, the acceptor & the endorser of the bill, he is of opinion that they are all written by the same person.—**R. v. COLEMAN** (1852), 6 Cox, C. C. 183.

1761. ———. —[An expert in handwriting should not be asked to say definitely that a particular writing is to be assigned to a particular person. His function is to point out similarities between two specimens of handwriting, or differences, & leave the ct. to draw its own conclusions.—**WAKEFORD v. LINCOLN (Bp.)** (1921), as reported in 90 L. J. P. C. 174, P. C.

1762. Value of expert evidence.—**GURNEY v. LANGLANDS**, No. 1756, *ante*.

1763. ———. —[**ROBSON v. ROCKE**, No. 1665, *ante*.

1764. ———. —[The evidence of professional witnesses is to be viewed with some degree of distrust; for it is generally with some bias. But within proper limits it is a very valuable assistance in inquiries of this kind. The advantage is, that habits of handwriting—as shown in minute points which escape common observation but are quite observable when pointed out—are detected & disclosed by science, skill & experience. It is so in the comparison of handwriting by the assistance of experts (**COCKBURN, C.J.**).—**CRESSWELL v. JACKSON** (1864), 4 F. & F. 1, N. P.

1765. Who may be expert witness—Not police officer.—[Copy-books found at prisoner's house containing writing by prisoner, & produced by a policeman, cannot be received in order to compare with a forged cheque, as policemen cannot give evidence as experts.

The policeman is certainly not a skilled witness (**BLACKBURN, J.**).—**R. v. HARVEY** (1869), 11 Cox, C. C. 546.

Annotations:—**Consd.** *R. v. Silverlock* (1894), 63 L. J. M. C. 233. **Refd.** *R. v. Derrick* (1910), 5 Cr. App. Rep. 162; *R. v. Rickard* (1918), 119 L. T. 192.

1766. How expert knowledge acquired—Not only in way of business or profession.—[A witness giving evidence under Criminal Procedure Act, 1865 (c. 18), s. 8, need not be a professional expert or a person whose skill in the comparison of hand-writings has been gained in the way of his profession or business.—**R. v. SILVERLOCK**, [1894] 2 Q. B. 766; 63 L. J. M. C. 233; 72 L. T. 298; 58 J. P. 788; 43 W. R. 14; 10 T. L. R. 623; 38 Sol. Jo. 664; 18 Cox, C. C. 104; 10 R. 431, C. C. R.

Annotation:—**Refd.** *R. v. Rickard* (1918), 119 L. T. 192.

1767. When assistance necessary—Criminal cases raising handwriting points.—[In a criminal case where questions of handwriting are raised the jury

1762 i. Value of expert evidence.—[In an action on a promissory note against the maker, deft. swore that the signature was not his, but an expert, comparing it with admitted signatures,

said that it was written by the same person. On ground for a new trial:—**Held**: the jury had not been directed that the evidence of experts was entitled to little weight when contra-

dicted by direct testimony, & the judge below having been satisfied with the verdict the ct. would not interfere.—**LUCE v. COYNE** (1875), 36 U. C. R. 305.—**CAN.**

should have the assistance of the evidence of experts, or, at least, of quasi-experts.—*R. v. RICKARD* (1918), 88 L. J. K. B. 720; 119 L. T. 192; 82 J. P. 256; 26 Cox, C. C. 318; 13 Cr. App. Rep. 140, C. C. R.

1768. Function of expert witness.—To assist the court.]—*WAKEFORD v. LINCOLN* (Bp.), No. 1761, ante.

SECT. 3.—PROOF OF EXECUTION.

SUB-SECT. 1.—IN GENERAL.

See, generally, *DEEDS*, Vol. XVII., pp. 199–223, 242.

1769. Copy of enrolment.—Upon an issue at law whether a deed to lead the uses of a fine levied by a man & his wife was duly executed by them, the deed having been enrolled for safe custody & afterwards lost; a copy of the enrolment was allowed at the trial to be given in evidence.—*COMBS v. DOWELL*, *SQUIRE v. DOWELL* (1707), 2 Vern. 591; 23 E. R. 984.

1770. Execution by agent.—Proof of agent's authority—*Prima facie* evidence.]—If a deed be produced purporting to bind a trading co., proof that the person executing it was their general law agent is *prima facie* sufficient, without showing he was authorised to execute the particular deed.—*DOE d. MACLEOD v. EAST LONDON WATERWORKS CO.* (1828), *Mood. & M.* 149, N. P.

1771. Proof of handwriting of attesting witness.—Absent abroad.]—A lease purported to have been signed by the mark of the party. A person proved the handwriting of the subscribing witness, & that he had gone abroad, & another person proved that deft. had spoken of the term that he had under the lease:—*Held*: this was sufficient proof of the execution of the lease by deft.—*DOE d. WHEELDON v. PAUL* (1829), 3 C. & P. 613, N. P.
Annotation:—*Mentd.* *Acoccks v. Phillips* (1860), 5 H. & N. 183.

1772. Memorandum.—Endorsed on draft of deed.—By party interested to prove execution.]—To prove the execution of a deed, by which A. conveyed lands to W. upon certain trusts, which deed was alleged to be lost, it was shown that L., in whose office W. had been a clerk, had found a draft of a deed of conveyance, with a memorandum on the back of it, in the handwriting of W.:—*Held*: this memorandum was not admissible in evidence.—*DOE d. MATHER v. WHITEFOOT* (1838), 8 C. & P. 270, N. P.

1773. Entries in bill of costs.—Of deceased attorney.]—(1) The entries in the bill of costs of a deceased attorney:—*Held*: good secondary evidence of the execution of deeds.

(2) Release presumed to have been executed in pursuance of covenants contained in a deed of

1791, there not having been any distinct admission of the right of the releasors since that time, & they never having interfered in the premises.—*SKEFFINGTON v. WHITEHURST* (1837), 3 Y. & C. Ex. 1; 7 L. J. Ex. Eq. 65; 160 E. R. 589; *on appeal*, *sub nom.* *SKEFFINGTON v. BUDD* (1842), 9 Cl. & Fin. 219, H. L.

1774. ——— *Will.*—Deceased died in 1835, leaving her will in the custody of her solr. In 1871 the will was sought for in the depositories of the solr., then dead, but there was found only a draft copy of the will; there was, however, an entry in the day book of the solr., & in his handwriting to the effect that he had prepared the will, attested its execution, & been paid his charges. The ct. admitted the entry as evidence of the execution.—*In the Goods of THOMAS* (1871), 41 L. J. P. & M. 32; 25 L. T. 509; 35 J. P. 702; 20 W. R. 149.

Proof of execution of wills, *see, generally*, *EXECUTORS; WILLS.*

1775. Acknowledgment.—Of terms of document.—*Lease.*—*DOE d. WHEELDON v. PAUL*, No. 1771, ante.

1776. ——— *Of signature thereto.*—Defts., in 1825, were put in possession of land by the owner, who, in 1827, executed a conveyance of it to them, which was void by reason of Charitable Uses Act, 1736 (c. 36). Devisees of vendor brought an action of ejectment in 1843. A demand of possession was made by the attorney who afterwards brought the action, under a written authority, purporting to be signed by lessors of pltf., but the attorney being unacquainted with their handwriting, a witness stated, that he had a few days before the trial called on lessors & showed them the authority, when they acknowledged the signatures to be theirs:—*Held*: the acknowledgment of the signatures by lessors afforded no legitimate evidence that it was signed by them.—*DOE d. PULKER v. WALKER* (1845), 14 L. J. Q. B. 181.

1777. Duplicate original.—Executed by one party.]—D. covenanted by deed that he, his heirs or assigns, would pay S. a royalty on coals which should be got from land purchased from S., & which should be shipped for sale. D. did not execute the deed. In an action on the covenant, D.'s representatives brought in his assigns as third parties, & they brought in fourth parties:—*Held*: the deed afforded secondary evidence of a counterpart having been executed by D.—*WITHAM v. VANE* (1883), 32 W. R. 617, H. L.

Annotations:—*Mentd.* *Borland's Trustee v. Steel*, [1901] 1 Ch. 279; *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12.

1778. Execution presumed.—Memorial of annuity.—Until contrary shown.]—In ejectment upon the assignment of a term to secure an annuity, a proper memorial of the annuity deeds will be

PART IV. SECT. 3, SUB-SECT. 1.

m. Proof of handwriting of attesting witness.—*Deceased.*—A deed appeared to have been executed in the presence of two witnesses, one of whom, a justice of the peace, authorised to take acknowledgment of deeds, was dead. No account could be given of the other by persons who had the best means of obtaining knowledge of the inhabitants of the place where the deed was executed:—*Held*: it was properly received in evidence on proof of the handwriting of deceased witness.—*DOE d. CHUBB v. HATHEWAY* (1850), 2 All. 69.—*CAN.*

n. Execution presumed.—Of bond pleaded with proferi.]—Where a bond is pleaded with a proferi, the admission of its execution, under a judge's

summons for that purpose, does not dispense with the necessity for its production at the trial, but only with the necessity for proof of execution.—*LESLIE v. LEAHY* (1837), 5 O. S. 482.—*CAN.*

— *Memorial of ancient document.*—A memorial more than thirty years old of a lost deed is good evidence upon its bare production, without calling or accounting for the subscribing witness. *Semble*: this principle extends to any written document, even to letters.—*DOE d. MACLEOD v. TURNBULL* (1848), 5 U. C. R. 129.—*CAN.*

p. ———.]—Secondary evidence of the contents of a document requiring execution, which can be shown to have been lost in proper

custody, & to have been lost, & which is more than thirty years old, may be admitted without proof of the execution of the original.—*KHETTER CHUNDER MOOKHJEE v. KHETTER PAUL SREETERUNO* (1880), 1 L. R. 5 Calc. 886.—*IND.*

q. ——— *Where opposing party admits.*—Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document, attestation of which is required by law.—*ASHRAFI LAL v. MUSAMMAB NAUHHI* (1921), 1 L. R. 41 All. 127.—*IND.*

r. Deed of conveyance.—*Certificate of registry.*—The execution of a deed of conveyance is not proved by the

Sect. 3.—Proof of execution: Sub-sects. 1, 2, 3 & 4.
1: Sub-sect. 1, A. (a).]

presumed till the contrary is shown.—DOE d. GRIFFIN v. MASON (1811), 3 Camp. 7, N. P.

Annotations:—**Consd.** Doe d. Lewis v. Bingham (1821), 4 B. & Ald. 672. **Refd.** Doe d. Broughton v. Gully (1829), 4 Man. & Ry. K. B. 249.

1779. ————]—In ejectment, upon the assignment of a term to secure an annuity, a proper memorial of the annuity deed will be presumed, until the contrary be shown.—DOE d. BROUGHTON v. GULLY (1829), 0 B. & C. 344; 4 Man. & Ry. K. B. 249; 7 L. J. O. S. K. B. 201; 109 E. R. 128.

Annotations:—**Mentd.** Doe d. Moore v. Ramsden (1833), 1 Nev. & M. K. B. 489; Bunter v. Cresswell (1850), 19 L. J. Q. B. 357.

1780. ———— **Circumstances not supporting presumption.]—**Where issue is joined on *non est factum* some evidence must be given of the identity of the party executing the deed, which is not to be presumed from its having been executed by a person in his name, in the presence of the attesting witness, who was unacquainted with him.—MIDDLETON v. SANDFORD (1814), 4 Camp. 34, N. P.

Annotations:—**Refd.** Whitlock v. Musgrave (1833), 3 Tyr. 541; Roden v. Ryde (1843), 4 Q. B. 626. **Mentd.** Addison v. Gibson (1847), 8 L. T. O. S. 467.

1781. ———— **Release.]—**If in an action of covenant for arrears of an annuity debt, plead a release, lost by time & accident, & to induce the jury to presume a release, show that the annuity was not paid for seventeen years, & that pltf. had borrowed money of the grantor of the annuity, & regularly paid him interest, without setting off the annuity, the jury ought not to find for deft., unless they are satisfied that there is fair ground for supposing that, at some particular period during the seventeen years, pltf. actually executed a release of the annuity.—BIGG v. ROBERTS (1827), 3 C. & P. 43, N. P.

1782. ————]—SKEFFINGTON v. WHITEHURST, No. 1773, *ante*.

1783. ———— **Of counter part—Original in hand of opposing party.]—**In an action for money had & received, deft., as an answer to the action, put in one part of a deed of covenant, executed by pltf., whereby deft. covenanted to pay over all moneys received by him on account of pltf., notice having been given to pltf. to produce the counterpart of this deed:—**Held:** deft.'s having possession of pltf.'s part of the deed, was presumptive evidence that he had executed the counterpart, & this was equally a ground of non-suit whether the counterpart had been lost or not.—EAST INDIA CO. v. LEWIS (1828), 3 C. & P. 358.

Annotation:—**Mentd.** Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131.

1784. ———— **Marriage settlement.]—**A suit was instituted for the appointment of new trustees

of a marriage settlement. The settlement was lost, but the husband & wife swore directly to the circumstances under which it was executed, to the execution of it by them, & to the contents of it. The solr. who prepared the settlement was dead, but, in addition to the evidence of the husband & wife, there was the indirect testimony of several other parties to the same effect:—**Held:** there was sufficient evidence for the ct. to assume that the settlement in question was actually executed, & to the effect contended for.—HALL v. DAWSON (1862), 7 L. T. 519.

Presumptions generally.]—See Part III., Sect. 6, *ante*.

1785. Evidence of identity—Of executing party—Necessity for.]—MIDDLETON v. SANDFORD, No. 1780, *ante*.

1786. ————]—In an action upon an instrument, the subscribing witness to which is dead or resides abroad, it is necessary besides proving the handwriting of the subscribing witness to give some evidence of the identity of the party who appears to have executed the instrument.—WHITELOCKE v. MUSGROVE (1833), 1 Cr. & M. 511; 3 Tyr. 541; 2 L. J. Ex. 210; 149 E. R. 502.

Annotations:—**Apld.** Jones v. Jones (1841), 9 M. & W. 75. **Distd.** Greenshields v. Crawford (1842), 9 M. & W. 314; Roden v. Ryde (1843), 4 Q. B. 626. **Refd.** Logan v. Alder (1833), 3 Tyr. 557.

1787. ————]—Evidence must be given of identity of the obligor of a bond with the party sued thereon, where the subscribing witness proves that he never saw deft. before or after it was executed.—LOGAN v. ALLDER (1833), 3 Tyr. 557, n.

Annotation:—**Consd.** Roden v. Ryde (1843), 4 Q. B. 626.

1788. ———— **Sufficiency of—Knowledge of party's handwriting.]—**In an action by indorsee against maker of a promissory note, deft. pleaded that he did not make the note, that he made it for the accommodation of pltf. There was an attesting witness to the note, who, on being called at the trial, stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation & residence he described, but that he had had no communication with him since, & that this was a common name in the neighbourhood where the note was made:—**Held:** there was no evidence to go to the jury of the identity of deft. with the maker of the note, & the second plea could not be called in aid for that purpose.—JONES v. JONES (1841), 9 M. & W. 75; 11 L. J. Ex. 265; 152 E. R. 33.

Annotations:—**Consd.** Roden v. Ryde (1843), 4 Q. B. 626. **Refd.** Hamber v. Roberts (1849), 7 C. B. 861; Stebbing v. Spicer (1849), 8 C. B. 827.

1789. ————]—In an action by indorsee against acceptor of a bill of exchange, it appeared that the bill was directed to "Charles Banner Crawford, East India House," & accepted "C. B. Crawford." It was proved that this

expressions being substantially the same. The affidavit is required to be made by a witness to the execution of the bill of sale, but an attestation is not essential to the validity of the instrument its execution can be proved by any competent witness.—EMERSON v. BANNERMAN (1891), 19 S. C. R. 1.—**CAN.**

c. Sufficiency of proof of execution.]—To prove the execution of a bill of sale executed in their favour by pltf.'s father, defts. called a Cazi, who deposed that the vendor came before him, accompanied by witnesses, & acknowledged the execution of the deed, which was then registered:—**Held:** the proof of execution was sufficient. Direct evidence of the handwriting of the executant was not

magistrate's certificate of acknowledgment endorsed, without the certificate of registry.—JOPLIN v. JOHNSON (1844), 2 Kerr, 541.—**CAN.**

d. Where memorial constitutes sole evidence.]—Where there was no other proof of the execution of a conveyance, which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the ct. refused to force the title upon a purchaser.—WISHART v. COOK (1868), 13 Gr. 237.—**CAN.**

e. Evidence of identity—Subscribing witness—Presumption.]—In an action by the assignee (of a bond), proof of the obligor's handwriting is sufficient, without calling the subscribing witness.—TAYLOR v. BURPÉE

(1861), 5 All. 191.—**CAN.**

f. Deed executed in foreign country—Proved by subscribing witness.]—A deed executed in a foreign country may be proved by the subscribing witness.—CROCKFORD v. EQUITABLE INSURANCE CO. (1863), 5 All. 651.—**CAN.**

g. Bill of sale—Affidavit of bona fides—Who can prove.]—Where an affidavit of bona fides to a bill of sale states that the sale was not made for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainee, while the form given in the statute uses the words "against any creditors of the bargainor," such violation does not avoid the bill of sale as against execution creditors, the two

signature was the handwriting of a gentleman of that name, formerly a clerk in the East India House who had left it five years ago:—*Held*: this was sufficient evidence of the identity of deft. with the person whose handwriting was proved.—*GREENSHIELDS v. CRAWFORD* (1842), 9 M. & W. 314; 1 Dowl. N. S. 439; 11 L. J. Ex. 372; 6 Jur. 303; 152 E. R. 133.

Annotations:—*Consd.* *Roden v. Ryde* (1843), 4 Q. B. 626. *Refd.* *Hamber v. Roberts* (1849), 7 C. B. 861.

1790. ————.]—In an action against H. as acceptor of a bill of exchange, it appeared that a H. had kept cash at the bank where the bill was made payable, & had drawn cheques which the cashier had paid. The cashier knew the party's handwriting, by the cheques, & swore that the acceptance was in the same writing; but he had not paid any cheque for some time, did not know the party personally, & could not further identify him with defendant:—*Held*: a sufficient *prima facie* case.—*RODEN v. RYDE* (1843), 4 Q. B. 626; 3 Gal. & Dav. 604; 12 L. J. Q. B. 276; 1 L. T. O. S. 145; 7 Jur. 304; 152 E. R. 1034.

Annotations:—*Refd.* *Hamber v. Roberts* (1849), 7 C. B. 861. *Mentd.* *Perren v. Monmouth Ry.* (1853), 1 C. L. R. 168; *Martin v. White* (1910), 102 L. T. 23.

1791. *S. P. SEWELL v. EVANS* (1843), 4 Q. B. 626; E. R.

Annotations:—*Refd.* *Hamber v. Roberts* (1849), 7 C. B. 861. *Mentd.* *Perren v. Monmouth Ry.* (1853), 1 C. L. R. 168; *Martin v. White* (1910), 102 L. T. 23.

SUB-SECT. 2.—SEALING.

1792. *Necessity for proof—Seal to board of guardians' certificate.*—A certificate of chargeability was made under Poor Law Amendment Act, 1842 (c. 57), s. 17, & purported to be "given under the seal of the board of guardians; the examinations stated it to be signed by the presiding chairman, & countersigned by the clerk of the board," but said nothing of the sealing. An order of removal was made, partly on this certificate & the examinations. Among the grounds of appeal against the order was one to this effect: "That it does not appear by any legal evidence that the certificate of chargeability was signed & sealed as required by the statute in such case made & provided by the presiding chairman of the board of guardians of," etc. The objection really relied on was, that the certificate did not appear to have been sealed with the seal of the board of guardians:—*Held*: this was a valid objection to the certificate.

We ought to see that the seal so put is the seal of the board of guardians (LORD DENMAN, C.J.):—*R. v. FARTHINGHOE* (1844), 1 New Mag. Cas. 46;

necessary.—*NEEL KANTO PANDIT v. JUGGOBUNDOO GHOSE* (1874), 12 B. L. R. App. 18.—*IND.*

d. *Duplicate original—Authenticated by registrar's certificate.*—The production of the registered duplicate original of an instrument with the registrar's certificate endorsed thereon is, *prima facie* evidence of the due execution thereof, notwithstanding the fact that material alterations appear on the face of the instrument, all questions as to these alterations being however still left open.—*GREYSTOCK v. BARNHART* (1899), 19 C. L. T. 381; 26 A. R. 545.—*CAN.*

e. *Mortgage—Certificate of justice.*—A mtge. to deft. which was prior to the deed to pltf. in point of

registry, was insufficiently proved where the only proof of execution was the certificate of a justice of the peace prescribed for acknowledgment of release of dower.—*BURCHELL v. HIGGLOW* (1904), 40 N. S. R. 493.—*CAN.*

PART IV. SECT. 3, SUB-SECT. 2.
f. *Necessity for proof—Effect of sealing.*—*MONARCH LUMBER CO. v. GARRISON* (1911), 18 W. L. R. 686.—*CAN.*

g. *Kinds of seal.*—The seal of a co. consisted of an adhesive paper label in which the name & address of a co. was printed & inscribed:—*Held*: the seal was a good seal within Companies Act, s. 67, although it was not engraved in the ordinary sense of the word.—

1 New Sess. Cas. 238; 3 L. T. O. S. 178; 8 J. P. 490.

Presumption in lieu of proof.—See Part III., Sect. 6, sub-sect. 10, *ante*.

Bonds.—See *BONDS*, Vol. VII., pp. 179, 180, Nos. 174, 175, 179.

Corporation seal.—See *CORPORATIONS*, Vol. XIII., p. 284, No. 163; p. 289, No. 200.

Deeds generally.—See *DEEDS*, Vol. XVII., pp. 202, 203, Nos. 130–136.

SUB-SECT. 3.—DELIVERY.

See *DEEDS*, pp. 204–207, Nos. 151–182; p. 209, No. 206; pp. 210, 211, Nos. 227–238.

Bonds.—See *BONDS*, Vol. VII., p. 181, No. 191.

SUB-SECT. 4.—ATTESTATION.

See Part V.,

SECT. 4.—PRIMARY EVIDENCE.

SUB-SECT. 1.—NECESSITY FOR.

A. *Where Document Essential to Party's Case.*

(a) *In General.*

1793. *Document must be put in evidence—Sequestration order.*—*ANON.* (1719), 10 Mod. Rep. 432.

1794. ——— *Declaration by deceased person.*—*R. v. TROWTER* (1722), 12 Vin. Abr. 119.

——— *Dying declaration.*—See *CRIMINAL LAW*, Vol. XV., p. 804, Nos. 8710–8712.

1795. ——— *Order of Sessions—Showing discharge under Insolvent Act.*—To prove that pltf. was discharged under an insolvent Act after the cause of action accrued & before action brought, it is not enough to give in evidence a parol acknowledgment by him; but the clerk of the peace should be called, & the order of sessions produced to show the regularity of the discharge.—*SCOTT v. CLARE* (1812), 3 Camp. 236.

Annotation:—*Refd.* *A.-G. v. Pemberton* (1824), M'Cle. 634.

1796. ——— *Bankrupt charged with concealing effects—All effects registered in book.*—On an indictment against bkpt. for concealing his effects, if the evidence is that bkpt. on his last examination stated that a book given in by him contained an account of all his effects, it is incumbent on prosecutor to produce the book, or account for it, that it may be seen whether that book mentions the property or not.—*R. v. EVANI* (1825), 1 Mood. C. C. 70.

Annotation:—*Mentd.* *Courtivron v. Meunier* (1851), 6 Exch. 74.

HOE v. LEE (1903), 3 S. R. N. S. W. 30.—*AUS.*

h. ———.]—Some of the parties executing a deed were corporate bodies, & the witnessing clause was expressed. "In witness whereof, the parties have hereunto set their hands & seals," & the seals were all simple water seals:—*Held*: sufficient, in the absence of evidence showing these not to be the proper corporate seals.—*ONTARIO SALT CO. v. MERCHANTS' SALT CO.* (1871), 18 Gr. 551.—*CAN.*

k. *Protest without seal.*—A protest without seal is admissible as evidence of the facts therein contained.—*RUSSELL v. CROFTON* (1852), 1 C. P. 428.—*CAN.*

Sect. 4.—Primary evidence: Sub-sect. 1, A. (a) & (b).]

1797. — Contract—For sale of goods.]—If trover is brought, & the intended defence is, that deft. was the consignor of the goods, & had a right to stop them *in transitu*, & pltf., in anticipation of this, set up that he *bona fide* bought the goods of such consignor before the stoppage *in transitu*. If it appear that that purchase by pltf. was by a written agreement, such agreement must be produced; & if it is not, pltf. will not be allowed to give other evidence of his buying the goods.—**BRAIN v. HARDEN** (1825), 2 C. & P. 52.

1798. — Building contract.]—Where an action was brought by a builder for the amount of extra work done, there having been a written contract between the parties:—**Held**: pltf. ought to have produced the written contract at the trial, in order that it might appear what was within the contract, & what not.—**JONES v. HOWELL** (1835), 4 Dowl. 176, Ex. Ch.

1799. — Not essential to opponent's case.]—When pltf. proves his case without disclosing the existence of a written contract, if deft. relies upon it, he is bound to produce it himself, although pltf.'s witness, who was a party to the written contract, has wrongly stated that it was not reduced into writing.—**MAGNAY v. KNIGHT** (1840), 1 Man. & G. 944; Drinkwater, 13; 2 Scott, N. R. 64; 4 Jur. 1088; 133 E. R. 615.

1800. — Although collateral to subject-matter of trial.]—On the trial of an action for work & labour, it appeared that the work was done during the progress of, but separate from, some other work, which pltf. was doing under a written contract, & which had been paid for:—**Held**: the written contract ought nevertheless to be produced.—**HOLBARD v. STEVENS** (1841), 5 Jur. 71.

1801. — Master & servant.]—R. v. DODSON (1808), 62 J. P. Jo. 729.

—**See, further, CRIMINAL LAW, Vol. XV., p. 928, Nos. 10,229, 10,230.**

Relating to land.]—See Sub-sect. 1, A. (b), post.

1802. — Bail bond—Recovery of costs of.]—In an action by an attorney to recover the costs of executing a bail bond, the bond itself must be produced.—**SWINFORD v. GREEN** (1822), 3 Stark. 135, N. P.

1803. — Money bill.]—In an action by A. against O. for money had & received, pltf. proved that O. admitted having received a bill which was the property of A., & paid it into his own banker's: pltf. also proposed to prove that O. had received credit with his banker for a bill similar in amount, & that there was no corre-

sponding debit against O. in the banker's book, nor any credit given to O. for any bill to the same amount:—**Held**: the proposed proof was not admissible, A.'s bill not being produced.—**v. OWEN** (1834), 2 Ad. & El. 35; 4 Nev. & M. K. B. 123; 4 L. J. K. B. 15; 111 E. R. 14.

Annotation:—Held. Peck v. North Staffordshire Ry. (1860), 6 Jur. N. S. 370.

1804. — Appointment of surveyor—Minute book recording appointment inadmissible.]—(1) A minute book, kept by the magistrates' clerk, was offered in evidence, to show who had been appointed by the magistrates to be surveyors of the highways for the year 1812:—**Held**: this evidence was not receivable without proof of a search for the original appointment, under the hands & seals of the magistrates.

Qu.: whether a minute book would have been receivable as secondary evidence, if the original appointments had been lost.

(2) A written resolution of a vestry meeting purported to allow to D. £50:—**Held**: evidence was not admissible, to prove what was said by the persons who were at the meeting, with a view of showing what the £50 were allowed for.

(3) A witness, who produced an examined copy of a record of a conviction at the assizes, stated that he examined it with the original record, in the custody of the clerk of assize, but that he thought the original record was written on paper, but was not sure. It was proved, by the son of the clerk of assize, that all the records in his father's custody were written on parchment; but he had no recollection of this particular record:—**Held**: the examined copy was receivable on evidence.

(4) On the trial of an indictment for the non-repair of highways, entries in an ancient parish book, produced by the churchwarden from the parish chest, were offered in evidence, to show who were the surveyors of the highways in 1707:—**Held**: the evidence was receivable.—**R. v. PEMBRIDGE (INHABITANTS)** (1841), Car. & M. 157.

1805. — Extracts from accounts.]—In an action for stallage in a market, pltf. put in three entire ministers' accounts, those three being part only of a long series, & the object being to show by a very short entry in each of them that rent had been paid for the toll of the market. Extracts from the remainder of the series, confined to that short extract, were then tendered in evidence, & after objection, refused by the judge. A witness was then asked whether he had examined the whole series of ministers' accounts, & whether he found a similar entry in each of them; & that evidence was received:—**Held**: the same objection applied to that evidence as to the extracts, &

PART IV. SECT. 4, SUB-SECT. 1.—
A. (a).

1797 l. Document must be put in evidence.—Contract.]—A written contract can only be proved by the production of the writing itself; & if the document is inadmissible from want of registration, no secondary evidence of the contract can be received. A party's admission as to the contents of a document not made in the pleadings, but in a deposition, is secondary evidence, & cannot supply the place of the document itself.—**SHEKH IBAHIM v. PARVATA HARI** (1871), 8 Bom. A. C. 163.—**IND.**

l. — Unless satisfactory reasons for non-production shown.]—If an agreement be declared on, pltf. must produce the agreement or give satisfactory evidence for its non-production.—**WILSON v. HOLMES** (1870), 1 V. R. (Law) 53.—**AUS.**

m. — .]—The basis of a charge being false pretence, & that false pretence being contained in a written document, unless a foundation be laid by secondary evidence to make out a *prima facie* case, the document itself must be produced.—**Re JOHNSTON** (1907), 13 B. C. R. 209.—**CAN.**

n. — .]—(1) It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents.

(2) An acknowledgment of the debt sued for had not been signed by an agent of deft. generally or specially authorised in that behalf within Act IX. of 1871, s. 20. Whatever general authority such agent may once have had from deft., it had ceased within the knowledge of pltf. at the time of

signature. Special authority in that behalf cannot be proved by secondary evidence of the contents of a letter the non-production of which is not satisfactorily accounted for.—**DINOMOYI DEVI v. ROY LOCHMIPUT SINGH** (1879), L. R. 7 Ind. App. 8.—**IND.**

osit for
use & occupation, if it appear, on the cross-examination of pltf.'s witnesses, that the agreement on which the action is brought, although originally made & entered into by parol, was afterwards reduced into writing, & signed by pltf. that agreement must be produced, or proper ground laid to admit secondary evidence of it.—**THUNDER v. WARREN** (1845), 8 I. L. R. 181.—**IR.**

p. — Separate counts on one agreement.—Corresponding document.]—Pltf. declared in *assumpsit* on two counts, each on an agreement, to deliver timber. Deft. pleaded non-

semble, neither were receivable.—LOCKWOOD v. WOOD (1848), 10 L. T. O. S. 521.

1806. — Parol evidence not admissible—Deed exercising power.]—BRACE v. BLICK (1836), 7 Sim. 619; 58 E. R. 975.

1807. — Portable notice.—In carrier's office.]—In trover against a carrier, where the question was whether the goods were rightfully detained by deft. in satisfaction of a general lien:—*Held*: (1) parol evidence could not be given of the contents of a portable notice, hung up in deft.'s office, containing a statement that all goods carried by deft. were to be subject to such general lien, but that the notice itself must be produced; (2) evidence of bills delivered to pltf., containing a similar statement, could not be received without a notice to produce the bills.—JONES v. TARLETON (1842), 9 M. & W. 675; 1 Dowl. N. S. 625; 11 L. J. Ex. 267; 6 Jur. 348. *Annotations*:—Generally, *Mentd.* Kirchner v. Venus (1859), 12 Moo. P. C. C. 361; Weeks v. Goode (1859), 6 C. B. N. S. 367; Yungmann v. Briesemann (1892), 67 L. T. 642.

1808. — Banker's clearing book.]—The cashier of a bank, upon his examination as a witness, stated that he had ascertained from the clearing book, kept by him & in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book & of his own handwriting, & not from any recollection of the fact deposed to; & the book was not produced:—*Held*: under these circumstances, the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry.—DUPUY v. TRUMAN (1843), 2 Y. & C. Ch. Cas. 341; 63 E. R. 150.

1809. — Series of accounts.]—LOCKWOOD v. WOOD, No. 1805, *ante*.

1810. — Or absence accounted for.]—The party who claims to put the contents of a writing in evidence must produce it, or account for its absence (EARLE, C.J.).—R. v. FRANKLAND (1863), L. & C. 276; 1 New Rep. 375; 32 L. J. M. C. 69; 7 L. T. 799; 27 J. P. 260; 9 Jur. N. S. 388; 11 W. R. 346, C. C. R.

Annotations:—*Mentd.* R. v. Webb (1893), 9 T. L. R. 199; Jeffrey v. Bamford, [1921] 2 K. B. 351.

assumpsit to the whole declaration, & several other pleas to the first count, & to that count a *nonne prosequi* was entered:—*Held*: it was sufficient at the trial for pltf. to produce one agreement corresponding with that declared on in the second count, & that it was not necessary for him to prove one corresponding with each count.—USBORNE v. GROVER (1856), 13 U. C. R. 164.—CAN.

Where not identified.]—The bill stated a deed which was admitted by answer. On a hearing on bill & answer, pltf. offered to read a deed corresponding with that stated in the bill but which had not been identified with it:—*Held*: it could not be read.—HUGHES v. COWLEY (1843), 5 I. Eq. R. 588.—IR.

r. — *Where document directly in issue.*]—The distinction is, between the cases in which the contents of a deed or other written instrument come directly in issue, in which cases the written instrument must be produced, or its non-production accounted for, & cases in which the question at issue is a collateral fact, growing out of or arising from, it may happen, the written instrument, & which, though provable by the instrument, may also be provable by any other sufficient evidence.—LAWLESS v. QUEALE (1845), 8 I. L. R. 382, 390.—IR.

s. — *New trial granted on*

production.]—Where pltf. was non-suited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, a new trial was granted on payment of costs, the bond having been afterwards found.—MUIRHEAD v. McDUGALL (1838), 5 O. S. 642.—CAN.

PART IV. SECT. 4, SUB-SECT. 1.—A. (b).

1812 i. Document must be put in evidence.—Tenancy agreement.—Parol evidence inadmissible.]—Deft. held under a lease for lives renewable for ever:—*Held*: pltf. could not give parol evidence that the lease was a renewal of a former lease executed pursuant to a covenant for perpetual renewal therein contained.—MOORE v. GARDE (1841), 2 Crawl. & D. 261.—IR.

1814 i. —.—.]—A lessee of the Crown verbally assigned his lease to B., who paid him for it & went into possession, having received the original lease from A. A. afterwards died, & his administrator brought ejectment against B.'s administrator. At the trial lessor of pltf. put in an exemplification of the original lease, & letters of administration. Deft. proved as above, & that after B.'s death the lease & other papers had been taken out of B.'s trunk, & lessor of pltf. had since stated it was in his possession. The lease was not produced on notice, but

1811. —.— Cross-examination.]—MACDONNELL v. EVANS, No. 1867, *post*.
Secondary evidence.]—See Sect. 5, *post*.

(b) Contracts relating to Land.

1812. Document must be put in evidence.—Tenancy agreement.—Parol evidence inadmissible.]—(1) Parol evidence of the fact of a pauper's having been tenant of premises in resp. parish, is admissible on the part of applt. parish, though he held under a written agreement not produced.

(2) The contents of this written agreement, undoubtedly, could not be proved by parol; & therefore, it was properly held, in the cases which have been cited, that where such a written agreement was in existence, the terms of the tenancy, or the amount of the rent, could be proved only by the production of the agreement itself. But the rule of law does not go so far as to prevent the admission of parol evidence of the fact, that the relation of landlord & tenant existed between particular parties at a particular time, in a particular parish (BAYLEY, J.).—R. v. HOLY TRINITY, KINGSTON-UPON-HULL (INHABITANTS) (1827), 7 B. & C. 611; 1 Man. & Ry. K. B. 444; 1 Man. & Ry. M. C. 146; 6 L. J. O. S. M. C. 24; 108 E. R. 851.

Annotations:—As to (1) *Appld.* Strother v. Barr (1828), 5 Bing. 136. *Distd.* R. v. Rawden (1828), 8 B. & C. 708; R. v. Merthyr Tydvil (1830), 1 B. & Ad. 29. *Appld.* Jenkins v. Hill (1854), 2 W. R. 268. *Refd.* Twyman v. Knowles (1853), 22 L. J. C. P. 143.

1813. —.—.]—Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession.—DOE v. HARVEY (1832), 8 Bing. 239; 1 Moo. & S. 374; 1 L. J. C. P. 9; 131 E. R. 393.

—.]—Upon the trial of an appeal, applt. having proved that the pauper occupied a tenement of £10 *per annum*, & paid rent & taxes for same, resp., in order to show that the pauper was not the sole tenant, attempted to prove by parol that the premises were let to the pauper & two other persons; but the witness on cross-examination having stated that the letting was by a written instrument:—*Held*: it could be proved

lessor of pltf. produced same after deft.'s case closed:—*Held*: the jury were justified in presuming a legal assignment of the lease under the circumstances.—DOE d. MURPHY v. MULHOLLAND (1831), 2 O. S. 115.—CAN.

1814 ii. —.—.]—Where pltf. in ejectment proves no documentary or promissory title but relies upon the estoppel arising from his having let deft. into possession of the land, & it appears in pltf.'s case that deft. took possession under a written agreement, pltf. cannot recover without producing the agreement, or giving secondary evidence of it after notice to produce.—DOE v. BLANCHE (1855), 3 All. 180.—CAN.

1814 iii. —.—.]—In an action of use & occupation, pltf. proved by a witness the fact of the occupation by deft. On his cross-examination he admitted that there was a written agreement in existence which pltf. did not produce:—*Held*: such instrument ought to have been given in evidence, & a declaration by deft. of holding at a particular rent was inadmissible.—LAWLESS v. QUEALE (1845), 8 I. L. R. 382.—IR.

1814 iv. —.—.]—Pltf. sought a renewal of a lease not in his possession. Deft.'s answer denied his right to the renewal "inasmuch as he is convinced, from documents in his possession, to

Sect. 4.—Primary evidence: Sub-sect. 1, A. (b) & B.]

only by the production of that instrument.—*R. v. RAWDEN (INHABITANTS)* (1828), 8 B. & C. 708; 3 Man. & Ry. K. B. 426; 2 Man. & Ry. M. C. 44; 7 L. J. O. S. M. C. 35; 108 E. R. 1205. *Annotation*:—*Consd.* Fielder v. Ray (1829), 6 Bing. 332.

1815. ———. Action for damage to reversion.]—*Qu.*: whether in an action for an injury to the reversion, proof that the premises were devised to pltf., & that an occupier holds as tenant to pltf., the latter fact being established by oral evidence, although the occupier holds under a written agreement, be sufficient to show a reversion in pltf.—*STROTHER v. BARR* (1828), 5 Bing. 136; 2 Moo. & P. 207; 6 L. J. O. S. C. P. 245; 130 E. R. 1013.

Annotations:—*Consd.* Fielder v. Ray (1829), 6 Bing. 332. *Refd.* Twyman v. Knowles (1853), 22 L. J. C. P. 143. *Mentd.* Young v. Spencer (1829), 5 Man. & Ry. K. B. 47.

1816. ———. In ejectment, pltf.'s witness stating that the premises had been held by the ancestor of deft., under a written agreement or lease:—Held: pltf. was bound to produce that agreement.—*FENN d. THOMAS v. GRIFFITH* (1830), 6 Bing. 533; 4 Moo. & P. 299; 8 L. J. O. S. C. P. 218; 130 E. R. 1386.

Annotation:—*Refd.* Magnay v. Knight (1840), Drinkwater, 13.

1817. ———. Notwithstanding acknowledgment of tenancy.]—The carriage of A. being on the premises of B., was seized by C. for rent due by B. to his landlord, D. In an action of trover brought by A. against C., a witness proved that B. had held the premises of D. for more than a year, but that he had a lease of them:—*Held*: the lease must be produced & given in evidence, & B.'s acquiescence in the distress would not dispense with such proof.—*SHEPHERD v. CAPE* (1833), 5 C. & P. 418, N. P.

which he will hereafter more particularly refer, that no such lease was executed." Def't. further stated that it appeared by a certain deed & schedule, which he admitted to be in his possession, that a lease for a different term & rent had been executed; & that it was manifest from the schedule that a renewal, if obtained, was fraudulent:—*Held*: def't. had referred to the deed & schedule in such way as to make it part of his answer, & must produce it.—*PHILAN v. HAMILTON* (1846), 9 L. Eq. R. 264.—**IR.**

1814 v. ———. Parol evidence insufficient.]—Mere oral testimony was, in the particular circumstances, insufficient to prove possession of land without any of the documentary evidence, leases, agreements, collection papers, etc., which is the invariably concomitant of actual possession in this country.—*THAKOOR DEEN TEWARREE v. ALI HOSSEIN KHAN* (1874), 13 B. L. R. 427; 21 W. R. 340; L. R. 1 Ind. App. 192.—**IND.**

t. ———. Right of way.]—Trespass *q.c.f.* Plea, *liberum tenementum*. Replication, demise to def't. from pltf. from year to year. Rejoinder, that after the demise it was consented & agreed that def't. & his servants, etc., should have leave to pass & repass in & over the close, in which, etc.:—*Held*: to support this rejoinder, a written agreement at least, if not one under seal, should be proved.—*BROUGHAM v. BALFOUR* (1853), 3 C. P. 297.—**CAN.**

a. ———.]—To an action of trespass def't. pleaded, justifying under an alleged grant of a right of way. Pltf. replied excess, & proved that a gate on the property had been removed & torn down in the exercise of the

alleged right of way. Pltf. & def't. both claimed their adjoining lots by conveyance from the same grantor, & def't. relied on the fact that his deed, which comprised the grant of the right of way over pltf.'s land, had been registered long previously to the registry of pltf.'s deed, but no evidence was given as to the registry or the date thereof:—*Held*: the certificate should have been tendered, & proved if objected to.—*McORMACK v. DENNISON* (1882), 3 R. & G. 71.—**CAN.**

b. ———. Crown patent.]—In an action of dower, the production of an abstract of the registries upon a lot, showing the granting by the Crown of a patent, is not sufficient evidence of the patent without the production of an exemplification.—*REED v. RANKS* (1860), 10 C. P. 202.—**CAN.**

c. ———.]—*McPHERSON v. EDWARDS* (1910), 14 W. L. R. 172.—**CAN.**

d. ———. Deed of bargain & sale.—Parol evidence insufficient.]—Dower. Plea, that the husband exchanged other lands with one F. for the lands in question, & that the defendant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain & sale of the other lands was produced, executed by defendant's husband, for an expressed consideration of £600. It was shown clearly by parol evidence that the transaction between F. & the husband was in fact an exchange:—*Held*: such evidence could not avail. The exchange must be proved in proper technical form, & by deed, & the defendant was therefore entitled to succeed.—*TOWSLEY v. SMITH* (1855), 12 U. C. R. 555.—**CAN.**

e. ———. Destruction of mortgage

-----]—A pauper stated that he entered under a lease; that he occupied for nine years under the lease, & then continued to occupy under a parol agreement:—*Held*: the lease ought to have been produced.—*R. v. AYRTON* (1844), 2 L. T. O. S. 309; *sub nom.* *R. v. AIRTON (INHABITANTS)*, 8 J. P. 487.

1819. ———.]—On a contract between outgoing & incoming tenant referring to the lease, the lease must be put in.—*TANNER v. WASHBURNE* (1858), 1 F. & F. 330.

1820. ———. Agreement to purchase land.]—Upon a sale of houses by auction according to certain particulars & conditions of sale, one of which was for the delivery of an abstract of title within ten days, & another for the payment of a deposit to the auctioneer, the purchaser of two houses paid a deposit, signed an agreement as purchaser, & obtained a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises described in the particulars & conditions of sale. The abstract of title, not being delivered, the purchaser brought an action against the auctioneer for the recovery of the deposit:—*Held*: the production of the receipt & of the conditions of sale, without producing the written contract signed by the purchaser, was insufficient.—*CURTIS v. GREATER* (1834), 1 Ad. & El. 167; 3 Nev. & M. K. B. 449; 3 L. J. K. B. 126; 110 E. R. 1170.

1821. ———. Although contents set forth in affidavits.]—*MARSHALL v. DAVIES* (1850), 10 L. T. O. S. 200; 14 Jur. 997.

B. Where Document not Essential to Party's Case.

1822. General rule.]—In an action of covenant upon a covenant to pay contained in a bill of sale,

deed.—Inadmissibility of secondary evidence.—In a suit to redeem a mortgage, it was proved that mtgees. & their assignee had fraudulently destroyed the deed by which the property was mortgaged:—*Held*: mtgees. could not be permitted to prove the contents of the deed or the amount of mtge.-debt by secondary evidence.—*SHEK ABDULLA v. SHEK MUHAMMAD* (1864), 1 Bom. 177.—**IND.**

f. ———. Letter in proof of alleged deed of conveyance.]—In ejectment, the point in dispute was whether T. R., one of pltfs., had ever conveyed the land to one J. R., deceased, under whom def't. derived title. Evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., or that the title was vested in J. R., & a letter from T. R. was also produced referring to such a deed, but no strictly legal evidence was given of the contents of such deed:—*Held*: such evidence, in the circumstances, was admissible on the part of def'ts. as primary evidence, & notice to pltfs. to produce such deed was unnecessary.—*ROGERS v. CARD* (1858), 7 C. P. 89.—**CAN.**

g. ———. Memorial of deed of appointment.]—*Re PONTON & SWANSTON* (1889), 16 O. R. 669.—**CAN.**

h. ———. Attested copy.—Memorial.]—When a deed is proved to have been executed, the original memorial need not be produced, an attested copy will do. But if the title deed be not before the ct., it cannot be proved by the memorial.—*JACK v. EJECTOR* (circa 1819), Rowe, 726.—**IR.**

PART IV. SECT. 4, SUB-SECT. 1.—B.

1822 i. General rule.]—An exor. sued for money received for his testator on

where the bill of sale assigned by way of mtge. certain property, fixtures, tools, etc., as per schedule, the schedule being separate & distinct from the deed, & not indorsed upon it:—*Held*: it was sufficient for pltf. to produce the bill of sale itself, & he was not bound to produce the schedule also.

The deed contains a distinct covenant to pay, having reference to no consideration, but the debt previously due. This covenant itself is entire, distinct, & independent; one to which effect may be given without reference to any other part of the indenture. What pltf. is bound to produce must depend upon this, upon what part of the deed the action is brought. There is nothing in any of the authorities cited to lead to the conclusion that, where an action is brought on a mere covenant to pay money, the party bringing the action is required to produce documents altogether unnecessary to the support of his case, & merely referred to as something collateral in some other part of the indenture in which the covenant to pay is contained (WILDE, C.J.).—*DAINES v. HEATH* (1847), 3 C. B. 938; 16 L. J. C. P. 117; 11 Jur. 185; 136 E. R. 376; *sub nom.* *DAVIES v. HEATH*, 8 L. T. O. S. 390.

1823. Document need not be put in evidence.—Sufficiency of other evidence.—Verbal demand.—Prior to action for trover.—If a verbal demand & a demand in writing are made at the same time, for the purpose of bringing an action of trover, & the one has no reference to the other, evidence of the verbal demand is sufficient without the production of the writing.

If they [the two demands] were concurrent & independent, I do not see how adding the latter could supersede the former, or vary the mode of proving it (LORD ELLENBOROUGH, C.J.).—*SMITH v. YOUNG* (1808), 1 Camp. 439, N. P.

Annotations:—*Mentd.* Featherstonhaugh v. Johnston (1818), 8 Taunt. 237; Catterall v. Kenyon (1842), 6 Jur. 507.

1824. ——— Sheriff's warrant.—To prove privy between sheriff & bailiff.—In order to charge the sheriff with the act of the bailiff for extortion it is not sufficient to produce a copy of the precept with the bailiff's name indorsed thereon, although the sheriff has returned *Cepi corpus*; pltf. in such a case must either produce the warrant or prove some recognition of the act of the bailiff by the sheriff.

But it is not essential in such case to produce the warrant, the privy between the sheriff & the bailiff may be proved, by showing that upon the arrest a bail bond was executed & delivered to the bailiff who returned it to the sheriff, upon which the latter made his return of *Cepi corpus*.—*MARTIN v. BEIL* (1816), 1 Stark. 413, N. P.; *subsequent proceedings* (1817), 6 M. & S. 220.

Annotation:—*Refd.* Taplin v. Atty. (1825), 3 Bing. 161.

1825. ——— Admission by other party.—To a declaration in *assumpsit* on a cheque, deft. pleaded that it was given for money won at an unlawful game at dice. Issue thereon. Deft. did not give notice to produce the cheque:—*Held*: on this issue pltf. was not bound to produce the cheque, either as part of his own case,

or, when called upon to do so at the trial as part of deft.'s evidence.

Here, deft. admitted by his plea that he gave the cheque, & therefore, pltf. was not bound to produce it as part of his own case (LORD DENMAN, C.J.).—*READ v. GAMBLE* (1835), 10 Ad. & El. 597, n.; 113 E. R. 227; *sub nom.* *REED v. GAMBLE*, 5 Nev. & M. K. B. 433.

Annotations:—*Consd.* Shearn v. Burnand (1839), 8 L. J. Q. B. 261. *Refd.* Lawrence v. Clark (1845), 14 M. & W. 250; Dwyer v. Collins (1852), 7 Exch. 639. *Mentd.* Goodered v. Armour (1842), 6 Jur. 1062.

1826. ——— Oral evidence only.—Pltf.'s case was proved by a written document, as well as by the examination of a witness, who was also examined in chief by defts., & in the course of such examination, referred to the document. Pltf. relied upon the document before the Vice-Chancellor; but, on appeal before the Lord Chancellor, rested his case upon the examination of the witness only:—*Held*: it was competent for him to do so, & defts.' objection to the reception of this evidence as secondary could only be supported by his producing the written document.—*OGLE v. MORGAN* (1852), 1 De G. M. & G. 359; 42 E. R. 590, L. C.

Annotations:—*Mentd.* Blackwell v. Pennant (1852), 9 Hare, 551; Vaughan v. Booth (1852), 16 Jur. 808; *Re* Drax, Savile v. Yeatman (1887), 57 L. T. 475; *Re* Ravensworth, Ravensworth v. Tindale, [1905] 2 Ch. 1; *Re* Sheffield, Ryan v. Bristol (1911), 104 L. T. 412; *Re* Jackson, Jackson v. Hamilton, [1923] 2 Ch. 365.

1827. Contract on agreement.—Recovery in quantum meruit.—In an action for work & labour, pltf. having proved the value of the work done, & closed his case, one of deft.'s witnesses swore that there was a memorandum in writing containing an estimate at which the work was to be performed, & produced a copy in pltf.'s handwriting, unstamped, & not signed either by him or deft.:—*Held*: pltf. was not thereby precluded from recovering on the common counts, as it did not appear whether the original memorandum were in existence, & as deft. had given him no notice to produce it, or, at all events, the testimony should have come from one of pltf.'s witnesses, on cross-examination.—*STEVENS v. PINNEY* (1818), 8 Taunt. 327; 2 Moore, C. P. 349; 129 E. R. 409.

Annotations:—*Consd.* Fielder v. Hay (1829), 6 Bing. 332; *Magnay v. Knight* (1840), 1 Man. & G. 941. *Refd.* Strother v. Barr (1828), 5 Bing. 136. *Mentd.* *Re* v. Motz Watts (1854), 23 L. J. M. C. 56.

1828. ———.—In an action for work & labour, when pltf. has established a *quantum meruit*, if deft.'s witness prove the existence of a written contract, & pltf. insist on deft.'s producing it, & it is not produced, pltf. must be called; but if pltf. does not require its production, the case may proceed.—*DAMER v. LANGFON* (1824), 1 C. & P. 168, N. P.

1829. ——— Alleged by opponent to be in writing.—Claim established without reference to writing.—Where a party has made out & closed a *prima facie* case, in doing which it does not appear that there was any written agreement, the other side cannot, when they go into their case, & show that there was a written agreement, throw upon the first party the *onus* of producing that agreement.—*R. v. PADSTOW (INHABITANTS)* (1832), 4 B. & Ad.

a note payable to him. The maker swore that he had paid deft., who handed him the note, which he still had, though with the name torn off:—*Held*: not necessary to produce the note.—*VAN ALLEN v. FRYMERE* (1857), 14 U. C. R. 579.—*CAN.*

1822 ii. ———.—Bill was filed to enforce a mechanic's lien against deft., whose title to the property in question was under a sublease:—*Held*: pltf.

was not entitled to the production of the sublease, as it was not necessary before decree to establish his case.—*BUCKE v. MCINTYRE* (1877), 7 P. L. 134.—*CAN.*

1822 iii. ———.—In an action for injury to a reversionary interest by obstructing a right of way, pltf.'s witnesses proved on cross-examination that the right was reserved by deed, but it was not proved that pltf. was a party or a

privy to that deed:—*Held*: the pltf. was not bound to produce such deed.—*MCULLAGH v. WILSON* (1838), 1 Jebb & S. 120.—*IR.*

1822 iv. ———.—When an agreement is alleged in a petition for specific performance of that agreement, it is not necessary to put in issue the written documents relied on as evidence of it.—*BUCKE v. O'CONNOR* (1892), 12 L. Ch. 11, 424; 14 Ir. Jur. 109.—*IR.*

Sect. 4.—*Primary evidence: Sub-sect. 1, B; sub-*

208; 1 Nev. & M. K. B. 9; 1 Nev. & M. M. C. 1; 2 L. J. M. C. 15; 110 E. R. 434.

Annotation :—*Consd. Magnay v. Knight* (1840), 1 Man. & G. 94.

1830. ————.]—Applts. against an order of removal called a witness to give parol evidence of a hiring. On cross-examination, he stated that, at the time of the hiring, he & the servant went to the chief constable's clerk, who, in their presence & by their direction, entered the terms of the hiring in writing, but that neither party signed the entry. He did not state whether or not the writing was read over to them :—*Held* : this was not sufficient proof of the contract having been put into writing to exclude parol evidence of the terms.—*R. v. WRANGLE (INHABITANTS)* (1835), 2 Ad. & El. 514; 1 Har. & W. 41; 4 Nev. & M. K. B. 375; 2 Nev. & M. M. C. 548; 4 L. J. M. C. 43; 111 E. R. 199.

Annotation :—*Reid. Trewett v. Lambert* (1839), 3 Jur. 629.

1831. ————.]—If, in an action for use & occupation, deft. cannot show by the cross-examination of pltf.'s witnesses, that the premises are held under a written agreement, but it afterwards appear by the evidence of deft.'s witnesses that the premises are so held, pltf. is not bound to put in the written agreement.—*MARSTON v. DEAN* (1835), 7 C. & P. 13, N. P.

1832. ————.]—In an action for use & occupation it is not a ground for setting aside a verdict for pltf. that pltf. did not produce a written agreement under which the premises were held, if the evidence given by pltf. in support of his case did not disclose the existence of such an agreement.—*FRY v. CHAPMAN* (1830), 5 Dowl. 265.

1833. ————.]—Where a witness, without being asked, speaks of a written agreement, but does not state the contents, & they are immaterial to the issue, the party who calls the witness is not bound to produce the document.—*MOTT v. DELANE* (1838), 2 Jur. 592.

1834. ————.]—Where a tenant was to hold land according to certain rules in writing under which a former tenant held, but the length of his term was agreed on orally :—*Held* : to show the expiration of the term it was not necessary to produce the rules.—*ILEY v. MOORHOUSE* (1839), 6 Bing. N. C. 52; 8 Scott, 156; 9 L. J. C. P. 113; 133 E. R. 20.

Annotation :—*Mentd. Newton v. Harland* (1840), 1 Man. & G. 644.

1835. ————.]—A witness, called to prove the terms of a verbal agreement for a lease, stated that he was in company with pltf. & deft. when it was entered into, & referred to an entry which he made a few hours afterwards, to refresh his memory. This entry was made by him from a paper written in pencil by pltf., during the interview between the parties, & read by him to deft., as embodying the terms of their agreement. Deft. assented to it, but he neither signed nor was asked to sign it, nor was it shown to him :—*Held* : it was not necessary to produce this paper as constituting the real agreement.—*TREWHITT v. LAMBERT* (1839), 10 Ad. & El. 470; 3 Jur. 629; 113 E. R. 178; *sub nom. TRUWHITT v. LAMBERT*, 3 Per. & Dav. 676.

1836. ————.]—**Document unstamped.**—After pltf. has proved, by witnesses, a case of implied or oral contract, he cannot be nonsuited by deft.'s producing an unstamped written instrument, purporting to contain the terms of the contract.—*FELDER v. RAY* (1829), 6 Bing. 332;

4 C. & P. 61; 3 Moo. & P. 659; 8 L. J. O. S. C. P. 65; 130 E. R. 1308.

Annotation :—*Reid. Crowther v. Solomons* (1848), 6 C. B. 758.

1837. Accounts book—Count on account stated.—On a settlement of accounts between pltf. & deft., both parties present, the clerk of the former made entries of the items in a book, & which were copied by the latter, into another book. Deft. did not, by any act, acknowledge pltf.'s book to be a correct statement of the items of the account, though he admitted the balance against him, as stated by pltf.'s clerk, to be correct at the time, adding, that when he had done certain things for pltf., "there would not be much, if anything, between them" :—*Held* : pltf.'s book was no primary evidence for pltf., so as to require its production, or its non-production to be accounted for, & the acknowledgement of deft. was evidence to support a count on an account stated.

Notice having been given to deft. to produce his book, which he did not do, he can make no complaint that secondary evidence was received of the contents (*PATTESON, J.*).—*RIGBY v. JEFFREYS* (1839), 7 Dowl. 561; 1 Will. Woll. & H. 555.

SUB-SECT. 2.—EFFECT OF PRODUCTION OF DOCUMENT.

1838. Production on notice—Not thereby evidence for party producing.—Where notice has been given to produce books if the party calls for them & inspects them, it does not therefore make them evidence for the party whose books they are.—*SAYER v. KITCHEN* (1794), 1 Esp. 207, N. P.

1839. ————.]—**Whether evidence for party requiring production.**—If the opposite party calls for the other's books, he has not the option to use them or not, he thereby makes them evidence.—*WHARAM v. ROUTLEDGE* (1805), 5 Esp. 235, N. P.

1840. ————.]—**If document material to issue.**—(1) If a written agreement is not signed by deft., pltf. need not give it in evidence, though he himself has signed it, & it regards the matter in issue; (2) If the pltf.'s counsel calls on the other side to produce a paper & reads it; he is bound to give it in evidence, if it is material to the issue; but if it is not material, plf.'s counsel need not give it in evidence, though required by the other side to do so.—*WILSON v. BOWIE* (1823), 1 C. & P. 8, N. P.

1841. ————.]—Where counsel, notice having been given to produce a letter, stated that fact, & calls for the letter in question, which is produced & put in his hands, he is bound to put it in, though he had not read it himself, when he declined to make use of it.—*SMITH v. BROWN* (1847), 9 L. T. O. S. 394; 2 Cox, C. C. 278.

1842. ————.]—**Must be proved by party calling for it.**—Where an agreement not under seal is produced at the trial by one of the parties in pursuance of an undertaking to produce it, the opposite party, to make it evidence, must prove it in the same manner as if it had come from his own custody.—*WETHERSTON v. EDGINGTON* (1809), 2 Camp. 94.

1843. ————.]—**Objection to non-production—Subsequent production by objecting party—Objection waived.**—If deft. produces a written instrument as part of his case, he thereby waives all objection on the ground of its non-production by pltf.—*OKEFORD v. MULLINGS* (1839), 8 L. J. Ex. 263.

1844. ————.]—**Refusal to produce document—Reasons for refusal not to be set out.**—*LAXTON v. REYNOLDS*, No. 2190, *post*.

— **Admission of secondary evidence.]—**
See Sect. 5, sub-sect. 6, *post*.
Examination of witnesses as to documents.]—
See Sect. 7, *post*.

SECT. 5.—SECONDARY EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

1845. No degrees of secondary evidence.]—
 There are no degrees in secondary evidence; therefore, where deft. has given notice to pltf. to produce a letter, of which he kept a copy, he may, if the letter is not produced, give parol evidence of its contents, & is not bound to put in the copy; but, if there had been a duplicate original, it might be otherwise.—*BROWN v. WOODMAN* (1834), 6 C. & P. 206, N. P.

*Annotations:—**Consd.* Doe d. Gilbert v. Ross (1840), 7 M. & W. 102. *Refd.* Hall v. Ball (1841), 3 Man. & G. 242.

1846. —.]—(1) Where a deed is in the hands of an attorney, who holds it not merely as attorney but as a security for money owing to him from his client, & the attorney, being called, on a *sub-pœna duces tecum*, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents.

(2) There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power.

(3) Where on a former trial of the title to the same property, on an ejectment by the same lessors of pltf. against a different deft. a deed was given in evidence on the part of deft., & the limitations in it were stated in ct. by deft.'s counsel:—*Held*: a copy of the shorthand notes of that statement was not receivable in evidence on the part of the same lessors of pltf., in a second ejectment against another party.

(4) An examined copy of the record of a fine, levied with proclamations, is as good evidence of the fine as the chirograph itself certified by the officer.—*DOE d. GILBERT v. ROSS* (1840), 7 M. & W. 102; 8 Dowl. 389; 10 L. J. Ex. 201; 4 Jur. 321; 151 E. R. 696.

*Annotations:—**As to* (1) *Consd.* Doe d. Loscombe v. Clifford (1847), 2 Car. & Kir. 448; Newton v. Chaplin (1850), 10 C. B. 356. *Refd.* Hibbert v. Knight (1848), 2 Exch. 11; Hope v. Liddell (1855), 7 De G. M. & G. 331. *As to* (2) *Refd.* Hall v. Ball (1841), 3 Man. & G. 242.

1847. —.]—(1) In trover for an expired lease, by lessor, the lease, or counterpart executed by the lessor, not being produced by deft., upon notice:—*Held*: the lessor might give parol evidence of the contents without producing the counterpart executed by the lessee.

(2) There are no degrees of secondary evidence.—*HALL v. BALL* (1841), 3 Man. & G. 242; 3 Scott, N. R. 577; 10 L. J. C. P. 285; 133 E. R. 1133.

*Annotations:—**As to* (1) *Refd.* R. v. Hinckley Overseers

(1863), 3 B. & S. 885. *Generally*, *Mentd.* Elworthy v. Sandford (1864), 3 H. & C. 330; Knight v. Williams, [1901] 1 Ch. 256.

1848. Admission by consent of party.—Whether subsequent objection precluded.]—(1) Where a master, by his report, certifies a fact, & exceptions are taken to the report, it lies upon those who are to uphold the report, to produce the evidence of the fact. So if he certifies the result of an account upon the allowance or disallowance of its items in dispute, & one of the parties excepts to the report, both as to the principle on which the account is taken, & the evidence in support of the allowance or disallowance of the items, the parties in whose favour the report is made, must produce the evidence on the hearing of the exceptions.

(2) *Qu.*: whether such consent to admit copies of such proceeding as before mentioned, precludes the party who consents from objecting that the originals are not evidence.—*BERNAL v. DONEGAL* (MARQUIS) (1827), 1 Bli. N. S. 594; 4 E. R. H. L.

SUB-SECT. 2.—WHEN INADMISSIBLE.

A. In General.

1849. General rule.]—It is dangerous to suffer any who by the law in pleading ought to show the deed itself to the ct., upon the general issue to prove in evidence to a jury by witnesses that there was such a deed, which they have heard & read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the ct.; or per-adventure the deed may be upon condition, limitation, with power of revocation, & by this way truth & justice, & the true reason of the common law would be subverted. But yet in great & notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; & if the jury find it, although it be not showed forth in evidence, it shall be good enough. But the copy of a record may be showed & given in evidence to the jury for records are of so high a nature, & such credit in law, that they cannot be proved by other means than by themselves & no rasure or interlineations shall be intended in them; & therefore, a copy of a record being testified to be true, is permitted to be given in evidence; but the sure way is, to exemplify it under the great seal, or at the least under the seal of the ct. (*per Cur.*)—*LEYFIELD'S CASE* (1611), 10 Co. Rep. 88 a; 77 E. R. 1057.

*Annotations:—**Refd.* Stockman v. Hampton (1636), Cro. Car. 431; Fox v. Grundie (1872), Freeman, K. B. 42; Whitfield v. Fausset (1750), 1 Ves. Sen. 387; Saltern v. Melhuish (1754), Amb. 247; Read v. Brookman (1789), 3 Term Rep. 151; Argent v. Durrant (1799), 8 Term Rep.

ing enrolment is secondary evidence of the deed.—*DEVONSHIRE (DUKE) v. NEILL* (1877), 2 L. R. Ir. 132.—*IR.*

PART IV. SECT. 5, SUB-SECT. 2.—A.

1849 I. General rule.]—Until a party has exhausted all the means prescribed by law for compelling a witness to produce a document known to be with him, & so long as the original is procurable, or its loss not satisfactorily accounted for, secondary evidence cannot be admitted.—*MUHAMMAD VALAD ABDUL MULNA v. IBRAHIM VALAD HASAN* (1866), 3 Bom. A. C. 160.—*IND.*

PART IV. SECT. 5, SUB-SECT. 1.

k. General rule.]—The rule of law, that the evidence offered should be the best & that secondary evidence can be received only when the impossibility of producing the best has been established is enacted in the interest of the parties, & is not founded upon consideration of public policy, & the objection to such evidence may be considered to be waived by the party interested in opposing it when it is not made at the time the evidence is offered.—*GUERIN v. FOX* (1898), Q. R. 15 S. C. 199.—*CAN.*

1. *Admission without objection.]—*

When secondary evidence is admitted without objection it may be acted upon.—*CANADIAN BANK OF COMMERCE v. BELLAMY* (1915), 33 W. L. R. 8; 9 W. W. R. 587; 25 D. L. R. 133; 8 Sask. L. R. 381.—*CAN.*

m. Memorials of registered deeds.]—Memorials of registered deeds are secondary evidence only, if produced & proved, or if thirty years old without proof, coming from the registry office.—*MARVIN v. HALES* (1857), 6 C. P. 208.—*CAN.*

n. Deed of bargain & sale.—Copy of enrolment.]—A copy of the enrolment of a deed of bargain & sale requir-

Sect. 5.—Secondary evidence: Sub-sect. 2, A. & B.]

403; *Hill v. Marsden* (1840), 6 M. & W. 718; *Jenkin v. Peace* (1840), 6 M. & W. 722; *Hodgson v. Warden* (1844), 13 M. & W. 22; *Thames Haven Dock & Ry. v. Brymer* (1850), 5 Exch. 696. **Mentd.** *Miller v. Manwaring* (1835), Cro. Car. 397; *Paramore v. Johnson* (1700), 1 Ld. Raym. 566; *Goodright d. Roffe v. Harwood* (1773), Loft. 282; *Master v. Miller* (1791), 4 Term Rep. 320; *Bolton v. Carlisle (Bp.)* (1793), 2 Hy. Bl. 259; *Unwin v. St. Quintin* (1843), 11 M. & W. 277; *Wells v. Doddington* (1845), 2 Coll. 73; *Cooper v. Shepherd* (1840), 3 C. B. 266.

1850. Where documents may or ought to be produced.]—A settlement by being rated & paying rates cannot be proved by evidence of paying only, without the production of the rate or accounting reasonably for the non-production of it, although the payer was both owner & occupier of the estate for which he paid the rate.

It is in every day's experience to reject parol evidence of a writing which may & ought to be produced (GROSE, J.).—*R. v. COPPULL (INHABITANTS)* (1801), 2 East, 25; 102 E. R. 277.

Annotations.]—**Reid.** *It. v. Llanfachly* (1853), 2 E. & B. 940. **Mentd.** *It. v. Staple Fitzpaine* (1842), 2 Q. B. 488.

1851. — Document filed in English court.]—A letter, which had been in the possession of deft., was filed in the Ct. of Ch. pursuant to an order of that ct. :—**Held** : secondary evidence of it was not admissible, it being in the power of either party upon application to that ct., to produce it.—*WILLIAMS v. MUNNINGS* (1824), Ry. & M. 18, N. P.

1852. — Although contents set forth in affidavit.]—On interlocutory applications, which are necessarily heard upon affidavits, the ct. does not dispense with the rule that, on disputed points, the best evidence in the power of the parties must be given; &, therefore, it is not sufficient for a party to state, upon affidavit, the purport & effect of a document which he has the means of producing.—*STAMPS v. BIRMINGHAM, WOLVERHAMPTON & STOUR VALLEY RY. CO.* (1848), 7 Harc. 251; 68 E. R. 103; *on appeal*, 2 Ph. 673, L. C.

Annotations.]—**Mentd.** *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; *Southall v. British Mutual Life Assce. Soc.* (1869), 38 L. J. Ch. 711.

1853. Documents of doubtful character.]—(1) The ct. will presume a subsequent enlarged endowment in support of an appropriation by a rector, which has been acted on for a very great length of time, although an insufficient endowment has been actually produced in evidence, appearing on the face of it to be inadequate, to that required to be made by the terms of the condition of the original licence, where it is not shown by proof of some deficiency in any particular respect, that the vicarage is, in fact, incompetently endowed.

1849 ii. —.—**I.**—A copy of a document cannot be admitted as evidence, unless the absence of the original is properly accounted for. The mere fact of the latter being in another ct. is not a sufficient reason.—*BAKIALDAS BUNDOADHYA v. INDURU MONKE DEBI* (1877), 1 C. L. R. 135.—**IND.**

1850 i. Where documents may or ought to be produced.]—Prisoner was accused of having set fire to his workshop, which was insured. The only proof against him was his confession to three witnesses. The agent of the co. was put in the box to prove the insurance & produced a memorandum of the policy, the original policy having after the claim was paid been sent to the head office of the co.:—**Held** : no secondary proof of the contents of an insurance policy will be allowed when the original policy itself, though deposited in another district, could have been obtained.—*R. v. BOURASSA* (1877), 3 Q. L. R. 359.—**CAN.**

1850 ii. —.—**I.**—As there was evidence that a certificate or report had been given by the engineer in this case oral evidence of the contents of the certificate or report was inadmissible.—*QUEBEC CITY v. QUEBEC CENTRAL RY. CO.* (1884), 10 S. C. R. 563.—**CAN.**

o. Duplicate of monthly statement of account.]—In an action for the price of goods sold & delivered:—**Held** : a duplicate copy of a monthly statement of account was improperly received in evidence.—*BECK v. ANDERSON* (1913), 26 W. L. R. 144.—**CAN.**

p. Copy of Crown patent — Necessity for notice of intention to use.]—Pltf. in order to succeed, had to prove the issue of a patent from the Crown for the land in question. He produced what purported to be a copy of such patent, but he had not given notice of his intention to use such copy:—**Held** : such copy could not be received in evidence.—*McPIERSON v. EDWARDS* (1910), 14 W. L. R. 172.—**CAN.**

(2) Extracts from documents, of doubtful character as evidence, cannot be received. The original must be produced, that the ct. may judge by inspection of the admissibility even of the document itself.

(3) Depositions of a witness who states himself to have been interested in the event of the cause, but duly released, cannot be read in a ct. of equity without producing the document which created the interest & the release, in order that the ct. may form their own judgment of them.—*WOLLEY v. BROWNHILL* (1824), 13 Price, 500; *McCle. 317*; 3 Eag. & Y. 1152; 147 E. R. 1061, Ex. Ch.

Annotations.]—**Generally.** **Mentd.** *Jesus College v. Gibbs* (1835), 1 Y. & C. Ex. 145; *Tomlinson v. Swinnerton* (1838), 2 Jur. 393; *Esdaile v. Peacock* (1859), John. 216.

1854. In answer to interrogatories—Document not in possession of party interrogated—Not producible by him.]—In an action for libel an interrogatory was administered to B., deft., by A., pltf., as to the contents of a letter alleged by A. to have been written by B. to a third person. B. in answer swore she had no recollection of the exact words in the said letter contained:—**Held** : (1) B. could not be called on to answer further as to the contents of a document of which she swore she had no recollection; (2) on principle B. ought not to be called on to give secondary evidence of a document as to which it was not proved that it was in her possession, or in that of any one whom she could compel to produce it, but which might even be in the possession of A. himself.—*DALRYMPLE v. LESLIE* (1881), 8 Q. B. D. 5; 51 L. J. Q. B. 61; 45 L. T. 478; 30 W. R. 105, D. C.

1855. Prosecution for larceny of cheque of prisoner not established.]—*R. v. BARRIS* (1890), 112 C. C. Ct. Cas. 822.

B. Grounds of Inadmissibility.

1856. Original might be produced—Letter filed in court.]—*WILLIAMS v. MUNNINGS*, No. 1851, *ante*.

1857. — Tenancy agreement.]—By 6 Geo. 4, c. 57, s. 2, a settlement by renting a tenement can only be acquired where the same has been *bonâ fide* rented for a year at £10 a year:—**Held** : such a renting could only appear by reference to the agreement with the landlord, & could not therefore be proved by parol, where the contract was in writing, & might have been produced.—*R. v. MERTHYR TIDVIL (INHABITANTS)* (1830), 1 B. & Ad. 29; 8 L. J. O. S. M. C. 114; 109 E. R. 698.

1858. — Deed in possession of third person—

PART IV. SECT. 5, SUB-SECT. 2.—B.

q. Original might be produced — Agreement for work & labour.]—*Assumpsit* for work & labour. Pltf.'s witness swore that the work was done upon a written agreement, which he had in ct., but refused to produce. He had not been subpoenaed:—**Held** : he was as much bound to produce the writing as if in attendance under a *subpœna duces tecum*. **Semble** : if the witness had been required by the ct. to produce the agreement, & had still refused, this would not have been sufficient to warrant the reception of secondary evidence.—*FARLEY v. GRAMHAM* (1852), 9 U. C. R. 438.—**CAN.**

r. — Bond.]—It was proved that deft. went into possession as assignee of a person to whom pltf. had given a bond for a deed; that he had received indulgence as to the payments required by the bond; that he had expressly promised to go out of possession if such payments were not

No evidence of refusal to produce.—Pltf. alleged as an excuse for not making profert of a deed, that it was "in the possession of certain persons, to wit J. & T., who before & at the time of the commencement of the suit, & thence hitherto, have held & still hold the same by agreement theretofore in that behalf made between pltf. & deft. :—*Held* : this was not a sufficient excuse for the want of profert, as it did not allege that the party who had possession of the deed had refused to produce it.—*HILL v. MARSDEN* (1840), 6 M. & W. 718 ; 8 Dowl. 750 ; 9 L. J. Ex. 202 ; 4 Jur. 633 ; 151 E. R. 602.

1859. — Detachable coffin plate.—*R. v. EDGE* (1842), *Wills' Circumstantial Evidence*, 5th ed., p. 260.

1860. Non-production of original not accounted for—Evidence of paying rates.—*R. v. COPPULL* (INHABITANTS), No. 1850, *ante*.

1861. — Deed of settlement.—To verify the abstract, a vendor produced an attested copy of a deed of settlement, dated 1752, together with a covenant of a third party to produce the original :—*Held* : (1) this was not a sufficient verification of the abstract of the title ; (2) it was necessary to prove that the original could not be produced before the purchaser was bound to receive secondary evidence of its contents.—*TURNER v. RAWLINSON* (1835), 4 L. J. Ch. 109.

1862. — Notice of default.—B. & C. became jointly & severally bound to A. as sureties for D., with a condition for the bond to be void, if B. & C., or either of them, should, within one calendar month next after notice given to them of D.'s default, pay any balance that might be due from D. to A., not exceeding a given sum. In debt by A. against exors. of B. the issue was, whether or not due notice of D.'s default had been given to deft. & to C. :—*Held* : in order to prove notice to C., it was not enough to produce a duplicate, with proof that the notice had been sent by post, properly addressed, to C., but A. was bound to produce the original notice, or to account for its absence.—*ROBINSON v. BROWN* (1846), 3 C. B. 754 ; 16 L. J. C. P. 46 ; 8 L. T. O. S. 118 ; 136 E. R. 302.

Annotation :—*Folld. Andrews v. Wirral R. C.*, [1916] 1 K. B. 863.

1863. — Piece of music.—On the trial of an action for piracy of musical copyright, a piece of music having been shown to a witness skilled in music, he was asked, for the purpose of proving that it was not first published in England, whether he had not seen printed copies of it for sale in a shop in Milan at a given date sixteen years before the trial :—*Held* : the question was irregular, as referring to the contents of a document not produced or accounted for.—*BOOSEY v. DAVIDSON* (1849), 13 Q. B. 257 ; 18 L. J. Q. B. 174 ; 13 L. T. O. S. 137 ; 13 Jur. 678 ; 116 E. R. 1261.

Annotations :—*Refd. Geralopulo v. Wieler* (1851), 16 C. B. 690. *Mentd. Boosey v. Purday* (1849), 4 Exch. 145 ; *Ollendorff v. Black* (1850), 20 L. J. Ch. 165 ; *Buxton v. James* (1851), 5 De G. & Sm. 80 ; *Jefferys v. Boosey* (1854), 4 H. L. Cas. 815.

1864. — Protest after collision—Contents pleaded without exhibiting original.—The difficulty

which I entertain as to the admission of this 10th article is one of a very different nature from that suggested by the counsel on either side. That article is in these words—"That in the aforesaid report of the owners of The Unicorn to the said Lords of the Board of Trade, the fact of The Unicorn's green light having been extinguished prior to the said collision was & is wholly suppressed, or at least not mentioned or adverted to." How can I take any evidence of that, except by the production of the instrument itself ? It is pleading, in substance & effect, what are the contents of this instrument not produced ; because, if I plead that such a fact is not in a given instrument, the only proof that any ct. can legally receive, in the first instance, is the instrument itself. The reason, therefore, why I cannot admit this part as it stands is obvious. In order to render it admissible, the party who pleads it must annex a copy of the report, "which he contends does not contain such an averment, or he must show that he has done his best to obtain it, & put himself in a situation to give parol evidence of its contents. As it stands now I cannot receive it. With respect to the latter part, pleading, "that in the protest made on behalf of The Unicorn, dated Jan. 31, 1849, the aforesaid fact is also suppressed, or at least is not mentioned or adverted to," Dr. Harding argues that it would be unnecessary, if the protest was brought in ; while, if the protest is not brought in, & the party for whom Dr. Harding appears has done his best to procure a copy, then it will be properly pleadable. But the same observation applies to this part of the case as applies to the preceding : it is pleading the contents of a written instrument without exhibiting it, or showing the reason why it was not exhibited. I fully admit the argument, that you have a right to bring it in for the purpose of showing that any material fact was stated in the protest, or showing that any important fact was omitted ; but then the only mode of proving that is by the production of the instrument to which you refer. I must, therefore, reject the whole article (*DR. LUSHINGTON*).—*THE ROB ROY* (1849), 13 Jur. 750.

1865. — Indenture of apprenticeship—Poor law settlement.—*R. v. LINTHWAITE* (INHABITANTS) (1849), 3 New Mag. Cas. 147 ; 13 L. T. O. S. 116 ; 13 J. P. Jo. 297.

1866. — Written agreement—Copy produced admitted to be correct.—By agreement the West London Ry. was to cross the Great Western Ry. on certain terms : the West London Co. demised their railway, with "all their rights, powers, & privileges in relation thereto" to the North-Western Ry. Co. In covenant against the last-mentioned co. on the lease for not efficiently working the line :—*Held* : the agreement was admissible against defts.

Semble : a copy of such agreement, admitted to be a correct copy, is not admissible without accounting for the non-production of the original.—*WEST LONDON RY. CO. v. LONDON & NORTH WESTERN RY. CO.* (1851), 17 L. T. O. S. 31.

made ; & that he was in default. This bond was in deft.'s possession, & he had received notice to produce it :—*Held* : deft. could not dispute pltf.'s title, & the bond not being produced, no secondary evidence was required of its contents.—*DORR v. LOUNT v. SIMPSON* (1852), 9 U. C. R. 544.—*CAN.*

s. — Mortgage.—In a suit by pltf. to redeem lands alleged to have been mortgaged under an instru-

ment in 1841, the document was not produced & therefore secondary evidence was not receivable to prove the contents of the document.—*THAJI BEEBI v. THIRUMALAIAPPA PILLAI* (1907), 1 L. R. 30 Mad. 386.—*IND.*

t. Non-production of original not accounted for—Bill of sale.—An alleged unsigned draft of a bill of sale said to have been executed by the parties in England, the original being, as stated,

in the hands of deft.'s solr. in England, & no reasonable explanation of its non-production being offered, was properly rejected as evidence.—*EVANS v. EVANS* (1911), 19 W. L. R. 237 ; 2 W. W. R. 795.—*CAN.*

a. Copy not admitted in lower court—Whether original admissible on appeal.—A. claiming to register as a £10 freeholder, was rejected by the ct. below, because he sought to

Sect. 5.—Secondary evidence: Sub-sect. 2, B.; sub-

1867. — Contents of letter—Parol evidence of.]

—A witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. Therefore, where a witness was asked, upon cross-examination, a letter in his own handwriting being shown to him, "Did you not write that letter in answer to a letter charging you with forgery?"—*Held*: the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document which for anything that appeared might have been produced.—*MACDONNELL v. EVANS* (1852), 11 C. B. 930; 21 L. J. C. P. 141; 18 L. T. O. S. 241; 16 J. P. 88; 16 Jur. 103; 138 E. R. 742.

Annotation:—Expld. & Distd. *Henman v. Lester* (1862), 12 C. B. N. S. 776.

1868. — Memorandum of contract.]—On the trial of a petition of right, setting up an alleged contract on the part of the Crown, the counsel for the Crown is not entitled to cross-examine the suppliant as to a copy of a memorandum signed by him, without giving proper evidence to account for the absence of the original; & a search must be proved in the proper department.—*SCOTT v. R.* (1861), 2 F. & F. 634.

SUB-SECT. 3.—WHEN ADMISSIBLE.

A. In General.

1869. General rule—Where original destroyed —Or in hands of other party.]—*LYNCH v. CLERKE*, No. 3540, *post*.

1870. — Only after reasonable effort to obtain primary evidence.]—In an action for maliciously, & without probable cause, charging pltf. with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, & that he delivered them at the ct. of quarter sessions to the clerk of the peace or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, & that the grand jury return *ignoramus*, & that it was usual in such case to throw away or destroy the depositions; that he had searched among his papers, & could not find them:—*Held*: parol evidence of their contents was admissible, & it was not necessary to call the deputy clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to have delivered them to his principal, & not being in his custody, it was to be presumed that they were lost or destroyed.

Secondary evidence is not to be admitted until a party has taken all reasonable pains to obtain the primary evidence. The degree of trouble to be taken for that purpose depends upon the nature of the instrument. If the instrument be of value, or of such a nature that the reasonable presumption is, that it is in existence, stricter evidence is required in order to show that it is destroyed or lost. If it be an instrument of no value, then the reasonable presumption being, that it has been destroyed or lost, slight evidence only of its destruc-

tion or loss is required (*BEST, J.*).—*FREEMAN v. ARKELL* (1824), 2 B. & C. 494; 1 C. & P. 135; 3 Dow. & Ry. K. B. 669; 2 L. J. O. S. K. B. 119; 107 E. R. 467; *subsequent proceedings*, 1 C. & P. 326, N. P.

Annotation:—Mentd. *Wiffier v. Bailey & Romford U. C.*, [1915] 1 K. B. 600.

1871. ——(1) It was proved by a pauper, that he had been bound apprentice twenty-three years ago to A.; that indentures were signed & sealed, & that he served seven years, & that A. had the indentures; that when the apprenticeship expired, the pauper asked A. for the indentures, & he said the parish officers had them:—*Held*: the declarations of A. who might have been called as a witness, were not admissible in evidence, & parol evidence of the contents was not admissible.

There was not sufficient evidence to show that a *bonâ fide* & diligent search was made for the instrument (*BAYLEY, J.*).

(2) In order to let in parol evidence of the contents of a written instrument, it must be shown that reasonable diligence has been used, but without success, to produce that instrument.—*R. v. DENIO (INHABITANTS)* (1827), 7 B. & C. 620; 1 Man. & Ry. K. B. 204; 1 Man. & Ry. M. C. 91; 108 E. R. 854; *sub nom.* *R. v. RHODEGEIDIO (INHABITANTS)*, 6 L. J. O. S. M. C. 10.

Annotations:—Consd. *R. v. Kenilworth* (1845), 7 Q. B. 642. *Refd.* *R. v. Saffron Hill* (1852), 1 E. & B. 93.

1872. On matters of account—Not provable by books.]—*P'EXTON v. GREEN* (1641), 1 Rep. Ch. 146; 21 E. R. 533.

1873. — General testimony only.]—Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance without producing them.—*ROBERTS v. DOXON* (1791), Peake, 116, N. P.

1874. On ground of public policy or convenience.]—When the directions which have been given by deft. to his agent cannot be read on the ground of public policy, the agent may be asked whether he did not act under the direction of deft.—*COOKE v. MAXWELL* (1817), 2 Stark. 183, N. P.

1875. ——In order to prove the acceptance of the stock by deft., evidence was adduced that T., & a person unknown to the clerk in the Bank, came there with T. & made an entry of his acceptance of the stock, & a witness was then called who proved that he had inspected the Bank books, & that the signature to the acceptance of the stock was in deft.'s handwriting:—*Held*: this evidence was admissible to prove the acceptance of the stock by deft., & it was not necessary that the Bank books themselves should be produced, they not being removable on the ground of public convenience.—*MORTIMER v. M'CALLAN* (1840), 6 M. & W. 58; 9 L. J. Ex. 73; 4 Jur. 172; 151 E. R. 320; *subsequent proceedings*, 7 M. & W. 20; *sub nom.* *M'CALLAN v. MORTIMER* (1842), 9 M. & W. 636, Ex. Ch.

Annotations:—Consd. *R. v. Mainwaring* (1856), 7 Cox, C. C. 192. *Appld.* *Owner v. Beehive Spinning Co.*, [1914] 1 K. B. 105. *Mentd.* *Thomas v. Fredricks* (1847), 10 Q. B. 775; *Nicholson v. Gooch* (1856), 5 E. & B. 999; *Re Hyder* (1857), 29 L. T. O. S. 217; *Grissell v. Bristowe* (1868), L. R. 3 C. P. 112; *Langton v. Waite* (1868), L. R. 6 Eq. 165; *Calder v. Dobell* (1871), L. R. 6 C. P. 486.

1876. Document stolen.]—Deft. not denying an

make title under a document which purported to be a copy, but was not proved to have been compared with the original instrument, & also because there was no proof of any attempt to procure the original instrument:—*Held*: the original instrument was not admissible in evidence on the

appeal.—*Re BERGIN* (1841), 2 Craw. & D. 356.—*IR.*

PART IV. SECT. 5, SUB-SECT. 3.—A.

b. Non-production of original accounted for.]—By the law of evidence administered in England, which

has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in ct. is the accounting for the non-production of the original.—*BHUBAN-SWARI DEBI v. HARISARAN SURMA*

imputation that he had instigated a servant to steal a lease material to the determination of pltf.'s cause, the ct. made absolute a rule for giving secondary evidence of its contents.—*DOE d. PEARSON v. RILES* (1831), 7 Bing. 724; 9 L. J. O. S. C. P. 226; 131 E. R. 280.

1877. Inscriptions on flags & banners.]—*R. v. HUNT* (1820), 3 B. & Ald. 566; 1 State Tr. N. S. 171; 106 E. R. 768, C. C. R.

*Annotations:—***Consd.** *R. v. Hinley* (1843), 2 L. T. O. S. 287. **Refd.** *R. v. Fursey* (1833), 6 C. & P. 81; *Jones v. Tarleton* (1842), 9 M. & W. 675; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *Boosey v. Davidson* (1849), 13 Q. B. 257; *R. v. Petcherini* (1855), 7 Cox, C. C. 79. **Mentd.** *R. v. Connop* (1836), 2 Har. & W. 81; *R. v. Frost* (1839), 9 C. & P. 129; *R. v. Vincent* (1839), 3 State Tr. N. S. 1037; *R. v. Ridgeway* (1843), 1 L. T. O. S. 622; *R. v. Cuffey* (1848), 7 State Tr. N. S. 467; *R. v. Lacey* (1848), 3 Cox, C. C. 517.

1878. Secondary evidence of copies—Where original in court.]—(1) If the manuscript of a handbill, published by order of deft., be given in evidence, a witness will be allowed to prove that he received a number of the printed copies of it from deft., without those copies being produced.

(2) If by a private Act of Parliament certain church trustees are to enter their proceedings in a book which is made evidence, & by the same Act persons aggrieved by the rates are to appeal to the trustees, appeals not required by the Act to be in writing, parol evidence may be given that the parties did in fact appeal, but not of what the trustees did on those appeals, as that should be proved by the book.—*R. v. MURPHY* (1837), 8 C. & P. 297, N. P.

*Annotations:—***Mentd.** *R. v. Blako* (1844), 6 Q. B. 126; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

1879. Fixed notice—Warning to trespassers.]—In an action for shooting a dog, brought against the owner of a plantation & his gamekeeper, it appeared that in the plantation in which the dog was shot there was fixed on a pole a board, on which was painted, "All dogs found trespassing in this plantation will be shot":—**Held:** a copy of that which was painted on the board might be given in evidence, without notice to produce the original board.—*BARTHOLOMEW v. STEPHENS* (1839), 8 C. & P. 728, N. P.

1883. — Posted on wall—Of foreign country.]—Pltf. & deft. agreed by charterparty that pltf.'s ship should after discharging her outward cargo proceed to Galatz or Ibraila, as ordered at Constantinople by the charterer's agents, & there receive a full cargo of wheat; & being so loaded should therewith proceed to Cork, for orders to discharge at a safe port in the United Kingdom, & deliver the same agreeable to bills of lading, & so end the voyage, restraints of princes & rulers, the dangers of the seas, etc., during the said voyage, always mutually excepted. The vessel, after discharging her outward cargo, proceeded to Constantinople; & in consequence of orders, there given by deft.'s agent, the master took the vessel to Ibraila. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat:—**Held:** a copy of a printed placard, with the name of the Russian commander attached to it, & posted on the walls of Ibraila, was admissible as evidence of the prohibition.—*BRUCE v. NICOLOPULO* (1855), 11 Exch. 129; 3 C. L. R.

775; 24 L. J. Ex. 321; 7 L. T. 803; 3 W. R. 483; 156 E. R. 773.

*Annotations:—***Mentd.** *Valente v. Gibbs* (1859), 6 C. B. N. S. 270; *Barker v. McAndrew* (1865), 18 C. B. N. S. 759; *Cohn v. Davidson* (1877), 2 Q. B. D. 455; *The Carrou Park* (1890), 15 P. D. 205.

1881. — Notice in factory—Affixed under statute.]—On the prosecution of the occupier of a factory for allowing a young person employed in the factory to remain in a room in which a manufacturing process was being carried on during the time allowed for meals, contrary to Factory & Workshop Act, 1901 (c. 22), s. 33, secondary evidence is admissible to prove the contents of the notice specifying the times allowed in the factory for meals, which notice has under sect. 32 of above Act to be affixed in the factory, although there has been no notice to produce the original notice.—**OWNER v. BEE HIVE SPINNING CO., LTD.**, [1914] 1 K. B. 105; 83 L. J. K. B. 282; 109 L. T. 800; 78 J. P. 15; 30 T. L. R. 21; 12 L. G. R. 421; 23 Cox, C. C. 626, D. C.

1882. Document handed to judge at previous trial—Whereabouts not traceable—Presumed returned to party.]—Where, on the second trial of a cause, a witness stated that he had, on the argument for the new trial, handed a document to one of the learned judges, & had not since seen it, or been able to find it, secondary evidence was received of its contents, without any search for it having been made at the chambers of the learned judge; the presumption being that his lordship returned it to the party who produced it.—*DEACON v. FULLER* (1833), 6 C. & P. 74, N. P.

1883. All efforts made to procure documents—Previous petition praying production—Refused.]—*Primâ facie*, it must be presumed that the books of a corp., which existed before Municipal Corporations Act, 1865 (c. 76), are in the possession of the new corp., which succeeded them under that Act; but if it be shown that the old corp., before their dissolution, deposited them with a banker, & that from his hands they passed into the master's office of the Ct. of Ch., this rebuts the presumption. In an action brought by the new corp., it appeared that deft. had presented a petition to the Vice-Chancellor to allow the production of these books on the present trial, which petition was opposed by the present pltf., & dismissed with costs:—**Held:** under these circumstances deft. was entitled to give parol evidence of the contents of the books.

In this case, deft. has done all that he can to obtain the books. I do not think it is for pltf. to go into the Ct. of Ch. to oppose the production of books, & then come to the assizes & oppose the reception of secondary evidence because the books are not produced. I shall receive secondary evidence (*GARNEY, B.*).—*LUDLOW CORPN. v. CHARLTON* (1840), 9 C. & P. 242, N. P.

1884. Document withheld by competent authority.]—The ct. will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other cts., when satisfied that the original document is withheld by a competent authority, will admit secondary evidence.—*In the Goods of MANFREDI* (1858), 1 Sw. & Tr. 135; 31 L. T. O. S. 171; 6 W. R. 792; 164 E. R. 663.

MOITRA (1881), 1 L. R. 6 Calc. 720.—**IND.**

c. Fixed notice—Trespass rates.]—Upon the hearing of a charge under Pounds Act, 1874, s. 17, secondary evidence may be given of the trespass rates & charges painted or printed on the board fixed to the gate of the

pound.—*R. v. DUNCAN, Ex p. GRIFFIN* (1837), 13 V. L. R. 509.—**AUS.**

d. All efforts made to procure documents.]—In order to render secondary evidence of a private document admissible it is necessary to prove that all reasonable efforts have been

made to procure the original, even where the person in possession is resident outside the jurisdiction of the ct., unless there are special circumstances to show that such efforts would have been useless.—*BOON v. VAUGHAN & CO., LTD.* (1919), T. P. D. 77.—**S. AF.**

Sect. 5.—Secondary evidence: Sub-sect. 3, A., B.

Documents withheld on ground of privilege.]— See Sub-sect. 3, D. (a), post.

B. Admissions made as to Documents.

1885. Admission admissible against party—Without producing document.]—If in conversation the opposite party states the contents of a written paper, his declaration may be given in evidence, without producing the paper.

They may certainly ask anything that either of plffs. said (GIFFORD, C.J.).—SEWELL & BRETT v. STUBBS & HANCOCK (1824), 1 C. & P. 73, N. P.

1886. ———.]—(1) When issue is joined on the contents of a deed, plff. may give in evidence an admission by deft. of the contents of that deed, without producing the deed itself, or accounting for its non-production.

(2) What deft. or plff. says, is evidence against himself, even though it relates to the contents of a deed; & the party using such evidence need not account for the absence of the deed, nor, supposing that it is in the possession of the other party, give notice to produce it. Such evidence is free from the objection which forms the foundation of the rule, which in general excludes secondary evidence of the contents of written instruments.—SLATTERIE v. POOLEY (1840), 6 M. & W. 664; 11. & W. 18; 10 L. J. Ex. 8; 4 Jur. 1038; 151 E. R. 579.

Annotations:—As to (1) Apld. R. v. Basingstoke (1851), 14 Q. B. 611. *Consd.* Chappell v. Bray (1860), 6 H. & N. 145; Henman v. Lester (1862), 12 C. B. N. S. 776. *Refd.* Vain v. Whitlington (1843), Car. & N. 484; Doe d. Groves v. Groves (1847), 10 Q. B. 486; Ridley v. Plymouth Grinding & Baking Co., Kingsbridge Flour Mill Co. v. Same (1848), 2 Exch. 711; Toll v. Lee (1849), 13 Jur. 614; Pritchard v. Bagshawe (1851), 11 C. B. 459; Whyman v. Gath (1853), 1 W. R. 373; Tupper v. Foulkes (1861), 7 Jur. N. S. 709; Hill v. Nuttall (1864), 17 C. B. N. S. 262; British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. *As to (2) Apld.* Howard v. Smith (1841), 3 Man. & G. 254. *Refd.* Bollenau v. Rutlin (1848), 2 Exch. 665; Boulter v. Peplow (1850), 9 C. B. 493; Murray v. Gregory (1850), 5 Exch. 468; Darby v. Onseley (1856), 1 H. & N. 1; Sanders v. Kameel (1858), 1 F. & F. 356. *Generally.* *Mentd.* Stabbings v. Stokes (1845), 6 L. T. O. S. 123; Plumer v. Brisco (1847), 11 Q. B. 46; Hughes v. Clark (1851), 10 C. B. 905; Dorrett v. Meux (1854), 15 C. B. 142.

1887. ———.]—Examinations before two justices removing a pauper from parish B. to parish W. showed that the pauper was a bastard born, before 1834, in a third parish, C.; that his mother was at the time of his birth settled in W.; that before her confinement the overseers of C. told her that she should not stay there unless a certificate from parish W. was obtained; that after this the overseer of W. took her to affiliate the child, & gave her relief whilst she remained in C.; & that parish W. for six years supported the pauper in C. after the mother had left C. On appeal against the order of removal, the sessions stopped the case, on the ground that the examinations disclosed a *prima facie* birth settlement

in C., & that no certificate from W. to C. was produced, nor any evidence given that such certificate was lost:—*Held*: the conduct of the overseers of W. was evidence of an admission by that parish that there existed such a certificate as was required to settle the pauper in W., for an admission of the effect of a written instrument by a party to a cause superseded the necessity of producing or accounting for such instrument, equally whether the admission was made in words, or was to be inferred from acts.—R. v. BASINGSTOKE (INHABITANTS) (1850), 14 Q. B. 611; 4 New Mag. Cas. 37; 4 New Sess. Cas. 80; 19 L. J. M. C. 97; 14 L. T. O. S. 372; 14 J. P. 75; 14 Jur. 246; 117 E. R. 237.

1888. ———.]—A notice to determine an agreement may be received in evidence, though the agreement has not been put in, where such notice has been acted on by both parties.—R. v. ANNETT (1858), 1 F. & F. 89.

1889. ———.]—Where plff., being ship's husband, received at a general meeting authority from all the owners to repair & lengthen a ship, & contracted in writing with a shipwright for the execution of this work, & deft. being one of the said owners, gave notice to plff. three days after the date of the said contract & the beginning of the said work, that he would not be liable for any expense so incurred, but the said work was nevertheless completed, & deft., on being told the amount paid by plff. for the work, did not object to the same nor inquire about the contract:—*Held*: it was a sufficient admission by deft. that the amount paid was in accordance with the contract, & plff. need not produce the contract.—CHAPPELL v. BRAY (1860), 7 H. & N. 145; 30 L. J. Ex. 24; 3 L. T. 278; 9 W. R. 17; 158 E. R. 60.

Annotation:—Refd. Hill v. Nuttall (1864), 17 C. B. N. S. 262.

1890. What amounts to admission—Memorandum indorsed on copy of deed.]—The following memorandum signed by plff., was indorsed upon the registered copy of a deed of settlement produced by deft.: "We do hereby certify that the within-written deed is the deed of settlement of the U. co., & that, to the best of our knowledge, the particulars therein contained are correctly set forth":—*Held*: the copy was primary evidence against plff. of the contents of the deed.—BOULTER v. PELOW (1850), 9 C. B. 493; 19 L. J. C. P. 190; 14 Jur. 248; 137 E. R. 984; *sub nom.* BOLTER v. BROOKE, BOLTER v. PELOW, 14 L. T. O. S. 466.

Annotation:—Mentd. Doe d. Whitty v. Carr (1850), 16 Q. B. 117.

1891. ——— **Abstract of deed & verifying affidavit—Used by party to support title—In previous proceedings.]—**(1) An abstract & affidavit used by a party upon a reference before the master, to prove title in himself, are admissible evidence against him in a subsequent action.

(2) The *nisi prius* record, showing that the writ

of loss in stating that he had effected no additional insurance:—*Held*: the sworn claim of plff. for loss made upon a policy with another co. was admissible without producing the policy.—HAZARD v. CANADA AGRICULTURAL INSURANCE CO. (1876), 39 U. C. R. 419.—CAN.

1885 iv. ———.]—The production, under a discovery order in an action by D. against J. & H., of a letter from J. to H., is an admission that J. has written that letter, and the ct. will admit secondary evidence of its contents on failure to produce the original at the trial.—DALGLEISH v. ISRAEL (1909), T. H. 229.—S. AF.

PART IV. SECT. 5, SUB-SECT. 3.—B.

1885 i. Admissions admissible against party—Without producing document.]—A copy of an under-lease between deft. & his under-tenant was proved in evidence upon notice given to produce the original:—*Held*: admissible, as against the under-tenant, he having admitted it was a copy, & no objection having been taken to it at the trial.—CONNELL v. POWER (1863), 13 C. P. 91.—CAN.

1885 ii. ———.]—Plff. sued deft. for the price of some fruit trees, & the defence was that they had been purchased by deft., but received to sell, upon commission for plff. Dft. had

given notice to produce "the several documents hereunder specified & all other documents, letters, etc., relating to the matters in question in this cause." The schedule specified all letters, etc., & "particularly certain orders given by deft. to plff. to forward the trees which deft. was to sell for the plff. under the agreement between them, & which orders are dated in or about Mar. 1856":—*Held*: sufficient to let in secondary evidence of a letter written by deft. to plff. in Mar., requiring the trees to be sent by a certain time.—LESLIE v. MORRISON (1868), 16 U. C. R. 130.—CAN.

1885 iii. ———.]—Dfts. pleaded false swearing by plff. in his affidavit

prove otherwise to be so:—*Held*: clearly sufficient.—COMMERCIAL BANK OF CANADA v. GREAT WESTERN RY. Co. (1862), 22 U. C. R. 233.—CAN.

*Sect. 5.—Secondary evidence: Sub-sect. 3, C. & D.
(a) i. & ii.]*

1902. Document retained by foreign government—Land tax assessment rolls.—*DE WALLIS (COUNT) CARE (1848)*, 6 Moo. P. C. C. 216; 12 Jur. 145; 13 E. R. 663, P. C.

1903. — Delivery up refused.—Papers were taken away from deft. by the Federal authorities in America, on the ground that he, deft., was the bearer of Secessionist despatches. The papers were all returned except one agreement, which was sent to Washington & there detained:—*Held*: secondary evidence of this agreement was admissible.—*QUILTER v. JORISS (1863)*, 14 C. B. N. S. 747; 2 New Rep. 323; 11 W. R. 888; 143 E. R. 638; *previous proceedings*, 3 F. & F. 644.
Annotation.—*Mentd.* *Beaufort v. Crawshaw (1860)*, L. R. 1 C. P. 699.

1904. Foreign municipal document—Register of births.—It being proved that the register of births kept at the Mairie at Hyères could not be removed:—*Held*: the contents of the entry of a birth could be proved by a copy the accuracy of which was proved by a witness who had himself compared it with the original.—*BURNABY v. BAILLIE (1889)*, 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125; 5 T. L. R. 556.
Annotations.—*Mentd.* *Evans v. Evans, [1904]* P. 274; *Hensley v. Hensley & Nevlin (1920)*, 122 L. T. 814; *Gaskill v. Gaskill, [1921]* P. 425.

1905. Document in hand of private person—Foreign bill of exchange.—Pltf. declared on a promise by defts., to pay over to him the proceeds of a foreign bill of exchange negotiated by them on his account:—*Held*: he was not bound to produce the bill, but might give parol evidence of its contents.—*HUNT v. ALWYN (1828)*, 1 Moo. & P. 433; 6 L. J. O. S. C. P. 103; *previous proceedings*, 3 C. & P. 284.

1906. — Refusal to deliver up—Purpose for which wanted not stated.—It is no ground for admitting secondary evidence of the contents of a private letter that the person who has possession of the letter is beyond the jurisdiction of the ct. & has refused to deliver it up when requested by a person who did not disclose the purpose for which it was wanted.—*BOYLE v. WISEMAN (1855)*, 10 Exch. 647; 3 C. L. R. 482; 24 L. J. Ex. 160; 24 L. T. O. S. 274; 1 Jur. N. S. 115; 3 W. R. 206; 156 E. R. 598; *subsequent proceedings*, 11 Exch. 360.

Annotations.—*Refd.* *Stowe v. Querner (1870)*, L. R. 5 Exch. 155. *Mentd.* *Osborn v. London Dock Co. (1856)*, 10 Exch. 698; *It v. Austin (1856)*, 25 L. J. M. C. 48; *Tupling v. Ward (1861)*, 30 L. J. Ex. 222; *Bartlett v. Lewis (1862)*, 12 C. B. N. S. 249; *Webb v. East (1879)*, 6 Ex. D. 23.

D. Documents in Hands of Third Person.

(a) Production Refused on Ground of Privilege or Lien.

i. In General.

1907. Whether secondary evidence admissible.—In an ejectment by devisees, it appeared that deft. had mortgaged the premises to B., & had given him the will. At the trial B. was subpoenaed to produce it, & he declined doing so, as it was part of his title:—*Held*: B. was not bound to produce the will, & secondary evidence of the contents was not admissible.—*DOE d. BOWDLER v. OWEN (1837)*, 8 C. & P. 110.

1908. ——A. had purchased at an auction an underlessee's interest in a house, & refused to pay a cheque which he had given for the deposit,

because the ground rent payable to the superior landlord was greater than it was stated to be at the sale:—*Held*: the superior landlord's solr. was not compellable to produce the counterpart of the original lease; & a person who had advanced money on that lease, & held it as equitable mtgee., could also not be compelled to produce the lease itself; but, if both these, on being called as witnesses, refused to produce the lease & counterpart, secondary evidence might be given of the contents of the lease, by calling any person who had seen it, & who neither claimed under it as one of his own title deeds, nor was privileged as an attorney or solr.—*MILLS v. ODDY (1834)*, 6 C. & P. 728, N. P.; *subsequent proceedings (1835)*, 2 Cr. M. & R. 103.

Annotation.—*Dbtd.* *Doe d. Bowdler v. Owen (1837)*, 8 C. & P. 110. In my opinion *Mills v. Oddy* is not law; if the document is in existence in the hands of a third person, you cannot give secondary evidence of its contents (*LORD ABINGER, C.B.*).

1909. — Copy of document—After due notice to produce original.—*LLOYD v. MOSTYN*, No. 2258, *post*.

1910. — — Not vouched to be copy—By party refusing to produce original.—An attorney is not bound to produce, or to answer any questions concerning the nature or contents of, a deed or other document intrusted to him professionally by his client; & the judge has no right to look at the instrument, to see if the objection to produce it or disclose its contents be well founded or not. A paper which the attorney admits to have been delivered out of his office as a copy of the deed, but which he states he is unable of his own knowledge to vouch to be a copy, is not admissible as secondary evidence, upon the attorney's refusal to produce the original.—*VOLANT v. SOYER (1853)*, 13 C. B. 231; 22 L. J. C. P. 83; 20 L. T. O. S. 208; 138 E. R. 1187.

1911. — ——*J*.—Deft., in an action to try a right of fishery, after judgment had been given for pltf., accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter which action was defended at the cost of a predecessor in title of pltf. Pltf. obtained possession of the documents after copies of them had been taken by deft. Deft. having appealed:—*Held*: deft. was not precluded on the ground of privilege from giving secondary evidence of their contents.—*CALCRAFT v. GUEST, [1898]* 1 Q. B. 759; 67 L. J. Q. B. 505; 78 L. T. 283; 46 W. R. 420; 42 Sol. Jo. 343, C. A.

Annotations.—*Consd.* *Ashburton v. Pape, [1913]* 2 Ch. 469. *Refd.* *Goldstone v. Williams, Deacon, [1899]* 1 Ch. 47. *Mentd.* *West Riding of Yorkshire Rivers Board v. Tadcaster R. D. C. (1907)*, 97 L. T. 436.

1912. — — Although obtained fraudulently.—It is no answer to an action brought for an injunction to restrain publication of copies of privileged documents to say that the copies, although improperly obtained, will be wanted in pending proceedings to prove the contents of the original documents, which, owing to the privilege, cannot be produced. P. was bkpt. & his discharge was opposed by, amongst others, pltf. P. obtained by a trick letters which had been written by pltf. to his solr. & were therefore privileged. P. had these letters copied & proposed to use them in the bkpcy. proceedings as secondary evidence of the contents of the letters which, owing to privilege, he could not produce. Pltf. brought an action for an injunction to restrain P. from disclosing the letters or the copies, & an order was made

PART IV. SECT. 5, SUB-SECT. 3.—D. (a) i.

1907 i. Whether secondary evidence admissible.—If the original document cannot be procured on the grounds of public policy, secondary evidence of its contents cannot be given.—*FORAN v. DERRICK (1892)*, 18 V. L. R. 408.—*AUS.*

restraining him from doing so except in the bkpcy. proceedings:—*Held*: the fact that the copies, although improperly obtained, might be admissible as secondary evidence in the bkpcy. proceedings, was no answer to the action, & pltf. was entitled to an absolute injunction without any exception.—*ASHBURTON (LORD) v. PAPE*, [1913] 2 Ch. 469; 82 L. J. Ch. 527; 109 L. T. 381; 57 Sol. Jo. 644; *sub nom.* *ASHBURTON (LORD) v. NOCTON*, 29 T. L. R. 623, C. A.

1913. —.]—(1) Where a written document is in the possession of a witness who is not compellable to produce it, & he refuses to do so, secondary evidence of the contents is admissible.

(2) Where a person, not party to a suit, attends on a common subpoena, & is called as a witness, & refuses to permit the production of a document which his attorney has brought into ct. in obedience to a *subpœna duces tecum*, but which the latter also declines to produce, pltf., having done everything that could be done to make apparent the impossibility of using the primary means of proof, is entitled to resort to secondary evidence of the contents, & is not precluded from so doing by his omission to serve the client with a *subpœna duces tecum*.—*NEWTON v. CHAPLIN* (1850), 10 C. B. 356; 19 L. J. C. P. 374; 15 L. T. O. S. 414; 14 Jur. 1121; 138 E. R. 144. *Annotation*:—*As to* (2) *Refd.* *Volant v. Soyer* (1853), 13 C. B. 231.

—.]—Where a document cannot be produced by reason of privilege, independent secondary evidence of it is admissible.—*R. v. LEATHAM* (1861), 3 E. & E. 658; 30 L. J. Q. B. 205; 3 L. T. 777; 25 J. P. 468; 7 Jur. N. S. 674; 9 W. R. 334; 8 Cox, C. C. 498; 121 E. R. 589.

Annotation:—*Mentd.* *Taylor v. Vergette* (1861), 30 L. J. Ex. 400.

1915. — *Attorney of third person holding deed.*—In action of covenant, the attorney of a third person who holds the deed as such, is not bound to produce it, but pltf. may go into secondary evidence.—*DITCHER v. KENRICK* (1824), 1 C. & P. 161, N. P.

Annotation:—*Consd.* *Hibberd v. Knight* (1848), 2 Exch. 11.

1916. — *Mortgage deed.*—If an attorney of a person not a party to an action having refused at the trial to produce a [mortgage] deed belonging to his client be directed by the judge to give parol evidence of the contents, the parties to the action have no right to object to such evidence going to the jury, even upon the supposition that the judge acted erroneously.—*MARSTON v. DOWNES* (1834), 1 Ad. & El. 31; 3 Nev. & M. K. B. 861; 3 L. J. K. B. 158; 110 E. R. 1119; *previous proceedings*, 6 C. & P. 381, N. P.

Annotations:—*Consd.* *Doe d. Gilbert v. Ross* (1840), 7 M. & W. 102; *Davies v. Waters* (1842), 9 M. & W. 608; *Newton v. Chaplin* (1850), 14 Jur. 1121; *Phelps v. Prew* (1854), 23 L. J. Q. B. 140. *Refd.* *Doe d. Egremont v. Date* (1842), 3 Q. B. 609; *Weeks v. Argent* (1847), 16 M. & W. 817. *Mentd.* *Cleave v. Jones* (1852), 7 Exch. 421.

1917. — *Served with subpoena to produce.*—*DOE d. GILBERT v. ROSS*, No. 1846, *ante*.

1918. — — — —.]—*HIBBERD v. KNIGHT*, No. 2244, *post*.

1919. — — — —.]—If an attorney appears in obedience to a *subpœna duces tecum*, & objects that he holds the deed which he is subpoenaed to

produce for a client, secondary evidence of the deed is admissible, though it is not proved that such client objects, or that he has had notice to produce.—*FISHMONGERS' Co. v. DIMSDALE* (1850), 17 L. T. O. S. 7; *subsequent proceedings* (1852), 12 C. B. 557.

1920. — — — —.]—In an action on a lease by assignees of the reversion, deft., in order to prove that the legal estate was in a third person, called the attorney of the person to produce a mtge. deed under a *subpœna duces tecum*. He refused to produce it, having been directed by his client not to do so. Another witness was then called to give secondary evidence of the deed; & in the course of his examination, it became necessary to identify the deed of which he was speaking with the deed which the other witness had refused to produce. The judge then ordered the first witness to show the outside of the deed to the second; & upon looking at the indorsement the latter identified it:—*Held*: the secondary evidence was properly received, though the client had not been subpoenaed & called as a witness to say whether he desired to withhold the deed.—*PHELPS v. PREW* (1854), 3 E. & B. 430; 2 C. L. R. 1422; 23 L. J. Q. B. 140; 22 L. T. O. S. 285; 18 Jur. 245; 2 W. R. 258; 118 E. R. 1203.

Annotations:—*Refd.* *Boyle v. Wiseman* (1855), 10 Exch. 647; *Brown v. Foster* (1857), 1 H. & N. 736.

1921. — — — —.]—*Client not served with subpoena—No proof of client's objection.*—*FISHMONGERS' Co. v. DIMSDALE*, No. 1919, *ante*.

1922. — — — —.]—*NEWTON v. CHAPLIN*, No. 1913, *ante*.

1923. — — — —.]—*PHELPS v. PREW*, No. 1920, *ante*.

1924. — *No service of subpoena—Document in court.*—If a deed be in the possession of a third person as mtgee., & he having the deed in ct., though not subpoenaed in the cause, decline to produce it, secondary evidence may be given of its contents; but if the deed is not in ct., & he has not been subpoenaed to produce it, it is otherwise.—*DOE d. LOSCOMBE v. CLIFFORD* (1847), 2 Car. & Kir. 448.

Annotation:—*Apld.* *Newton v. Chaplin* (1850), 10 C. B. 356.

1925. — — — —.]—*Document not in court.*—*DOE d. LOSCOMBE v. CLIFFORD*, No. 1924, *ante*.

1926. — *By officer of company in liquidation—Under examination under Companies Act, 1862 (c. 89).*—An officer of a co. which has gone into liquidation is not justified in refusing, in the course of an examination under sect. 115 of above Act to answer questions as to documents belonging to the co. which have come into his possession as an officer of the co., on the ground that such documents have passed into the possession of persons who are in litigation with the co., & have successfully claimed privilege in the litigation in respect of such documents.—*Re LONDON & NORTHERN BANK, Ex p. ARCHER* (1901), 85 L. T. 398; 50 W. R. 202; 18 T. L. R. 206; 46 Sol. Jo. 176, C. A.

Annotation:—*Refd.* *Re London & Northern Bank, Ex p. Haddock* (1902), 86 L. T. 430.

i. *Parol Evidence of Contents by Attorney of Client.*

1927. Inadmissible.—If upon notice given to the attorney of a party to produce an agreement

1917 i. — *Attorney of third person holding deed—Served with subpoena to produce.*—A land-agent is not bound to produce a deed, the property of his principal, though his title be not questioned. If a lease be not produced, though notice to produce was served, the party requiring its pro-

duction may give secondary evidence, whether obtained by accident or otherwise.—*FLOOD v. MORIARTY* (1847), Bl. D. & Osb. 165.—*MORIARTY*.

1917 ii. — — — —.]—*Deeds in court but production refused.*—A solr. who claimed a lien on deeds, was summoned as a witness with a *subpœna duces*

tecum, brought the deeds into ct., but refused to produce them:—*Held*: secondary evidence of their contents was not admissible, the person proposing to give the secondary evidence being liable to pay the costs to the solr.—*A.-G. v. ASHE* (1859), 10 L. Ch. R. 309.—*IR*.

Sect. 5.—Secondary evidence: Sub-sect. 3, D. (a) ii., (b), E. & F.; sub-sect. 4, A., B. & C.; sub-sect. 5, A.]

in his possession, he neglect so to do, he cannot be called as a witness to prove its contents.—*BOTHOMLEY v. USBORNE* (1790), Peake, Add. Cas. 99, N. P.

1928. ———.]—An attorney is not bound to speak as to the particulars of a bill of exchange, when the knowledge of those particulars is only derived from the bill being entrusted to him by his client.—*BRARD v. ACKERMAN* (1804), 5 Esp. 119, N. P.

Annotations:—Consd. Greenhough v. Gaskell (1833), Coop. temp. Brough, 96; *Phelps v. Prew* (1854), 3 E. & B. 430.

1929. ———.]—An attorney is not allowed to give evidence of the contents of a deed in his client's possession, the client refusing to produce it.—*R. v. UPPER BODDINGTON (INHABITANTS)* (1826), 8 Dow. & Ry. K. B. 726; 4 Dow. & Ry. M. C. 233; 5 L. J. O. S. M. C. 10.

1930. ———.]—In an action against a mtgor. the attorney of the mtgee. who has the mtge. deed cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents but he may be asked for what purpose the money was raised & secondary evidence may be given of the contents of the mtge. deed.—*MARSTON v. DOWNES* (1834), 6 C. & P. 381, N. P.; *subsequent proceedings*, 1 Ad. & El. 31.

Annotations:—Consd. Hibberd v. Knight (1848), 2 Exch. 11; *Newton v. Chaplin* (1850), 14 Jur. 1121; *Phelps v. Prew* (1854), 23 L. J. Q. B. 140. *Refd.* Boyle v. Wiseman (1855), 10 Exch. 647.

1931. ———.]—The attorney for deft., who was also trustee for him under a certain deed, having been called as a witness, refused to produce the deed on the requisition of pltf.'s counsel, alleging his client's privilege. It further appeared, that he had not read the deed until the day of the trial, when, at the suggestion of his counsel in consultation, he obtained it from deft., & ascertained its contents in their presence & for their information:—*Held:* the witness, having become acquainted with the deed by reason of his professional character, was not bound to produce it, or state its contents, & where a witness was not bound to produce a deed, he was not bound to give parol evidence of its contents.—*DAVIES v. WATERS* (1842), 1 Dowl. N. S. 651; 9 M. & W. 608; 11 L. J. Ex. 214; 152 E. R. 257.

Annotation:—Refd. Tournier v. National Provincial & Union Bank of England, [1924] 1 K. B. 461.

1932. ———.]—*HIBBERD v. KNIGHT*, No. 2244, *post*.

1933. ———.]—*VOLANT v. SOYER*, No. 1910, *ante*.

1934. Where evidence given—By direction of court—Right of parties to object.—*MARSTON v. DOWNES*, No. 1910, *ante*.

1935. ———. Voluntarily—Receivable.—*HIBBERD v. KNIGHT*, No. 2244, *post*.

(b) No Ground for Withholding Production.

1936. Secondary evidence inadmissible.—The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of that document.—*JESUS COLLEGE v. GIBBS* (1834), 1 Y. & C. Ex. 145; 160 E. R. 59; *subsequent proceedings* (1835), 1 Y. & C. Ex. 445.

Annotation:—Refd. *Phelps v. Prew* (1854), 3 E. & B. 430.

1937. ———. Remedy punishment for contempt.—Where a witness served with a *subpoena duces tecum* to produce a written document either does not attend, or does attend & refuses to produce the document, not on the ground of privilege, the party seeking to avail himself of the document cannot give secondary evidence of its contents; the

remedy is to punish the witness for a contempt.—*R. v. LLANFAETHLY (INHABITANTS)* (1853), 2 E. & B. 940; 2 C. L. R. 230; 23 L. J. M. C. 33; 22 L. T. O. S. 117; 18 J. P. 8; 17 Jur. 1123; 2 W. R. 61; 118 E. R. 1018.

Annotation:—Consd. *Phelps v. Prew* (1854), 3 E. & B. 430.

E. Lost or Destroyed Documents.

See Sub-sect. 5, *post*.

F. Documents in Possession of Adversary—Notice to Produce.

See Sub-sect. 6, *post*.

SUB-SECT. 4.—NATURE OF ADMISSIBLE SECONDARY EVIDENCE.

A. In General.

1938. General rule.—(1) If you cannot prove a deed by producing it you may produce the counterpart; if you can't produce the counterpart you may produce a copy even if you cannot prove it to be a true copy: if a copy cannot be produced you may go into parol evidence of the deed (*LORD MANSFIELD, C.J.*)

(2) If all the subscribing witnesses are dead, comparison of hands is all the evidence which can be given (*LORD MANSFIELD, C.J.*).—*LUDLAM d. HUNT* (1774), Lofft, 362; 98 E. R. 695.

1939. Parol evidence — Rector's books.—Rector's books are not to be proved *in voce*, & leave to put off the cause in order to prove them by interrogatories will be refused.—*LAKE v. SKINNER* (1819), 1 Jac. & W. 9; 37 E. R. 278.

Annotation:—Consd. *Cox v. Allingham* (1821), Jac. 337.

1940. ———. Declaration as to contents—Made by party in hearing of witness.—A party to the action, being called as a witness on his own behalf, may be asked in cross-examination the contents of a letter which he has written, without producing the letter.

If a question arises as to the contents of a written instrument, & you can get a witness to come & swear that he heard pltf. say that it contained such & such expressions, that is good evidence of the contents of the document without producing it; & if pltf. is himself in the box, you may ask him as to the contents of the document, & his answer will be as good evidence as any previous statement. He may, perhaps, refer to the deed for better information, & perhaps, the judge might say that the document ought to be produced (*POLLOCK, C.B.*).—*FARROW v. BLOMFIELD* (1859), 1 F. & F. 653, N. P.

Lost or destroyed documents.—*See* Sub-sect. 5, *post*.

Documents not produced after notice.—*See* Sub-sect. 6, *post*.

Documents not produced on ground of privilege—Held by attorney for client—Parol evidence by attorney.—*See* Sub-sect. 3, D. (a) (ii.), *ante*.

B. Copies.

See Sect. 9, *post*.

Lost or destroyed documents.—*See* Sub sect. 5, E. (b), *post*.

Documents not produced after notice.—*See* Sub-sect. 6, C., *post*.

C. Duplicates, Abstracts, etc.

1941. Duplicate originals—Demand for copy of distress warrant—Action for distress.—If pltf.'s attorney previous to bringing an action for a distress under the warrant of a magistrate, make

out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to Constables Protection Act, 1750 (c. 44), s. 6, & sign both for his client, & then deliver one to deft., the other will be sufficient evidence at the trial.—*JORY v. ORCHARD* (1799), 2 Bos. & P. 39; 120 E. R. 1143.

Annotations :—*Consd.* Anderson v. May (1800), 2 Bos. & P. 237; R. v. Whitley (1908), 72 J. P. 272. *Refd.* Philipson v. Chase (1809), 2 Camp. 110.

1942. — *By copying machine.*—The duplicate of a writing taken from the autograph at one impression, by means of a copying machine, cannot be read in evidence as an original.—*NODIN v. MURRAY* (1812), 3 Camp. 228, N. P.

1943. — *Machine worked by witness.*—A copy of a document taken by a machine, worked by the witness who produces it, is admissible as secondary evidence.—*SIMPSON v. THORETON* (1842), 2 Mood. & R. 433, N. P.

Annotation :—*Consd.* Smith v. Blakey (1867), 8 B. & S. 157.

1944. — *Company prospectus—Original with registrar.*—In all actions arising out of or connected with a joint stock co., it is absolutely necessary that pltf. should prove that the co. has been registered in accordance with 7 & 8 Vict. c. 110.

In an action by the solr. of a railway co. against a member of the managing committee, copies of the prospectus returned to the Register Office, under the Act, are not admissible as duplicate originals.—*GRESHAM v. POLHILL* (1847), 9 L. T. O. S. 178, N. P.

1945. — *Demand—In action of trover.*—In trover a written demand of the goods signed by pltf., & attested by a subscribing witness, was served on deft. :—*Held* : at the trial, a duplicate original of this could not be given in evidence as a demand by pltf., without calling the subscribing witness, but the judge would allow it to be read as a paper delivered to deft., though not as sent by pltf., in order to allow pltf., if he could, to show anything that deft. had said or done in consequence of it.—*BRIANT v. DORMER* (1848), 2 Car. & Kir. 602, N. P.

1943. Counterpart—Of settlement.—Counterpart of a settlement was admitted sufficient evidence of the settlement, & a conveyance decreed pursuant to it.—*EYTON v. EYTON* (1700), Prec. Ch. 116; 2 Vern. 380; 24 E. R. 50; *subsequent proceedings* (1706), 4 Bro. Parl. Cas. 149, H. L.

1947. — *Not unless old.*—A counterpart is not evidence, unless old, or in case of a fine.—*ANON.* (1704), 1 Salk. 287; Holt, K. B. 301; 91 E. R. 254.

Annotation :—*Refd.* Ex p. Robson (1753), Amb. 180.

1948. — *Demise.*—In an action for rent upon an indenture of lease deft. pleaded *non demisit* :—*Held* : the counterpart was sufficient evidence of the demise.—*HOUGHTON v. KENIG* (1856), 18 C. B. 235; 25 L. J. C. P. 218; 20 J. P. 470; 139 E. R. 1358.

Annotation :—*Refd.* Burchell v. Clark (1876), 25 W. R. 334.

1949. Abstract—Deed.—*PETERBOROUGH (EARL) v. GERMAINE*, No. 2747, *post*.

1950. — *Abstract of a deed was not admitted as secondary evidence of the deed.*—*LEWIS v. LEATHAM* (1842), 11 L. J. Ch. 176; 6 Jur. 501.

PART IV. SECT. 5, SUB-SECT. 4.—C.

1943 I. Abstract—Deed.—A memorial is good secondary evidence of such parts of the deed as are transcribed in it, without calling the subscribing witness; & it is no objection for this purpose that the additions of the subscribing witnesses to the deed are not inserted in it.—*DOE d. ENGLAND*

v. CRYSDALE (1841), 6 O. S. 254.—*CAN.*

1949 II. — *Abstract of a deed.*—A registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mtge., describing it, *habendum* "to have & to hold the mortgaged premises unto assignee, his heirs & assigns, etc." subject to the provisos & conditions in the mtge."

1951. Draft—Deed.—Drafts of deeds, of which one was objected to on the ground of its being insufficiently proved, & the other on the ground that the deed belonged to deft.'s title, were admitted in evidence.—*SUTCLIFFE v. JAMES* (1879), 40 L. T. 875; 27 W. R. 750.

1952. Letter-book.—*STURGE v. BUCHANAN*, No. 3753, *post*.

SUB-SECT. 5.—LOST OR DESTROYED DOCUMENTS

A. In General.

1953. Rules at law & in equity the same—Except where deed wilfully destroyed.—The intent of the first testator plainly was to include this copyhold; but to make it pass at law it ought to have been surrendered. The presumption, that it was, from the ct. rolls being burnt, is in no matter of law. Nor will this ct. go upon presumption of evidence, any more than a ct. of law. Although, if deeds or writings are destroyed by a party, who would take benefit thereof, a ct. of equity *in odium spoliatoris* will go farther than a ct. of law. But if it be a casual destruction, the evidence is the same here as at law (LORD HARDWICKE, C.).—*COOKES v. HELLIER* (1749), 1 Ves. Sen. 231; 27 E. R. 1003.

Annotation :—*Mentd.* Dillon v. Parker (1818), 1 Swan. 359.

1954. — (1) On loss of a deed same rule of evidence here as at law.

(2) Decree wherein present pltf's. & defts. were parties, read as evidence, though not conclusive. So of depositions in that cause where the bill & decree was for performance of trusts, settling the rights of all.

(3) The loss only can be made out by circumstances; destruction of deed by affidavit.

Though destruction of a deed may be proved by affidavit, the loss of one cannot commonly be so, but only can be made out by circumstances; as that inquiry has been made, & search in the proper place & hands, & in vain (LORD HARDWICKE, C.).—*ASKEW v. POULTERERS CO.* (1750), 2 Ves. Sen. 89; 28 E. R. 59.

1955. — The same rule at law & in equity as to the loss of a deed.—*CLAVERING v. CLAVERING* (1751), 2 Ves. Sen. 232; 28 E. R. 150.

1956. Lost at time of pleading—Found before trial—Admissible.—A deed alleged in a plea to be lost by time & accident may be given in evidence, if having been lost at the time of pleading it is found before trial.—*HAWLEY v. PEACOCK* (1811), 2 Camp. 557, N. P.

1957. Admissibility of secondary evidence—Lost endowment.—A vicar, unable to produce an endowment, has to support his claim by secondary evidence, & if that secondary evidence furnishes a ground for inferring that the missing endowment contained a gift to the vicar, of all small tithes, there are authorities for decreeing to him not only the tithes which have actually been received by him, but all other tithes of that class, either neglected or of modern introduction. The cases in which the inference has been made, have been, generally, cases in which the vicar has received the whole small tithes actually rendered, & in which it did not appear that any other person

which deed poll or indorsement by way of assignment, is witnessed, etc., was offered as evidence of the endowment :—*Held* : sufficient.—*Re MARR* (1888), 16 O. R. 391.—*CAN.*

I. Letters—Press copies.—*HARRISON v. SMITH* (1869), 6 W. W. & A. B. 182.—*AUS.*

Sect. 5.—Secondary evidence: Sub-sect. 5, A., B.

had received any tithes of that class. Such a usage has been supposed to warrant the presumption that the endowment bestowed upon the vicar all small tithes, in general words.—*MASTERS v. FLETCHER* (1830), 1 You. 25; 159 E. R. 891.

Annotations.—*Folld.* *Clee v. Hall*, *Godson v. Hall*, *Wheeler v. Hall* (1840), 7 Cl. & Fin. 744. *Refd.* *Salkeld v. Johnstone* (1842), 11 L. J. Ch. 201.

1958. ———.]—To a vicar's bill for an account of all small tithes, debts. answered that the right to all tithes, as well small as great, became vested in the rector, & in the owners of the lands by grants & conveyances, & that they & their tenants held the lands, with the tithes, or free from all tithes whatsoever; but that some occupiers paid annually to the vicar, in respect of their houses, certain small sums in the name of "privy tithes" which debts. alleged were personal tithes, & not compositions for small tithes. The vicar, unable to produce an endowment, gave secondary evidence showing that the vicarage was endowed generally with small tithes. There was no evidence that any small tithes were ever paid to or claimed by the rector, or the persons who become entitled to the rectory:—*Held*: (1) debts., after failing to show title to the small tithes in themselves or the owners of the lands, could not be heard to say that the small payments in the name of privy tithes were compositions.—*CLEE v. HALL*, *GODSON v. HALL* (1840), 7 Cl. & Fin. 744; *West*, 148; 7 E. R. 1252, H. L.; *affy.* *S. C. sub nom.* *HALL v. GODSON* (1830), 2 Y. & C. Ex. 153.

1959. ———.]—*Bill of exchange*.—On opening the commission, the debt of A., petitioning creditor, was established on two bills of exchange, one of which was dishonoured & the other undue; & the adjudication took place. The running bill was lost immediately afterwards. The commission being disputed at law by a party, whom the assignees sued in trover:—*Held*: it was sufficient to prove the existence of petitioning creditor's debt, giving secondary evidence of the bill, at the date of the commission.—*POOLEY v. MILLARD* (1831), 1 Cr. & J. 411; 1 Tyr. 331; 9 L. J. O. S. Ex. 114; 148 E. R. 1483.

1960. ———.]—Upon a plea of *non acceptavit* in an action by indorsee against the acceptor of a bill of exchange, pltf. having proved that the bill was destroyed:—*Held*: secondary evidence of its contents was admissible.—*BLACKIE v. PIDDING* (1848), 6 C. B. 196; 11 L. T. O. S. 203; 136 E. R. 1225.

Annotation.—*Folld.* *Charnley v. Grundy* (1854), 14 C. B. 608.

1961. ———.]—*Assignment in bankruptcy*.—In an action by bkpt. against his assignees to try the validity of his commission:—*Held*: the assignment having been lost before it had been entered of record pursuant to 6 Geo. 4, c. 16, s. 96, second-

ary evidence of its contents might be given.—*GILES v. SMITH* (1834), 1 Cr. M. & R. 462; 5 Tyr. 15; 4 L. J. Ex. 17; 149 E. R. 1161.

1962. ———.]—*Written authority to pay money*.—Pltf. sought to recover £50 from deft. on the account stated, & gave evidence of an admitted account between them, in which that sum appeared as an item against deft., & of payment of interest in respect of it, & promises to pay the principal. Deft. proved that the debt arose out of a written undertaking on his part, which he had obtained from pltf. & destroyed, "to remit pltf. £50, which sum he, deft., held of H., & by him authorised to pay" pltf.; & called H., who swore that he never authorised deft. to pay the money for him, & that he had since settled all his accounts with pltf.:—*Held*: deft. was not precluded from giving his evidence, & if believed, it entitled him to a nonsuit.—*PIERCE v. EVANS* (1835), 2 Cr. M. & R. 294; 1 Gale, 265; 5 Tyr. 1042; 4 L. J. Ex. 306; 150 E. R. 128.

Annotation.—*Mentd.* *Camillo Tank S.S. Co. v. Alexandria Engineering Works* (1921), 38 T. L. R. 134.

1963. ———.]—*Lost office copy of decree in chancery*.—

(1) In support of an alleged custom of a manor, that the lord was only entitled to take one heriot from each tenant, whatever number of tenements he might hold:—*Held*: an old decree of the Ct. of Ch., in a suit between copyholders & the lord, & establishing the custom, produced by a witness who succeeded his brother as lord of the manor, & who stated that he found it amongst his brother's papers, was admissible in evidence against a subsequent lord of the manor, as a copy of the original, for which an ineffectual search had been made.

(2) Secondary evidence is admissible of an office copy of the decree delivered by a prior lord to a tenant, when asked by him for evidence to prove the customs of the manor, when a proper but ineffectual search for it has been made.—*PRICE v. WOODHOUSE* (1849), 3 Exch. 616; 18 L. J. Ex. 271; 13 L. T. O. S. 7; 13 J. P. 636; 154 E. R. 991.

1964. ———.]—*Letter*.—*R. v. JOHNSON* (1826), 2 C. & P. 415, N. P.

1965. ———.]—*Allotting shares*.—In an action by an allottee of shares in a projected joint-stock co. to recover back the deposit, pltf. gave secondary evidence of the letter of allotment, the original having been lost, but did not produce the letter of application.

Pltf. proved that the money was paid upon some contract, for he gave secondary evidence, as he was entitled to do, of the letter of allotment (*PATTESON, J.*).—*CHAPLIN v. CLARKE* (1849), 4 Exch. 403; 6 Ry. & Can. Cas. 193; 154 E. R. 1269; *sub nom.* *CLARKE v. CHAPLIN*, 13 L. T. O. S. 286, Ex. Ch.

Annotations.—*Mentd.* *Moore v. Garwood* (1849), 4 Exch. 681; *Ward v. Londeborough* (1852), 12 C. B. 252; *Londeborough v. Mowatt* (1854), 18 Jur. 1094; *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

PART IV. SECT. 5, SUB-SECT. 5.—A.

1964 i. *Admissibility of secondary evidence*.—*Letter*.—Secondary evidence of a contract admitted without proof of a search at the dead letter office for a lost letter.—*WILLIAMS v. GREY* (1874), 23 C. P. 561.—*CAN.*

1964 ii. ———.]—A witness swearing that he believes a letter was put into the post office with his other letters may read a copy of it from his letter book.—*WHYTE v. CLARK* (1817), 1 Murr. 233.—*SCOT.*

document.]—Secondary evidence of the contents of an unstamped document which ought to have been stamped is inadmissible.

—*LOUIS v. GRIGG* (1913), 14 S. R. N. S. W. 78; 30 N. S. W. W. N. 17.—*AUS.*

h. ———.]—Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped.—*ARUNACHELUM CHETTY v. OLAGAPPAN CHETTY* (1868), 4 Mad. 312.—*IND.*

k. ———.]—*Necessity for proof of search*.—Copies were received without proof of a search for the originals:—*Held*: they had been improperly received in evidence.—*FALMOUTH (CHURCHWARDENS) v. VAUGHAN* (1870), 11 N. S. R. (2 R. & C.) 438.—*CAN.*

l. ———.]—Where an ancient

allotment book of a township referred to a writ of partition & plans & what purported on their faces to be copies of such plans, came out of the proper custody & had for a long period of time been recognised by the proprietors of the township as muniments of their title:—*Held*: they would be receivable in evidence after proof that search had been made for the originals & that they could not be found.—*SONGSTER v. PAYZANT* (1858), 2 Thom. 408.—*CAN.*

— *Document partly destroyed*.—If part of an original document be lost or accidentally destroyed, the part which is preserved may be

1966. — **Bill of sale.**—TURNER v. DENT (1852), 19 L. T. O. S. 160.

1967. — **Promissory note.**—Upon an issue on a plea that debt did not make the note declared on:—**Held:** it appearing that the note was lost, secondary evidence might be given of its contents.—CHARNLEY v. GRUNDY (1854), 14 C. B. 608; 2 C. L. R. 822; 23 L. J. C. P. 121; 23 L. T. O. S. 67; 18 Jur. 653; 2 W. R. 372; 139 E. R. 250.

Annotation:—**Reid.** M'Donnell v. Murray (1860), 1 L. T. 498.

1968. — **Lost will.**—(1) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.

(2) Declarations, written or oral, made by testator, both before & after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents.—SUGDEN v. ST. LEONARDS (LORD) (1876), 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 372; 21 W. R. 860, C. A.

Annotations:—**As to (1) Consd.** Woodward v. Goulstone (1886), 11 App. Cas. 469. **Apld.** Read v. Price, [1909] 2 K. B. 724. **Consd.** In the Goods of Phibbs (1917), 86 L. J. P. 81. **Reid.** Harris v. Knight (1890), 15 P. D. 170; Gill v. Gill, [1909] P. 157. **As to (2) Foll.** Gould v. Lakes (1880), 6 P. D. 1. **Consd.** Atkinson v. Morris, [1897] P. 40. **Reid.** Re Sykes, Drake v. Sykes (1907), 23 T. L. R. 747; Re Jessop, [1924] P. 221. **Generally, Mentd.** Krehl v. Burrell (1878), 10 Ch. D. 420; Gardiner v. Courthope (1886), 12 P. D. 14; Clark v. Dixon (1891), 8 T. L. R. 11; Allan v. Morrison, [1900] A. C. 604.

1969. — ———. —I am of opinion that statements made by a testator after making of the will not merely with reference to the contents of the lost instrument but with reference to the constituent parts of it are admissible (HANNEN, P.).—GOULD v. LAKES (1880), 6 P. D. 1; 49 L. J. P. 59; 43 L. T. 382; 44 J. P. 698; 29 W. R. 155.

Annotations:—**Reid.** In the Goods of Hutchison (1902), 18 T. L. R. 706; In the Estate of Bryan, [1907] P. 125; In the Estate of Jessop (1924), 40 T. L. R. 800.

See, also, EXECUTORS.

1970. — **Without notice to produce.**—R. v. SPRAGGE (prior to 1811), cited 14 East, 276; 104 E. R. 607.

Annotation:—**Reid.** How v. Hall (1811), 14 East, 274.

1971. — ———. —R. v. HAWORTH, No. 2239, post.

1972. — ———. —R. v. HOOD (1830), 1 Mood. C. C. 281.

Annotations:—**Mentd.** Hoyle v. Bush (1840), Drinkwater, 15; Howard v. Gosset (1845), 10 Q. B. 359; Hodgins v. Poc (1867), 16 W. R. 224; Rafferty v. The People (1873), 12 Cox, C. C. 617.

1973. — ———. —(1) Upon an indictment

admitted in evidence & secondary evidence given to the remainder.—DOR v. JACK (1849), 1 All. 476.—**CAN.**

n. — **Lost deed.**—In dower, the loss of most of the deeds affecting the title was proved, or rather presumed, from the burning of the house of the owner in fee, but a deed was proved to demandant's husband & brother as joint tenants, by production of a memorial from the registry office, & the death of demandant's husband before his brother & co-joint tenant was also proved.—**Held:** secondary evidence of the deeds was admissible.—HASKILL v. FRASER (1862), 12 C. P. 383.—**CAN.**

o. — ———. —DOYLE v. DULHANTY (1890), 23 N. S. L. 78.—**CAN.**

p. — **Without proof of execution.**—Secondary evidence of the contents of a document requiring execution, which can be shown to have been lost in proper custody, & to have been lost, & which is more than thirty years old, may be admitted without proof of the execution of the original.—KHETTER CHUNDER MOOKEWEE v. KHETTER PAUL SREKRETUNO (1880), 1 L. R. 5 Calc. 886.—**IND.**

q. — **Acknowledgment of debt.**—

against principal & receiver, where it appears that goods are found on the receiver's premises, which have been taken from prosecutor's premises, letters between the parties are admissible in evidence for the purpose of showing guilty knowledge, notwithstanding they are not directly connected with the charge in question.

(2) **Semble:** it is not competent to prosecutor, in such a case, to give parol evidence on the directions upon certain hampers sent by the principal to the receiver, who lived at a distance, & which it was alleged contained a part of the stolen property, without having given notice to produce them; unless from the facts of the case the presumption is stronger that they are destroyed than that they are in existence.—R. v. HINLEY (1843), 2 Mood. & R. 524; 2 L. T. O. S. 287; 1 Cox, C. C. 12.

B. Proof of Existence of Original.

1974. **Necessity for.**—The rule of evidence is the same in equity as at law; the proper evidence of surrenders, or title to a copyhold, is the ct. roll or a copy of it, or it must appear they existed once, & are lost, etc., & so make way to go into parol evidence (LORD TALBOT, C.).—ANDREWS v. WALLER (1733), 2 Eq. Cas. Abr. 414; 6 Vin. Abr. 237, pl. 12; 22 E. R. 351, L. C.

Annotation:—**Mentd.** Chapman v. Gibson (1791), 3 Bro. C. C. 229.

1975. — **Licence for voyage.**—When a ship insured is captured in a voyage to an enemy's country, & the British licence legalising the voyage is lost, to show that she had such a licence, it is necessary to prove the loss of the paper purporting to be a licence put on board the ship, & to produce examined copies of the Ord. in Council for granting the licence, & of the copy of the licence preserved in the Secretary of State's office.—EYRE v. PALSgrave (1811), 2 Camp. 605, N. P.

1976. — **Proof of genuineness.**—Where an original note is lost, & a copy of it is offered in evidence, you must show the original note was genuine before you will be allowed to read the copy.—GOODIER v. LAKE (1737), 1 Atk. 446; 26 E. R. 284.

C. Proof of Loss or Destruction.

1977. **Necessity for.**—ANDREWS v. WALLER, No. 1974, ante.

PART IV. SECT. 5, SUB-SECT. 5.—C.

1977 i. **Necessity for.**—Where a note had been indorsed to an attorney's clerk in the course of business, & mislaid:—**Held:** secondary evidence of it could not be given, without calling the clerk, although the attorney was called & swore to his belief of its loss.—GROVER v. CLARKE (1836), 5 O. S. 208.—**CAN.**

1977 ii. ———. —Before a substituted certificate will be admitted in evidence there must be proof of loss of the original.—PAVIER v. SNOW (1899), 7 B. C. L. 80; 1 M. M. Cas. 384.—**CAN.**

1977 iii. ———. —The loss of a bond traversed, evidence may be given of its contents without proving the loss.—MIDLAND DISTRICT COMMERCIAL BANK v. MURHEAD (1855), 4 C. P. 434.—**CAN.**

1977 iv. ———. —In ejectment plff. claimed under a deed from the patentee of the Crown to his father. The deed was not produced:—**Held:** the evidence, set out in the report, was sufficient to prove its existence, & its having been subsequently burned.—

An original account book containing an acknowledgment of a debt had been filed in ct., & subsequently lost whilst in ct.:—**Held:** secondary evidence of such acknowledgment might be given, notwithstanding Limitation Act, s. 19.—WAJBUN v. KADIR BUKSH (1886), 1 L. R. 13 Calc. 292.—**IND.**

PART IV. SECT. 5, SUB-SECT. 5.—B.

r. **Necessity for—Judgment nunc pro tunc—Lost roll.**—SHEDDEN v. SMITH (1827), 1 N. B. R. (Chp.) 136.—**CAN.**

s. ———. —The ct. being of opinion that the evidence sufficiently established the existence at one time of a missing deed, refused the relief sought.—JOHNSON v. SOVEREIGN (1878), 25 Gr. 434.—**CAN.**

t. ———. —If an officer of a co. on his examination states that he does not know whether or not certain documents exist which, by the rules of the co. should be in existence, he will be ordered to inquire & obtain the information necessary to enable him to answer fully & explicitly.—BAIN v. CANADIAN PACIFIC RY. Co. (1905), 15 Man. L. R. 544.—**CAN.**

Sect. 5.—Secondary evidence: Sub-sect. 5, C. & D. (a).]

1978. —.]—Parol evidence not admitted of the purport of written evidence, without showing it was lost.—*BLIEDSTYN v. SEDGWICK* (1730), *Lee temp. Hard.* 304; 95 E. R. 196, L. C.

1979. —.]—Evidence of the contents of a deed destroyed, & of the destruction of it, admitted.

There are several rules by which evidence even parol may be given of the contents of a deed. It is ground sufficient to show that the deed is in the hands of the opposite party & that he had notice to produce it & does not. Another ground is to give reasonable account of the deed being lost or destroyed (*LORD HARDWICKE, C.*).—*SALTERN v. MELHUISE* (1754), *Amb.* 247; 27 E. R. 165, L. C.

—*Mentd.* *Dillon v. Coppin* (1839), 4 My. & Cr.

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1980. —.]—In order to give evidence of an instrument as lost, you must prove such an instrument did once exist; you must prove contents; & you must prove destruction, or loss. . . . But it is not necessary to prove actual present existence by the deed itself; which, if you could do, you would generally prove contents but you must give reasonable ground to the ct. to believe its once existence. Neither need you prove authentically the contents; for that would imply power of production (*per CUR.*).—*TYSEN v. CLARKE* (1774), *Lofft*, 496; 3 Wils. 541; 98 E. R. 766.

1981. —.]—*CLOSMADREUC v. CARRET*, No. 2576, *post*.

1982. —.]—A. purchased & transferred £1,000 stock in the name of her niece & wrote her a letter stating that she had done so, & that she intended it for the niece's benefit. In the letter A. enclosed a bank power which she stated was to enable her to receive the dividends for her life, which power she requested the niece to execute & return to her, & also to destroy the letter; both of which the niece accordingly did. It afterwards turned out that the bank power authorised A. to sell out the stock as well as receive the dividends. It appeared that A. had always been very kind to the niece, & by her will made before the transfer had given her an annuity of £30. The contents of the letter were proved by the niece & by a third person, to whom she had shown it:—*Held*: the

destruction of the letter being satisfactorily accounted for, the ct. would receive secondary evidence of its contents, & the intention to benefit the niece was sufficiently clearly shown to rebut the general presumption that the stock still belonged to A., although the case could not be regarded as one of an adopted child.—*BEECHER v. MAJOR* (1865), 2 Drew. & Sm. 431; 6 New Rep. 284; 12 L. T. 562; 13 W. R. 853; 62 E. R. 684; *sub nom.* *BEEDEN v. MAJOR*, 11 Jur. N. S. 537; *affd.*, 6 New Rep. 370, L. C.

1983. —.]—An ante-nuptial written promise was made by the husband to settle upon his wife £10,000, & to leave her one-half of his property by his will:—*Held*: it would be enforced after the husband's death, although the letters containing such promise had been lost, the existence & substance of the letters being clearly established by the evidence.—*GILCHRIST v. HERBERT* (1872), 26 L. T. 381; 20 W. R. 348.

1984. Proof of actual fact of loss.—Not necessary.]—Where a deed has been lost, it is not necessary to prove the actual fact of the loss. A policy had been mortgaged to secure a debt, & the deed was missing after the death of the mtgee., but had been in existence a short time before:—*Held*: the ct. refused to assume that the mtgee. had cancelled the deed when *in extremis*, & allowed secondary evidence of its existence.—*ABINGTON v. GREEN* (1866), 14 W. R. 852.

1985. Sufficiency of — Reasonable proof.]—*SALTERN v. MELHUISE*, No. 1979, *ante*.

1986. — **Depends on importance of document.]**—*FREEMAN v. ARKELL*, No. 1870, *ante*.

1987. — **Best available evidence.]**—To let in secondary evidence, the best evidence of loss of the original document, that the case admits of, ought to be given. If a party has delivered over a letter to his daughter, & previous to the trial a witness has made diligent search for it, assisted by the daughter, & could not find it, this is not sufficient evidence of loss to let in proof of its contents without calling the daughter. But if the party had kept it in his own custody, & had set a person to search, who could not find it in any of the places where letters were kept, that would be sufficient.—*PARKINS v. COBBET* (1824), 1 C. & P. 282, N. P.

1988. — **Lost forged document.]**—If the forged writing be not produced at the trial of the forger thereof, the best proof that can be given

MCCARTHY v. AIRBUCKLE (1879), 29 C. P. 529.—*CAN.*

1977 v. —.]—The fact of destruction of a message delivered by depts. to a telegraph co. was not shown & though secondary evidence of contents was given by depts., it was inadmissible, & there was therefore no evidence that transcript delivered to ptfs. was incorrect.—*FLYNN v. KELLY* (1906), 12 O. L. R. 440; 8 O. W. R. 120.—*CAN.*

1977 vi. —.]—Where a statement of the contents of a written document is made by counsel & accepted by both sides as a correct version, although there is no evidence of its loss or destruction, the ct. must construe its meaning in the same manner as if it had been produced.—*O'REGAN v. CANADIAN PACIFIC RY. CO.* (1912), 41 N. B. R. 347; 11 E. L. R. 457.—*CAN.*

1977 vii. —.]—A registered copy, in the absence of satisfactory evidence of the destruction of the original bond, is not admissible as secondary evidence.—*ABBAS ALI KHAN v. YADEEM IHAM REDDY* (1843), 3 Moo. Ind. App. 156.—*IND.*

1977 viii. —.]—A. denied the execution of a bond, & it was not produced

by ptff., who, having served B. with notice to produce, tendered secondary evidence of its contents. B. was not examined as a witness, & no evidence was given of the loss or destruction of the bond:—*Held*: secondary evidence was not admissible.—*WOMESH CHUNDER GHOSH v. SHAMA SUNDARI BAI* (1881), 1 L. R. 7 Calc. 98.—*IND.*

1977 ix. —.]—The destruction or loss of documents alleged by depts. to have been destroyed not being proved:—*Held*: their non-production placed them under the recognised prohibitions of the law of evidence.—*RAM PRASAD v. RAOHUNANDAN PRASAD* (1885), 1 L. R. 7 All. 738.—*IND.*

1977 x. —.]—The loss or destruction of a document not having been proved, secondary evidence admitted under Indian Evidence Act, s. 65 (c).—*KRISHNA KISHORI CHHOWDRANI v. KISHORI LAL ROY* (1887), 1 L. R. 14 Ind. App. 71; 1 L. R. 14 Calc. 486.—*IND.*

1977 xi. —.]—Before evidence of the loss of a deed, evidence of the contents of it cannot be given.—*BAXTER v. CLEMENTS* (1787), *Vern. & Ser.* 263.—*IR.*

1977 xii. —.]—The loss or destruc-

tion of the will not being alleged or proved the ct. refused to give probate of its contents.—*JAMESON v. LEITCH* (1842), *Milw.* 683.—*IR.*

1977 xiii. —.]—*Simble*: a memorial of a landed estates ct. conveyance lodged in the registry of deeds being a duplicate of the original conveyance, may be received in evidence without proof of the loss of the original.—*STAPLES v. YOUNG*, [1908] 1 L. R. 135, 139.—*IR.*

1977 xiv. —.]—*Held*. Incompetent to ask a witness what were the contents of letters she had written, there being no evidence that the letters were destroyed, or could not be recovered.—*ARCHISON v. ROBERTSON* (1846), 9 Duml. (Ct. of Sess.) 15.—*SCOT.*

A. Sufficiency of — Of destruction — Place of custody destroyed by fire.]—Where a sale of lands for taxes had taken place, & a suit was subsequently instituted by the purchaser to set aside a conveyance to debt. executed after the registration of his own deed, & debt. impeached the deed executed in pursuance of sale, it was shown that a warrant had been at one time in the ct. house, a portion of which was destroyed by fire, & that on that

of the loss or destruction of the original instrument must be adduced before a copy may be used as secondary evidence.—*R. v. HALL* (1872), 12 Cox, C. C. 159.

1989. — **Of destruction—Affidavit.]—***ASKEW v. POULTERERS Co.*, No. 1954, *ante*.

1990. — **Parol testimony—Of person destroying it.]—**In order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, & that upon application to the pauper, who was then ill & died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, & he burnt it long since; & it was also proved that inquiry was made of the extric. of the master, who said that she knew nothing about it:—*Held*: this proof was sufficient to let in parol evidence of the contents of the indenture.—*R. v. MORTON* (INHABITANTS) (1815), 4 M. & S. 48; 105 E. R. 753.

*Annotations:—***Consd.** *R. v. Denio* (1827), 7 B. & C. 620. **Distd.** *R. v. Rhodogeldio* (1827), 6 L. J. O. S. M. C. 10; *R. v. Rawden* (1834), 2 Ad. & El. 156. **Apld.** *R. v. Kenilworth* (1845), 7 Q. B. 642. **Refd.** *Doo d. Richards v. Lewis* (1852), 11 C. B. 1035; *Braintree Churchwardens & Overseers v. St. Mary, Bury St. Edmunds Churchwardens & Overseers* (1858), 23 J. P. 245; *R. v. Braintree* (1858), 1 E. & E. 51; *R. v. Fordlingbridge* (1858), E. B. & E. 678.

1991. — **Place of custody ransacked by troops.]—**Where marriage articles were lost evidence was given that the house of the person in whose custody they ought to be, had been ransacked in 1798, by French troops & rebels, & many papers had been destroyed. Diligent search was made afterwards for the articles, which were not to be found:—*Held*: this was a fair presumption that they were destroyed, & secondary evidence of their existence & tenor was admitted.—*LORTON* (VISCOUNT) *v. GORE* (1828), 1 Dow. & Cl. 190; 6 E. R. 496; *sub nom. GORE v. LORTON* (LORD), 2 Bl. N. S. 286.

*Annotation:—***Refd.** *Skeffington v. Whitehurst* (1838), 3 Y. & C. Ex. 1.

1992. — **Subsequent deed reciting destruction—Draft of destroyed deed.]—**A married woman was alleged to have executed an appointment in 1800, & to have destroyed it. In 1813, disputes having arisen between her & the appointees, she & her husband executed a deed of compromise, which recited the appointment of 1800, & that she had destroyed it. In a contest between the appointees & a party claiming under her will:—*Held*: the deed of compromise was admissible in evidence, as was also the draft bill of costs of her solr. & a draft of the deed of 1800 found in his possession.—*DYNE v. COSTOBADIE* (1853), 17 Beav. 140; 1 Eq. Rep. 116; 23 L. J. Ch. 66; 21 L. T. O. S. 135; 1 W. R. 315; 51 E. R. 986.

1993. — **Bill of costs for preparation.]—***DYNE v. COSTOBADIE*, No. 1992, *ante*.

1994. — **Of loss—Evidence of circumstances—Unavailing search & inquiry.]—***ASKEW v. POULTERERS Co.*, No. 1954, *ante*.

1995. — **Application to attorney in**

occasion the warrant had been probably consumed:—*Held*: sufficient evidence to authorise the *Et.* in admitting secondary evidence of its contents.—*FERGUSON v. FREEMAN* (1879), 27 Gr. 211.—**CAN.**

1994 i. — **Of loss—Evidence of circumstances—Unavailing search & inquiry.]—**Where an agreement for a right of way had been made ten or twelve years before the trial, & the road laid out & used in pursuance of it, secondary evidence of the contents of the agreement was received, it appearing by the testimony of the person in whose possession it was left, that he had searched thoroughly for

it, & was sure it was not in his possession; that he might have burnt it as a useless paper, or given it to one of the parties, but had no distinct recollection of what he had done with it, & it was just as probable he had burnt it, as that he had given it to one of the parties.—*BASTERACH v. ATKINSON* (1852), 2 All. 439.—**CAN.**

b. — **Question for judge.]—**The sufficiency of preliminary proof of the loss of a document to entitle secondary evidence to be received is a question for the judge at the trial to determine.—*GILBERT v. CAMPBELL* (1869), 1 Han. 471.—**CAN.**

bankruptcy—Not to assignees personally.]—Policies of insurance having been delivered to the assignees of bkpt., one of whom is since dead, proof of an application to the solr. under the commission for such policies who did not know what had become of them, does not warrant the admission of secondary evidence.—*WILLIAMS v. YOUNGHUSBAND* (1815), 1 Stark. 139, N. P.

1996. — **Parol testimony—On oath.]—**To admit secondary evidence of a deed, it is not sufficient that the attorney, who prepared it, swears that he delivered it to A. & B., & believes it to be lost.—*HORLOCK v. PRIESTLEY* (1823), 1 L. J. O. S. Ch. 73.

1997. — **— — —.]—**Upon a question whether a pauper was settled in A. by the apprenticeship of her deceased husband, it was proved that indentures of apprenticeship which were not produced, had been executed by the husband, his father, & master. In order to prove the loss of the indentures so as to let in parol evidence of the contents, the pauper was called to prove a conversation with her husband shortly before his death respecting the indentures:—*Held*: such evidence was not admissible, it not having been proved that the indentures had ever been in the husband's possession, nor that inquiries had been made from the other parties to the indentures.—*R. v. RAWDEN* (INHABITANTS) (1831), 2 Ad. & El. 156; 4 Nev. & M. K. B. 97; 2 Nev. & M. M. C. 418; 111 E. R. 61.

*Annotation:—***Refd.** *R. v. Fordlingbridge* (1858), E. B. & E. 678.

1998. — **— — —.]—**In replevin, debts avowed for a distress for poor rate:—*Held*: one of debts, having acted as overseer of the poor was *prima facie* evidence that he was so, & to let in secondary evidence of his appointment, it was sufficient proof of loss that a witness stated that he, at the desire of the attorney, had applied to deft. for his appointment, & that he said that he had lost it, without proving any search made.—*BRISTOL CITY v. WAIT* (1834), 6 C. & P. 591; *subsequent proceedings, BRISTOL* (GOVERNORS OF THE POOR) *v. WAIT* (1836), 5 Ad. & El. 1.

— **Sufficient search.]—***See* Sub-sect. 5, D., *post*.

1999. Document proved to have been in hands of adversary—**Notice to produce must first be given.]—**Where a document is proved to have come into the hands of one party to a cause, the opposite party cannot entitle himself to give secondary evidence of its contents by showing that it has been since lost or destroyed, unless he has served notice to produce.—*DOE d. PHILLIPS v. MORRIS* (1835), 3 Ad. & El. 46; 1 Har. & W. 226; 4 Nev. & M. K. B. 598; 4 L. J. K. B. 145; 111 E. R. 329.

D. Search.

(a) *What Search to be made.*

2000. Must be diligent.]—A plff. may give secondary evidence of the contents of a written

c. — **— — — Affidavit.]—**It having been shown at the trial that an assignment of the policy had in fact been made, but it being doubtful whether sufficient evidence of its loss had been given to warrant the judge in admitting secondary evidence of its contents further evidence by affidavit of the loss was received.—*DOLEN v. METROPOLITAN LIFE INSURANCE CO.* (1894), 26 O. R. 67.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 5.—D. (a).

2000 i. Must be diligent.]—Before secondary evidence can be let in proof must be adduced that such deed once

the objection that the counterpart [of a deed] ought not to have been received in evidence, the degree of diligence to be used in searching for a deed must depend on the importance of the deed & the particular circumstances of each case (BEST, C.J.).—GULLY v. EXETER (Bp.) (1827), 4 Bing. 290; 12 Moore, C. P. 591; 130 E. R. 779. *Annotations*:—**Reid**, *McGahey v. Alston* (1836), 2 M. & W. 206; *R. v. Hinckley Churchwardens & Overseers* (1863), 27 J. P. 823. **Mentz**, *Doe d. Sams v. Garlick* (1845), 14 M. & W. 698; *Beauchamp v. Winn* (1869), 4 Ch. App. 562; *Crompton v. Jarratt* (1883), 30 Ch. D. 298.

2013. Must be ineffectual.—Where ineffectual search has been made for a justice's warrant, parol evidence may be given of its contents.—*WEATHERELL v. WATSON* (1822), 1 L. J. O. S. K. B. 2.

2014. —.—.—*HARPER v. COOK*, No. 2000, *ante*.

2015. —.—.—*PRICE v. WOODHOUSE*, No. 1963, *ante*.

2016. Must be bonâ fide.—*R. v. DENIO* (INHABITANTS), No. 1871, *ante*.

2017. —.—.—*POOLEY v. GOODWIN*, No. 2573, *post*.

2018. —.—.—*R. v. KENILWORTH* (INHABITANTS), No. 2002, *ante*.

2019. Need not be recent—Or made ad hoc.—

In order to let in secondary evidence of a document, it is not necessary that the search for that document should have been recent, or made for the purpose of the cause.—*FITZ v. RABBITS* (1837), 2 Mood. & R. 60, N. P.

2020. Must be reasonable—Though not wholly exhaustive.—(1) Where secondary evidence is admitted to prove the contents of a lost instrument, the ct. will presume that the instrument was stamped, unless there be evidence showing that it was not stamped. The *onus* of proving this is upon the party raising the objection.

(2) To render secondary evidence admissible in proof of the contents of a lost document, it is sufficient to prove that every reasonable search for the document has been made, although every possible search may not appear to have been made.—*HART v. HART* (1841), 1 Hare, 1; 11 L. J. Ch. 9; 5 Jur. 1007; 68 E. R. 927.

Annotations:—*As to* (1) **Consd.** *Crowther v. Solomons* (1848), 6 C. B. 758. **Reid**, *Smith v. Henley* (1844), 3 L. T. O. S. 49; *Cloismadoue v. Carrel* (1856), 18 C. B. 36; *Marine Investment Co. v. Havilsde* (1872), L. R. 5 H. L. 624.

(b) *Where to be made.*

2021. Where document most likely to be found.

—*BECKFORD v. JACKSON* (1795), 1 Esp. 337.

PART IV. SECT. 5, SUB-SECT. 5.— D. (b).

2021 i. Where document most likely to be found.—Where a person is in the habit of preserving & filing away letters of importance, secondary evidence of the contents of a letter of that description is not admissible without search among his letters, there being no proof of its loss.—*LITTLE v. JOHN-SON* (1842), 1 Kerr, 496.—**CAN.**

2021 ii. —.—.—Certain letters put in at the first trial in the county ct. were filed in the ct. of common pleas on appeal from the decision, & at the second trial a witness proved that he had applied to the clerk of the ct., who searched in his office, & told the witness that he had also inquired of the judge, but that the papers could not be found.—*Held*: sufficient to let in secondary evidence.—*SUTOR v. McLEAN* (1859), 18 U. C. R. 490.—**CAN.**

2021 iii. —.—.—P. was absent from the country, & pltf. proved a search with several of his relatives for a deed from P. to him, but it was not shown that P. had lived or left the charge of his papers with any of them. Secondary evidence being then admitted, subject to objection, pltf. proved the existence of this deed, & the execution by P. of a memorial of it, which the deputy registrar produced.—*Held*: the search was not sufficient to let in secondary evidence.—*COVERT v. ROBINSON* (1865), 24 U. C. R. 282.—**CAN.**

2021 iv. —.—.—Pltf. in ejectment claimed under a mtge. from C. to O., executed in 1856. C. being called proved his execution of such a mtge., & the memorial of it signed by him was produced from the registry office. He had last seen the mtge. with O., the mtgee., in 1857. O. in 1859 became insolvent, & made an assignment of all his estate to F. He absconded to the United States shortly after, & was followed by F. It was not shown that F. had ever had the mtge., though the land was assigned to him; & it appeared that in a suit against him & O., in chancery, on behalf of the creditors, commenced many years after the assignment, which resulted in the appointment of pltf. as receiver, F. produced the papers in the suit under an order of the ct., & this mtge. was not among them. A search was proved to have been made in the master's office, with pltf.'s solr. in that suit, & among the receiver's papers, but not with O., who was still

living in Michigan, nor with his solr. in the suit.—*Held*: the proof of search was sufficient to let in the secondary evidence; for under the circumstances of the case there was no presumption that O. retained the mtge. or took it to the United States with him.—*GORDON v. McPHEIL* (1872), 32 U. C. R. 430.—**CAN.**

2021 v. —.—.—Where pltf., the widow of H., suing on a bond for maintenance made to her late husband & herself, testified that she had the bond in possession after her husband's death, that she gave it to her own son to be recorded, & had not seen it since; & the son testified that he had sent it by the magistrate to get it recorded & had not since seen it, & the document was traced to the office of the registrar of deeds, who testified that some one supposed to be entitled to it had got it out of his possession, & that he had searched in his office in vain for it. A paper sworn by the registrar to be an accurate copy of the registry was admitted as secondary evidence.—*Held*: the evidence was properly received.—*HAZELL v. DYAS* (1876), 2 L. & C. 36.—**CAN.**

2021 vi. —.—.—It appeared that search for the will was made in the office in which it would have been had it been admitted to probate; in the different registry offices of the counties in which the several parcels of land, of which testator died seised, were situate; among the papers of the owners of the several parcels; among the papers of the only exor. of three named in the will who could be found; among the papers of the draftsman of the will, & among those of several of the devisees.—*Held*: sufficient to let in secondary evidence of the will.—*BROWN v. MORROW* (1878), 43 U. C. R. 436.—**CAN.**

2021 vii. —.—.—On a reference, H. sought to use a certain bill of costs as a voucher of monies properly expended by him in legal proceedings, & it was shown that the said bill had been properly brought into the master's office on a former reference & properly left there, & that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor on any occasion when it would probably have been removed from the office.—*Held*: the master should have admitted secondary evidence of its contents.—*BEATTY v. HALDAN*

(1885), 10 O. R. 278.—**CAN.**

2021 viii. —.—.—The testimony of a sheriff, who had executed under a writ of execution, that he had searched for it in his office, but could not find it; that he believed that it was not in his office or in his possession; that he thought that he had returned it to the attorney who had issued it; also, the testimony of the clerk of the ct., out of which the execution had issued, that he had made search for it, but could not find it, & his belief was that it had never been filed in his office.—*Held*: a sufficient foundation upon which to admit secondary evidence of the contents of the execution.—*ROSS v. ADAMS* (1896), 31 N. B. R. 158.—**CAN.**

2021 ix. —.—.—A release to uses, for the purpose of barring the entail, was alleged to be lost. At the trial, it was proved that search was made for it among the papers of the releasee to uses, in the possession of his solr. & exor., & also among the papers of the releasor, in the possession of his extrix.—*Held*: the search was sufficient to establish the presumption that the deed was lost, & a memorial of the deed was properly received as secondary evidence.—*MORRIS v. IR.* (1860), 12 L. C. L. 129; 12 Ir. Jur. 304.—**IR.**

2021 x. —.—.—In order to show that a sufficient search has been made for a lost deed to admit of secondary proof of its contents, evidence is admissible of inquiries made of persons who would be likely to have the document in their possession, & of the replies given by them to such inquiries, without affidavits or depositions of those persons themselves as to the extent & result of the searches made by them.—*SMITH v. SMITH* (1870), 10 L. R. Eq. 273.—**IR.**

2021 xi. —.—.—At the trial a certified copy of a Crown grant to the original grantee of the land, under the seal of the district land registrar, was tendered as evidence of the grant. Evidence was given that inquiries for the Crown grant had been unsuccessfully made of old-established solrs.—*Trins* in A. It appeared that the widow of the grantee had gone to N., where she had died, & that no inquiries had been made of her administrators.—*Held*: as these were the persons most likely to possess the missing deed, & they had not been communicated with, the copy tendered could not be received in evidence.—*HUGHES v. HOAKES* (1898), 17 N. Z. L. R. 113.—**N.Z.**

evidence: Sub-sect. 5, D. (b).]

2022. —. —.]—**BREWSTER v. SEWELL**, No. 2004, ante.

2023. —. —.]—**Appointment of overseer—Parish chest.**—An unsuccessful search for the appointment of overseers for 1802, was made in the parish chest, & among the papers of B., deceased, who had acted as exor. to A., who had acted as overseer in that year:—*Held*: this was sufficient *prima facie* evidence of the loss of the appointment, to let in parol evidence of its contents, without producing the probate of the will of A. or of B.—*R. v. WITHERLY (INHABITANTS)* (1820), 4 Man. & Ry. K. B. 724; 2 Man. & Ry. M. C. 438; 8 L. J. O. S. M. C. 43.

2024. —. —.]—**According to the course of business.**—A cheque drawn on account of a parish was delivered to deft., the paying clerk. It was shown that the bankers on that day paid a sum of that amount, & that it was their custom to return the cancelled cheques to the paying clerk, who ought to have deposited them in a proper place at the workhouse. Application had been made to his successor at that place, who handed some bundles to a witness, who searched them without success. The paying clerk was not called:—*Held*: sufficient search to let in secondary evidence of the cheque.—*M'GAHEY v. ALSTON* (1836), 2 M. & W. 206; 2 Gale, 238; 6 L. J. Ex. 29; 150 E. R. 731.

*Annotations:—***Apld.** *Hart v. Hart* (1841), 1 Hare, 1; *R. v. Hineckley Overseers* (1863), 3 B. & S. 885. **Mentd.** *R. v. Bath Recorder* (1839), 9 A. & E. 714; *Sinclair v. Sinclair* (1845), 13 M. & W. 610; *Doe d. Bowley v. Barnes* (1846), 8 Q. B. 1037; *McMahon v. Lennard* (1858), 6 H. L. Cas. 970.

2025. —. —.]—(1) A search made by a clerk of pltf. in every place where it is probable, according to the course of business, that the paper might be found, is sufficient, to let in secondary evidence of its contents, without applying to the clerk who had originally received the paper, or to the clerk who had the care of the papers at the time when the document in question was received, & without requiring any search to be made by either of them.

(2) In order to render a letter admissible in evidence against the writer, it is not absolutely necessary to prove his handwriting; it is sufficient, if it appear from other evidence, that he recognised & acted upon the letter.—*SHEPPARD v. RADFORD* (1839), 3 J. P. 770.

2026. —. —.]—**Power of attorney executing surrender—Search amongst court rolls.**—(1) A witness who resides in Dublin, is out of the jurisdiction of the ct. of this country so as to let in proof of his handwriting, the same as if he were dead.

(2) A ct. roll stating that a surrender was by power of attorney, would be secondary evidence of the power of attorney if the power of attorney cannot be found after a sufficient search.

(3) The steward of a manor proved that where a surrender was by power of attorney, the practice was to keep the power of attorney with the ct. rolls. The power in question, which was for a surrender in 1814, could not be found either with the ct. rolls or anywhere in the office in which the ct. rolls had been kept ever since 1814, both by the present steward & his predecessor, who was steward in 1814:—*Held*: sufficient to let in secondary evidence.—*DOE d. COUNSELL v. CAPERTON* (1839), 9 C. & P. 112.

2027. —. —.]—**Warrant—Seizure by sheriff under fieri facias.**—In an action of trover against the sheriff, for goods seized under a *fi. fa.*, the warrant

of seizure was not produced, nor any notice given to produce it. It was proved that the sheriff's officer who made the seizure had put his son into possession, & given the warrant to him; the son stated that he believed he returned it either to his father or to the sheriff's office. The officer said that it was his custom to deliver the warrants to the auctioneer, that they might be transmitted with the auction sheet to the excise office, through the supervisor of excise for the district; that he had searched his own papers for it, & had inquired for it at the sheriff's office. A search was also proved among the auctioneer's papers, & at the excise office; but the supervisor was not called, nor any search of his papers proved:—*Held*: reasonable proof was given of the loss of the warrant, so as to let in secondary evidence of its contents, in order to connect the sheriff with the officer.—*MINSHALL v. LLOYD* (1837), 2 M. & W. 300; *Murp. & H.* 125; 1 Jur. 300.

*Annotations:—***Mentd.** *Mackintosh v. Trotter* (1838), 3 M. & W. 184; *Weeton v. Woodcock* (1840), 7 M. & W. 14; *Elliott v. Bishop* (1854), 10 Exch. 496; *Wilde v. Waters* (1855), 16 C. B. 637; *Walmesley v. Milne* (1859), 7 C. B. N. S. 115; *Re Roberts, Ex p. Brook* (1878), 10 Ch. D. 100; *Gough v. Wood*, [1894] 1 Q. B. 713; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523.

2028. —. —.]—**Deposited with high constable.**—The mayor of the borough of S., under the Municipal Corpn. Act, 1835 (c. 76), s. 92, signed a warrant of distress for levying on the overseer of a township, which was partly within & partly without the borough, the proportion of a borough rate, payable in respect of that part of the township which was within the borough. The high constable of the borough, to whom the warrant was directed, stated that he had received & levied under it, but could not tell what had become of it, & that his practice was to return some warrants to the town clerk, & to retain others:—*Held*: secondary evidence of the warrant was admissible.—*FERNLEY v. WORTHINGTON* (1840), 1 Man. & G. 491; 1 Scott, N. R. 432; 10 L. J. M. C. 81; 133 E. R. 425; *sub nom.* *FEARNLEY v. WORTHINGTON*, 4 Jur. 918.

*Annotations:—***Mentd.** *Wilkinson v. Gray* (1844), 9 J. P. 71; *Cobb v. Allan* (1846), 16 L. J. Q. B. 397.

2029. —. —.]—**Papers deposited with party's attorney—Enquiry of widow unnecessary.**—The master of an apprentice, having had the indenture in his possession, failed in business, & an attorney took the management of his affairs, & custody of his papers, which he inspected, but did not find the indenture:—*Held*: this, after the master's death, was a sufficient cause to let in secondary evidence of the indenture, though his widow was living, & no enquiry had been made of her respecting it.—*R. v. PIDDLEHINTON (INHABITANTS)* (1832), 3 B. & Ad. 460; 3 Bott, 6th ed. 261; 1 L. J. M. C. 43; 110 E. R. 166.

*Annotation:—***Refd.** *R. v. Hineckley Overseers* (1863), 3 B. & S. 885.

2030. —. —.]—(1) Where an assignment of turnpike tolls had been executed by way of mtge. to K., in an action by K.'s personal representative, after his death, against the trustees for arrears of interest:—*Held*: a search for the security in the office of K.'s solr., where his papers had been deposited, except some deposited, in a suit against K.'s representative, in the office of one of the masters in chancery, & also in the latter office without finding the security among any of such papers, was sufficient evidence of its loss to let in secondary evidence, & entries in a book of the trustees indorsed "Mtge. Book," containing an abstract of the names of the creditors, the amounts of their securities, & the interest due upon

them, was good secondary evidence of such security.

(2) Printed copies of the annual accounts of the trust, made up from original statements, signed by the chairman of the trustees, & returned pursuant to 3 Geo. 4, c. 126, s. 78, were produced from the office of the clerk of the peace, & tendered in evidence. They were not signed by the chairman:—*Held*: they were not admissible either as primary or secondary evidence.—*PARDON v. PRICE* (1844), 13 M. & W. 267; 14 L. J. Ex. 212; 153 E. R. 110.

Annotations:—*Generally*, *Mentd.* *Bartlett v. Dimond* (1845), 14 M. & W. 49; *R. v. Balby & Workson Turnpike Road Trustees* (1853), Bail Ct. Cas. 134.

2031. — Bankrupt Office—Papers of bankrupt.—*R. v. BENT*, No. 2153, *post*.

2032. — Newspaper—Deposited in public reading-room.—In an action for a libel published in a newspaper evidence that copies of the newspaper containing the libel have been gratuitously circulated in pltf.'s neighbourhood, though they be not shown to have been sent by deft., the publisher, is admissible to show the extent of the circulation of the paper, & the consequent injury to pltf. It was sought to prove that one of such newspapers had been sent to a public reading-room in pltf.'s parish, to which there were eighty subscribers. The president of the reading-room stated, that a newspaper, called the "Nonconformist," which was the name of that published by deft., was gratuitously sent to the room; that, from the glance he had of it, he judged it contained the libel in question; that it remained there a fortnight, when it was taken away, as he supposed, & not returned; that he had searched the room for it & believed it was lost:—*Held*: this was sufficient evidence to show that the newspaper sent to the reading-room was one of the copies of deft.'s newspaper containing the libel, & this was sufficient proof of its loss to make secondary evidence of its contents admissible.—*GATHERCOLE v. MIALI* (1846), 15 M. & W. 319; 15 L. J. Ex. 179; 7 L. T. O. S. 89; 10 J. P. 582; 10 Jur. 337; 153 E. R. 872.

2033. — Settlement—Inquiry of all the trustees.—A., pending a treaty of marriage between her & B., without B.'s knowledge, made a settlement of certain leaseholds, to herself for life, remainder to C., her son by a former marriage, remainder over to D. The deed, the execution of which did not appear to have been attested, was deposited by A. & C. shortly after its execution, with E., an attorney, with instructions to give it up only to those two together. After the death of A.'s husband, A. & C. went together to E., & got back the deed. A. died. In an ejectment brought by one claiming under C. against one claiming under a mtge. from A., it was proposed to give secondary evidence of the contents of this deed, upon proof that an unsuccessful search for it had been made at the house of A., & upon calling one of the two trustees named in it, who stated that he had never seen or heard of the deed:—*Held*: notwithstanding the circumstances under which it was executed, the deed might still be a valid deed, but sufficient search had not been made to let in secondary evidence of its contents, inasmuch as no inquiry had been made as to the other trustee.—*DOE d. RICHARDS v. LEWIS, RICHARDS v. LEWIS* (1851), 11 C. B. 1035; 20 L. J. C. P. 177; 17 L. T. O. S. 126; 138 E. R. 786; *sub nom.* *RICHARDS v. LEWIS, DOE d. RICHARDS v. LEWIS*, 15 Jur. 512.

Annotation:—*Mentd.* *Doe d. Newman v. Rusham* (1852), 17 Q. B. 723.

2034. — Tenancy agreement—Inquiry of landlord.—On the trial of an appeal, quarter sessions decided that there was not sufficient proof of search for a written agreement by P., to let a tenement, to make secondary evidence of its contents admissible, & rejected the evidence, subject to a case, by which it appeared that the document was traced to the custody of P., & that a witness deposed that he asked P. if there was such an agreement, & P. answered, "I cannot say for a certainty;" & that P. then sent his clerk witness to P.'s office to search, which they did; & the document was not found. P. was not called as a witness:—*Held*: it was not necessary to call P. if there was proof of the search having been made in the proper place of deposit.—*R. v. SAFFRON HILL (INHABITANTS)* (1852), 1 E. & B. 93; 22 L. J. M. C. 22; 20 L. T. O. S. 92; 16 Jur. 1139; 118 E. R. 371.

Annotation:—*Refd.* *R. v. Braintree* (1858), 1 E. & E. 51.

2035. — — — — ——To found the reception of secondary evidence of the contents of an agreement in writing respecting a house in question between G. & his landlord, P., by whose clerk it had been drawn up & with whom it had remained, a witness was called, who said, "I went last week to P. & asked him whether there was any agreement between himself & G. respecting the house in question. He said, 'I cannot say for a certainty, I will search.' He then told the clerk to search, & the clerk & I searched together amongst the papers of the office, & also amongst the day-books & ledgers, & we could find no agreement." Quarter sessions held this insufficient to let in secondary evidence of the contents of the agreement:—*Held*: it did not appear that the search had been made in the right place, & the decision of the sessions ought not to be overruled.—*R. v. ST. MARY, ISLINGTON, OVERSEERS* (1852), 16 J. P. 760; 1 W. R. 34.

2036. — Letters—Receivable by assignees of bankrupt.—In an action by the assignees of a bkpt., who had absconded:—*Held*: secondary evidence would be received on behalf of deft., of letters sent to bkpt., a notice to produce having been served on pltf., & an unsuccessful search having been made thereupon.

The assignees are the persons with whom these letters, if in existence, ought to be. But it has been proved that they are not with them. The secondary evidence is therefore admissible (*CROWDER, J.*).—*MILLER v. FRICKER* (1858), 1 E. & P. 91.

2037. — Alleged contract with Crown.—*SCOTT v. R.*, No. 1868, *ante*.

2038. — Indenture of apprenticeship—Poor law settlement—Parish chest.—The mother of a pauper stated, that about twenty-four years ago she received money from the parish officers of S. to put her son out apprentice, & that she accordingly put him out; that the indenture was signed by her, the pauper, the master, & by a witness; that she gave it to the wife of a market-gardener who attended the market of S., to take to the overseers of the parish of S.; that the market-gardener & his wife were both dead, the latter having survived her husband; & that she did not know whether the market-gardener's wife had left any will, but had heard that she had. Evidence was then given that search had been made in the parish chest of S. for the indenture, & that it could not be found:—*Held*: as it was the duty of the overseers, if the indenture had come into their possession, to deposit it in the parish chest the presumption was, that it was lost or destroyed, & therefore, secondary evidence of the execution

Sect. 5.—Secondary evidence: Sub-sect. 5, D. (b)

& contents of the indenture was admissible.—*R. v. STOURBRIDGE (INHABITANTS)* (1828), 8 B. & C. 96; 1 Man. & Ry. M. C. 297; 2 Man. & Ry. K. B. 43; 6 L. J. O. S. M. C. 65; 108 E. R. 978.

Annotation.—*Reid*. *McGahey v. Alston* (1836), 2 M. & W. 208.

2039. ——— Papers of apprentice.]—

(1) This ct. has jurisdiction to review the decision of a ct. of quarter sessions as to whether sufficient search has been made for a document to render secondary evidence of it receivable.

(2) On a question of derivative settlement, it was alleged that the grandfather of the pauper had been bound as parish apprentice sixty-nine years before. In order to prove the indenture of apprenticeship executed by the parish officers, it was shown that ineffectual search for it had been made among the papers of the pauper:—*Held*: a counterpart was properly admitted as secondary evidence of its contents to prove a settlement by apprenticeship, without showing that the papers of the master had also been examined, as the presumption would be, after so long a period, that, as the apprentice alone was interested in the preservation of the deed, the instrument, if not found with him, was lost.—*R. v. HINCKLEY OVERSEERS* (1863), 3 B. & S. 885; 2 New Rep. 67; 32 L. J. M. C. 158; 8 L. T. 270; 27 J. P. 823; 9 Jur. N. S. 1054; 11 W. R. 663; 122 E. R. 331.

2040. ——— Covenantors for production of deed.]

—*HAWKER v. KING* (1900), 108 L. T. Jo. 540.

(c) Evidence of Search—Sufficiency of.

2041. Person proved to have had custody not called—Although living.]—To establish a settlement by apprenticeship it was proved that the indenture was of two parts, that one had been destroyed, that the other had come to the hands of A., who when asked for it said she could not find it:—*Held*: as A. had not been subpoenaed, the evidence was insufficient.—*R. v. CASTLETON (INHABITANTS)* (1795), 6 Term Rep. 236; 101 E. R. 530.

Annotations.—*Consd.* *R. v. Morton* (1815), 4 M. & S. 48; *Munn v. Godbold* (1825), 3 Bing. 292. *Fold.* *R. v. Dento* (1827), 7 B. & C. 620. *Consd.* *R. v. Hinckley Overseers*

(1863), 3 B. & S. 885. *Reid*. *R. v. Rhodogeldio* (1827), 6 L. J. O. S. M. C. 10; *R. v. Piddlehinton* (1832), 3 B. & Ad. 460; *R. v. Kenilworth* (1845), 2 New Sess. Cas. 66; *R. v. Braintree* (1858), 1 E. & E. 51.

2042. ———.]—*PARKINS v. COBBET*, No. 1987, *ante*.

2043. Statements made by third parties—To witness conducting search.]—*R. v. KENILWORTH (INHABITANTS)*, No. 2002, *ante*.

2044. ——— Third parties not called.]—

Appls. against an order of removal set up a settlement of the pauper by apprenticeship under an indenture, which had been lost. To prove proper search, they proposed to ask certain witnesses what inquiries they had made of, & what answers they had received from parties who were likely to have the document in their possession; but the parties themselves were not called. The sessions refused to allow the questions to be put:—*Held*: the evidence was admissible, upon the preliminary inquiry whether proper search had been made, though it might not be admissible as evidence in the main issue before the ct.—*R. v. BRAINTREE (INHABITANTS)* (1858), 1 E. & E. 51; 28 L. J. M. C. 1; 32 L. T. O. S. 90; 4 Jur. N. S. 1238; 7 W. R. 48; 120 E. R. 827.

2045. Decision as to sufficiency—Finality of justices' decision.]—*R. v. KENILWORTH (INHABITANTS)*, No. 2002, *ante*.

2046. ——— Decision of quarter sessions—Reviewable by King's Bench.]—*R. v. HINCKLEY OVERSEERS*, No. 2039, *ante*.

E. What Secondary Evidence Admissible.

(a) In General.

2047. General rule.]—A counterpart may be read if an original deed is lost, & if no counterpart a copy, & if no copy, parol evidence of the manner of its being lost; if destroyed by fire, or lost by any unforeseen accident, they are of themselves sufficient excuses.—*VILLIERS v. VILLIERS* (1740), 2 Atk. 71; 26 E. R. 444, L. C.

Annotations.—*Reid*. *Munn v. Godbold* (1825), 3 Bing. 292. *Mentd.* *Hodson v. Russell* (1739), 9 Mod. Rep. 236; *Tothill v. Pitt* (1770), Dick. 432.

2048. ———.]—(1) Where an original is lost, a copy may be admitted; if no copy, then a proof by witnesses who have heard the deed, & yet it is

PART IV. SECT. 5, SUB-SECT. 5.—
D. (a).

2041 i. Person proved to have had custody not called—Although living.]—Where a deed has been traced into the actual possession of a party, it is necessary to call him to account for it before secondary evidence can be let in; but where doubt exists as to whether it was actually left with a party who has no interest in it:—*Held*: sufficient to prove a search amongst the papers of the person who it was presumed had last had possession of it.—*BARTO v. MORRIS* (1859), Coeh. 90.—*CAN.*

2041 ii. ———.]—To prove a deed from the sheriff, the memorial was put in it, having been down by R., a partner of W. D., the said W. D. having formerly been partner of J. D., then attorney for the plffs., that the deed had come into the office of J. D., J. D. not being called, & could not be found there on diligent search by B. It being objected that plff.'s attorney, to whose hands the sheriff's deed was traced, should have been called:—*Held*: diligent search by B., who was partner with W. D., the former partner of J. D., with whom the deed had been left, the said B. having succeeded J. D. in the business, & having access to all his papers, & having seen the deed in his office lately, was sufficient search to admit of secondary evidence

without calling J. D.—*NESBITT RICE* (1864), 14 C. P. 409.—*CAN.*

e. ——— Affidavit of search at Registrar-General's office.]—On an application for administration to the estate of a deceased person, it is not necessary that the affidavit of search at the Registrar-General's office for a will deposited should state that a "careful search has been made."—*Re HEALEY'S ESTATE* (1887), 13 V. L. R. 156.—*AUS.*

f. ———.]—In the course of a conjunct proof in a divorce, the loss of a letter was sought to be proved by pursuer, who addressed two witnesses, one of whom had received the letter, & the other had delivered it:—*Held*: although pursuer might have directed more searching inquiry for it, yet it being sufficiently proved that neither the pursuer nor her friends were in possession of it, secondary evidence of its contents was admissible.—*RITCHIE v. RITCHIE* (1857), 19 Dunl. (Ct. of Sess.) 505.—*SCOT.*

2045 i. Decision as to sufficiency—Finality of justices' decision.]—After secondary evidence of a document has been received, it is too late to object to the sufficiency of the search.—*DOE v. MAGLEW v. TURNBULL* (1848), 5 U. C. R. 129.—*CAN.*

2045 ii. ———.]—Whether or not sufficient proof of search for, or loss of,

an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the judge of first instance, & is treated as depending very much on his discretion. His conclusion should not be overruled except in a clear case of miscarriage.—*SRIMATI RANI HURRIPIRIA DEBI v. RUKMINI DEBI* (1892), L. R. 19 Ind. App. 79; 1 L. R. 19 Calc. 438.—*IND.*

g. Evidence of plaintiff & wife—Inadmissible witnesses.]—Evidence by plff. & wife of a search for & the loss of a bill of sale under which the judge ruled he must prove property:—*Held*: insufficient to let in secondary evidence of the contents of such bill of sale.—*BRATT v. LEE* (1858), 7 C. P. 280.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 5.—
E. (a).

h. Entries—Sheriff's books & fee book of court—Lost records.]—Where the papers belonging to the district ct. & to the sheriff had been burned, & the records themselves thus destroyed:—*Held*: in ejectment, deft., claiming under a sheriff's deed, might prove the judgment & executions by secondary evidence contained in the sheriff's books & in a fee book of the ct., & by the attorney who obtained the judgment, whose papers had also been

a thing the law abhors to admit the memory of man for evidence (LORD HARDWICKE, C.).

(2) The certificate of the King under his sign manual of a matter of fact has always been refused (WILLES, C.J.).—*OMYCHUND v. BARKER* (1745), 1 Atk. 21; 26 E. R. 15; *sub nom.* *OMYCHUND v. BARKER*, Willes, 538; 2 Eq. Cas. Abr. 397, L. C.

Annotations:—*Generally*, *Mentd.* East India Co. v. Campbell (1749), 1 Ves. Sen. 246; *Atcheson v. Everitt* (1776), 1 Cowp. 382; *R. v. Gilham* (1795), 1 Esp. 285; *Spain (King) v. Hullett* (1833), 7 Bl. N. S. 359; *Bollen v. Melladew* (1851), 10 C. B. 898; *Parkes v. Parkes* (1852), 2 Rob. Ecol. 518; *Salomons v. Miller* (1853), 8 Exch. 778; *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19; *Rhodes v. Rhodes* (1860), John. 653; *Maden v. Catanach* (1861), 5 L. T. 288; *A.-G. v. Bradlaugh* (1885), 14 Q. B. D. 667; *Bowman v. Secular Soc.*, [1917] A. C. 406.

2049. —[After due but fruitless search for an indenture, proof that a deceased person more than sixty years ago served A. in the apparent position of an apprentice, raises the presumption that he was bound apprentice by indenture, & is sufficient to sustain a settlement by apprenticeship.—*R. v. FORDINGBRIDGE (INHABITANTS)* (1858), E. B. & E. 678; 27 L. J. M. C. 290; 31 L. T. O. S. 197; 23 J. P. 38; 4 Jur. N. S. 951; 6 W. R. 649; 120 E. R. 664.

2050. Entries.—In Court of Chancery—Lost defeasance of statute staple.—The entries of a statute staple, & a defeasance thereon, in the book of the clerk of the recognisance in the Ct. of Ch. in Ireland, are good evidence, the originals not being to be found.—*LATTIN v. ROBINSON* (1724), 3 Bro. Parl. Cas. 575; 1 E. R. 1507, H. L.

2051. —In court roll—Lost power of attorney—Executing surrender.—*DOED. COUNSELL v. CAPERTON*, No. 2026, *ante*.

2052. —In mortgage book—Lost mortgage deed.—*PARDOE v. PRICE*, No. 2030, *ante*.

2053. —In solicitor's account book—Lost conveyance.—*MOULTON v. EDMONDS*, No. 2060, *post*.

2054. —In diary—By deceased clerk—Relating to original & draft copies.—In 1861, W., a solr., & the acting trustee of a settlement, invested part of the trust funds in a mtge. of some property of C., a client of his, by taking a transfer of a legal first mtge. of the property to himself & his co-trustee. In 1865, C., being pressed by his bankers to give security for his overdrawn account, asked W. to give him the title deeds of the property to deposit with his bankers, promising to substitute for them some other security, which he never did. W. accordingly, without the knowledge of his co-trustee & *cestuis que trust*, gave C. all the title deeds, who thereupon deposited them with his bankers, except the mtges., which he suppressed. On a deposit of title deeds it was the custom of the bank to require a certificate of title from some solr., & on this occasion they accepted the certificate of W., who

certified that C. had a good title to the property. W. & C., having both died insolvent, a bill was filed by the co-trustee & *cestuis que trust* against the bank, praying for a foreclosure decree & delivery of the deeds. Neither of the mtges. nor any copies of them were forthcoming:—*Held*: drafts produced from the proper custody & bearing indorsement in the handwriting of W., showing that the deeds were engrossed from them, & were duly executed & stamped, & the diary of a deceased clerk containing entries in his handwriting made in the regular course of his business & showing that he had drawn the drafts, & had attended the execution & stamping of the deeds, were good secondary evidence of the mtges.—*WALDY v. GRAY* (1875), L. R. 20 Eq. 238; 44 L. J. Ch. 394; 32 L. T. 531; 23 W. R. 676.

Annotations:—*Mentd.* *Bradley v. Riches* (1878), 33 L. T. 810; *Cave v. Cave* (1880), 23 W. R. 798.

2055. Books of Secretary of State—Lost licence to trade.—If a licence to trade is lost, the next best evidence is the register of it in the books of the Secretary of State.—*RHIND v. WILKINSON* (1810), 2 Taunt. 237; 127 E. R. 1068.

Annotations:—*Mentd.* *Abitbol v. Bristol* (1816), 2 Marsh. 157; *Doxford v. King* (1846), 8 L. T. O. S. 190; *Williams v. Baltic Insee. Assocn. of London*, [1924] 2 K. B. 282.

2056. Enrolment of deed—Making tenant to præcipe.—Where the deed to make the tenant to the præcipe is lost, a recovery is not to be amended by an attested copy of that deed; nor by an office copy of the enrolment of a deed; but it may be amended by the enrolment itself being brought into ct.—*DAWNEY, DEMANDANT, NEWSOME, TENANT, DOWNE (LORD), VOUCHER* (1813), 4 Taunt. 798; 128 E. R. 545.

Annotation:—*Refd.* *Doe d. Wilmot v. Pickering* (1823), 3 Dow. & Ry. K. B. 497.

2057. Minute-book—Setting out appointment—Original appointment lost.—*R. v. PEMBRIDGE (INHABITANTS)*, No. 1804, *ante*.

2058. Registered memorial—Lost deed.—A registered memorial of a lost deed is good secondary evidence.—*CATHROW v. LEADE, CATHROW v. CATHROW, CATHROW v. PEARD* (1851), 4 De G. & Sm. 527; 61 E. R. 942.

2059. —Articles of demise—Executed by grantee only.—A bill was filed for a renewal, setting forth articles of demise of 1746 by a party then seised in fee, & alleged to contain a covenant for perpetual renewal; that such articles were lost, but that a registered memorial, executed by the grantee only, existed in the Registry Office in Ireland; & that, in conformity with the said covenant, a lease was executed in 1750 by the grantor in the alleged articles, who, in the *interim* had become tenant for life, containing such a covenant, & reciting articles, also showing subsequent renewals successively by tenants for life:—*Held*: the memorial of the articles, though not executed by the grantor, was admissible in evidence

burned, & by plff.; & he was not bound to obtain exemplifications.—*HEANEY v. PARKER* (1868), 27 U. C. R. 509.—*CAN.*

k. —In judgment book—Lost records.—In an action to revive a judgment secondary evidence of the record was admitted on proof of loss & of the entries in the hand of the late prothonotary in the judgment book indicating that the roll had been filed & execution issued.—*GRAHAM v. BOAK* (1882), 3 R. & G. 286.—*CAN.*

l. —In ledger—Lost memoranda.—Entries in a ledger, sworn to have been made in the usual course of business, from memoranda regularly made, which memoranda had been

accidentally destroyed by fire are not evidence.—*CUMMINGS v. GOURLAY* (1908), 1 Alta. L. R. 86.—*CAN.*

2058 i. Registered memorial—Lost deed.—*HUNNIFORD v. HORWOOD* (1879), 5 V. L. R. 250.—*AUS.*

2058 ii. —.—*ARMSTRONG v. LITTLE* (1861), 20 U. C. R. 425.—*CAN.*

2058 iii. —.—[The plaints & records in a number of suits upon bonds instituted by the same plff. against different persons were destroyed by fire. The suits were re-instituted, & duplicate copies of the plaints were filed. The only evidence of the contents of the bonds, from which the plaints were prepared, consisted of a

register kept by plff.'s *gomastus* of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, & the names of the attesting witnesses. From this register the duplicate plaints had been prepared:—*Held*: though the register was not secondary evidence of the contents of the bonds, yet it was a document for the purpose of refreshing his memory, under Evidence Act, s. 159.—*TARCKATH NATH MULLICK v. JEAMAT NOSYA* (1879), 1 L. R. 5 Calc. 353.—*IND.*

m. —Of lease.—The memorial of a lease admitted as evidence of the original words of the lease.—*STUDDART*

Sect. 5.—Secondary evidence: Sub-sect. 5, E. (a) & (b).]

against those claiming under him as purchasers both of the execution of such articles & also of their contents.—*SADLER v. BIGGS* (1853), 4 H. L. Cas. 435; 22 L. T. O. S. 69; 10 E. R. 531, H. L.

*Annotation:—*Refd. *McKay v. McNally* (1879), 41 L. T. 230.

2060. Abstract of deed.]—(1) In a vendor's suit for specific performance the abstract showed a seisin in fee in B. in 1798, & a devolution of the title both legal & equitable from him to pltf., & uninterrupted enjoyment thereunder. In one of the deeds abstracted, dated in 1815, there was, however, a recital of seisin in A. in 1779, & that by mesne conveyances the premises came to B. The deeds recited were missing, but affidavits were produced verifying extracts from the account books of deceased solrs. who had been concerned in framing the recited deeds, in which charges were made for preparing those deeds & for attending to witness their execution:—*Held*: the recital coupled with the extracts was good secondary evidence of the execution & contents of the missing deeds.

(2) The abstracted deed in 1815 also contained recitals of deeds purporting to be mtges. of the premises in question by B., & subsequent reconveyances to him by the mtgees. These deeds were also missing, but were abstracted in an abstract produced to the purchaser, which had been made out & examined by a conveyancer in 1815, & from which the recitals in the deed of 1815 had been prepared:—*Held*: the abstract of 1815 was sufficient secondary evidence of the execution & contents of the missing deeds.—*MOULTON v. EDMONDS* (1859), 1 De G. F. & J. 246; 29 L. J. Ch. 181; 1 L. T. 391; 6 Jur. N. S. 305; 8 W. R. 153; 45 E. R. 352, L. C.

*Annotations:—*As to (1) & (2) Refd. *Re Halifax Commercial Banking Co. & Wood* (1898), 79 L. T. 536. *Generally, Mentd. Re Nisbet & Potts' Contract*, [1905] 1 Ch. 391.

2061. Rental book.—Lost lease.]—Pltf., in the lifetime of E., his mother, by deed, dated Jan. 9, 1814, mortgaged certain premises in fee to one J., whose interest therein was subsequently vested absolutely in deft. by purchase in the year 1857, under the power of sale in the mtge. B. died in 1848, having been in possession of the premises for a period of thirty years, & in 1861 pltf., who was one of her next of kin, took out administration to her, & brought ejectment to recover the premises from deft., alleging that a term therein, of which E. died possessed, devolved upon him as such administrator. At the trial evidence was given of E.'s possession, & building cottages on the land, in one of which she lived, & the other she

let to a tenant, & of her exercising various other acts of ownership over the premises; that a fire had happened in 1836, in which a certain deed was burnt, & due search having been made for it in vain, parol evidence was given of its contents, showing that it was an assignment made in 1819 to E., of the premises in question for the residue of a term of ninety-nine years, determinable on three lives, one of which lives was proved to be in existence at the time of the trial. The original lease from the freeholder in 1798, creating the term, was not forthcoming, although due search had been made for it in the proper quarter, but an old rental was put in, showing that the steward, appointed by the freeholder to be the receiver, had received the conventional rents for the premises in 1801, 1802, 1804, & 1805:—*Held*: E.'s possession & acts of ownership being evidence of a presumptive title in fee, unless cut down or explained, it was necessary for pltf. to remove such title, & to show a legal interest in her for a term of years surviving the commencement of the action.—*METTERS v. BROWN* (1863), 1 H. & C. 686; 1 New Rep. 367; 32 L. J. Ex. 138; 7 L. T. 795; 9 Jur. N. S. 416; 11 W. R. 429; 158 E. R. 1060; *subsequent proceedings*, 2 New Rep. 227.

2062. Counterfoil.—Lost cheque.]—Prisoner was the managing director of a co., & had promised to send a cheque for £4,000 to A. on Aug. 16. The cheque itself could not be found, but in the counterfoil book was one for £4,000 in favour of A., following a counterfoil dated Aug. 16:—*Held*: this counterfoil was admissible as evidence against prisoner.—*R. v. WILKINSON* (1867), 31 J. P. 377; 10 Cox, C. C. 537.

2063. Written declaration by testator.—Lost will.]—*SUGDEN v. ST. LEONARDS* (LORD), No. 1968,

(b) Copies.

2064. General rule.]—Pleadings & a decree were lost:—*Held*: a paper writing, dated Oct. 26, 1684, must be entered as the decree, & be enrolled *nunc pro tunc*.—*JESSON v. BREWER* (1763), 1 Dick. 370; 21 E. R. 312.

2065. —.]—There is no doubt there are cases where the copy of an ancient document has been received, where search has been made for the original & it could not be found, but it must be either a copy or an abstract (*PARKE, B.*).—*DOE d. PADWICK v. SKINNER* (1848), 3 Exch. 84; 18 L. J. Ex. 107; 13 J. P. 200; 154 E. R. 766; *sub nom. PADWICK v. SKINNER*, 12 L. T. O. S. 131.

2066. Necessity for examination with original.]

R. NEYLAN (1841), 1 Leg. Rep. 142.—**IR.**

n. Invalid registered certificate of sale.—Lost tax deed.]—In ejectment pltf. claimed under a tax deed, which he did not produce, giving evidence that it had been burnt after registration by him, but giving no evidence of its contents, except the production of the certificate, registered under 16 Vict. c. 182, s. 65, which did not state the date or cause of the sale:—*Held*: there was no proof of the deed, for the certificate for the reasons stated, showed it to be invalid.—*KEMM v. PARKYN* (1877), 28 C. P. 123.—**CAN.**

o. Recitals in renewal of lease.—Lost lease.]—Where an ancient lease, upon which a question arose as to the power to cut turf for sale, is lost, the recitals of the terms of the demise in a renewal will be taken as evidence of the terms of the demise, even against an alleged user of the rights.—*CHAT-*

TERTON v. WHITE (1839), 1 I. Eq. R. 200.—**IR.**

p. Renewal of civil bill decree.—Lost decree.]—The renewal of a civil bill decree received as secondary evidence of the decree, after proof of the loss of the original decree.—*M'AMBRIDGE v. JELLETT* (1843), 3 Craw. & D. 18.—**IR.**

q. Petition for approval of appointment of trustee.—Lost will.]—In an action for the recovery of possession of a certain piece of land, deft. denied the title in pltf. Pltf.'s title arose under a will which was lost. There was, however, amongst the records of the ct. a petition which some sixty years previous had been presented to the ct., & signed by one of the exors. to the will, asking the approval of the ct. to the appointment of a trustee in connection with the property under the will. The petition further set out pltf.'s title to the land as remainder-

man in fee:—*Held*: the facts disclosed in the said petition were properly admitted as evidence in proof of the contents of the lost will.—*EPISCOPAL R. C. CORP. v. MURPHY* (1898), 8 Nfld. L. R. 96.—**NFLD.**

r. Books of vendors of goods.—Insured stock & books destroyed by fire.]—In an action against an insurance co. the pursuer alleged that the stock insured & his books had been destroyed by fire. Diligence was granted to defenders to recover the books of third parties, who had sold goods to the pursuer, in order that they might prove the extent of the said sales.—*PORTER v. PHOENIX ASSURANCE CO.* (1867), 5 Maeph. (Ct. of Sess.) 633; 39 S. C. Jur. 268.—**SCOT.**

PART IV. SECT. 5, SUB-SECT. 5.—E. (b).

2066 i. Necessity for examination with original.]—A copy of an order & of a

—A copy of a deed was made by the witness to give to counsel but not examined with the original:—*Held*: this was good evidence of the original, which was burnt.—*MEDLICOR v. JOYNER* (1667), 2 Keb. 546; 1 Mod. Rep. 4; 84 E. R. 342.

Annotations:—*Refd.* *Harvey v. Phillips* (1743), 2 Atk. 541; *Omeyhund v. Barker* (1744), 1 Atk. 21; *Saltern v. Melhuish* (1754), Amb. 247.

2067. — *Original referred to in other instruments—Memorial entered in land register.*—A claim under a lost deed was allowed on the production of an unauthenticated copy of it, coupled with its being recited & recognised in other deeds & instruments, & its being memorialised in the register for the West Riding of Yorkshire, where the lands alleged to be comprised in the lost deed, were situate.—*TUNSTALL v. TRAPPES* (1829), 3 Sim. 286; 57 E. R. 1005.

Annotations:—*Mentd.* *Hart v. Cradock* (1837), 1 Jur. 735; *Neate v. Marlborough* (1838), 3 My. & Cr. 407; *Barnes v. Raester* (1842), 1 Y. & C. Ch. Cas. 401; *Allin v. Crawshaw* (1851), 9 Hare, 382; *Acraman v. Corbett* (1861), 30 L. J. Ch. 642; *Benham v. Keane* (1861), 3 De G. F. & J. 318; *Doswell v. Reece* (1865), 13 L. T. 156; *Mara v. Browne*, [1895] 2 Ch. 69; *Re Thursby's Settlement*, *Grant v. Littlehale*, [1910] 2 Ch. 181; *Re Stanley's Settlement*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

2068. Exemplification—Of depositions—Relating to lost conveyance.—*BLOWER v. KITCHMERE* (1666), 2 Kel. 31; 84 E. R. 20.

2069. — *Of recovery.*—An exemplification of the et. rolls of a recovery in ancient demesne shall be received in evidence, if the original record be destroyed.—*GREEN v. FROUD* (1674), 3 Keb. 310; 1 Mod. Rep. 117; 84 E. R. 738; *sub nom.* *ANON.*, 1 Vent. 257.

Annotations:—*Mentd.* *Warren d. Webb v. Greenville* (1740), 2 Stra. 1129; *Goodtitle d. Bridges v. Chandos* (1760), 2 Burr. 1065; *Middleton v. Melton* (1829), 8 L. J. O. S. K. B. 243; *Patch v. Shore* (1862), 3 Drew. & Sm. 589.

2070. — *Of will—Validity of will suspected.*—An original will was lost, & from the exemplification thereof under seal of the Prerogative Ct., there was reason to suspect its validity, as to the disposition of the real estate:—*Held*: such exemplification could not be admitted as evidence.—*ARTHUR v. ARTHUR* (1720), 3 Bro. Parl. Cas. 568; 1 E. R. 1503, H. L.

2071. Office copy—Of lost bill in Chancery.—The office copy of a bill cannot be read in evidence if the original is not upon the file, though an officer of the et. is ready to prove that the original cannot be found among the records. Entries of presentments in the books of a manor are not evidence of acts of ownership, nor used over lands by the lord of the manor.—*IRWIN (VISCOUNT) v. SIMPSON* (1758), 7 Bro. Parl. Cas. 306; 3 E. R. 199, H. L.

2072. — *Of enrolment of deed.*—*SMART v. WILLIAMS* (1694), Comb. 247; 3 Lev. 387; 1 Salk. 280; 90 E. R. 457.

Annotations:—*Consd.* *Tinkler v. Walpole* (1811), 14 East, 226. *Mentd.* *Stanyngton v. Cosins* (1746), *Barnes*, 456; *Birch v. Wright* (1786), 1 Term Rep. 378; *Hall d. Surtees v. Doe* (1822), 5 B. & Ald. 687.

2073. — *—*—*J.*—*DAWNEY, DEMANDANT, NEWSOME, TENANT, DOWNE (LORD), VOUCHER, No. 2056, ante.*

2074. Examined copy—Returns of parish regis-

ters—Whether proof of loss of original necessary.—

(1) *Semble*: the returns made annually of transcripts of parish registers to the registry of the diocese, under Canon 70, are not receivable in evidence instead of the original register, or an examined copy of it, without proof of the loss of the original register; but if the original be proved to have been lost, examined copies of these returns would be admissible.

(2) *Semble*: if the returns were made under Parochial Registers Act, 1812 (c. 146), s. 6, 7, examined copies of them would be evidence, without proof of the loss of the original register.—*WALKER v. BEAUCHAMP (COUNTESS)* (1834), 6 C. & P. 552, N. P.

Annotations:—*Generally.* *Mentd.* *Slaney v. Wade* (1836), 7 Sim. 595; *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Shedden v. A.-G.* (1860), 30 L. J. P. M. & A. 217.

2075. — *Marriage settlement.*—In 1828, two trustees executed a marriage settlement. The trustees died:—*Held*: the settlement having been lost, an examined copy might be received as secondary evidence of the original.—*WESTMORELAND v. HOLLAND* (1871), 23 L. T. 797; 19 W. R. 302.

2076. Attested copy—Deed.—A purchaser made an objection to a title for want of a deed, which had been enrolled at a public office, but could not be found. A copy of it, taken in 1632, attested to be a true one by five witnesses, was produced in et.:—*Held*: this would have been sufficient, even without an attestation.—*HARVEY v. PHILLIPS* (1743), 2 Atk. 541; 26 E. R. 725, L. C. *Annotation*:—*Mentd.* *Re Halifax Commercial Banking Co. & Wood* (1898), 79 L. T. 536.

2077. — *—*—*J.*—*DAWNEY, DEMANDANT, NEWSOME, TENANT, DOWNE (LORD), VOUCHER, No. 2056, ante.*

2078. — *—*—*J.*—*FITZWALTER PEERAGE, No. 1671, ante.*

2079. — *—*—*J.*—In covenant on a lost deed, with *non est factum* pleaded, it was proved that, on search, the deed, which by the date was sixty years old, could not be found in the muniment-room of plff., but that there was found there a paper which purported to be an attested copy of it. It was proved that both the persons whose signatures were to it as attesting the copy were dead; & the handwriting of one of them was proved; & it was also proved that persons of the same names as those who had attested the original deed were also dead:—*Held*: upon this proof this paper was not receivable as secondary evidence of the deed.—*BRINDLEY v. WOODHOUSE* (1845), 1 Car. & Kir. 647, N. P.

Annotation:—*Refd.* *Re Halifax Commercial Banking Co. v. Wood* (1898), 79 L. T. 536.

2080. Of parliamentary survey.—Copy of Parliamentary survey under the Commonwealth was admitted in evidence, the original having been destroyed.—*UNDERHILL v. DURHAM* (1699), 1 Freem. K. B. 509; 2 Gwill. 542; 89 E. R. 383.

2081. Of official licence—Authorising voyage.—*EYRE v. PALSGRAVE, No. 1975, ante.*

2082. Of faculty—Suit for tithes.—A copy of a faculty granted in 1613 was admitted as evidence

writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost.—*WARDROPE v. CANADIAN PACIFIC RY. CO.* (1884), 7 O. R. 321.—*CAN.*

2066 ii. — *—*—A copy of a deed which has been proved to be lost should not be received in evidence, & is of no value as evidence even when admitted, unless it has first been proved that the

copy produced is a correct copy of the lost deed.—*LEKHIMONI DASI v. KORUNA KANT MOITRO* (1878), C. L. R. 509.—*IND.*

s. Office copy.—Where a *wajib-ul-urz* was destroyed in the Mutiny, & plff. tendered in evidence a book obtained from the *tahsil* office, which purported to contain a copy of such *wajib-ul-urz* & of the signatures of the persons signing the original, & the name of the official in whose presence the instrument was executed & the et.

below was satisfied that there was no reason to doubt its being a genuine copy:—*Held*: such copy was evidence, not of a contemplated *wajib-ul-urz*, but of one which had been executed & completed.—*DABEE DUT v. ENAIT (SHEIK)* (1870), 2 N. W. 395.—*IND.*

t. Examined copy.—A document, more than thirty years old, purporting to be a copy of a lost instrument & coming out of the proper custody, is not made evidence by an indorsement

Sect. 5.—Secondary evidence: Sub-sect. 5, E. (b), (c) & (d).]

in a title suit, it being produced from the custody of a person whose rights were abridged by it, & there being evidence that the original could not be found in the proper depository, which was destroyed by the Great Fire of London.—*ISHAM v. WALLACE* (1830), 4 Sim. 25; 58 E. R. 10.

2083. Of award.]—The ct. may proceed upon proof of the copy or draft of an award, on being satisfied that the original is lost.—*Re DARWIN* (1831), 9 L. J. O. S. K. B. 183.

2084. Of endowment of vicarage.]—*TUCKER v. WILKINS*, No. 3400, *post*.

2085. Of affidavit.—Setting forth lost agreement.—Correctness admitted by opposite party.]—*POOLEY v. GOODWIN*, No. 2573, *post*.

2086. Of will.]—*FITZWALTER PEERAGE*, No. 1671, *ante*.

2087. Lost forged document.]—*R. v. HALL*, No. 1988, *ante*.

2088. Of abstract of lost deed.]—A vendor of certain lands situate in Yorkshire lost or mislaid the deed which by the conditions of sale was to be treated as the root of his title. By way of verification of the abstract of title delivered to the purchaser the vendor supplied the following evidence. That the abstracted portions were "practically" copies of the abstracted deeds; that the abstract was compared with the original deeds & contained everything that was material; a certified copy of the memorial of the deed which was registered in Yorkshire:—*Held*: the vendor

had not discharged his duty to the purchaser of verifying the abstract properly.—*Re HALIFAX COMMERCIAL BANKING CO., LTD. & WOOD* (1898), 79 L. T. 536; 47 W. R. 194; 15 T. L. R. 106; 43 Sol. Jo. 124, C. A.

Willful destruction.]—*See* Sub-sect. 5, F., *post*.

(c) Drafts and Counterparts.

2089. Draft.—Traced to proper custody.]—A draft of a deed, traced into possession of deft.'s family, is very good evidence on the loss of a deed.—*WHITFIELD v. FAUSSET* (1750), 1 Ves. Sen. 387;

27 E. R. 1097, L. C.

Annotations:—*Reid*. *Read v. Brookman* (1789), 3 Term Rep. 151. *Mentd.* *Chesterfield v. Janssen* (1751), 2 Ves. Sen. 125; *Doe d. Brune v. Martyn* (1826), 8 B. & C. 497; *Crosse v. Beddingfield* (1841), 5 Jur. 836.

2090. — Of award.]—*Re DARWIN*, No. 2083, *ante*.

2091. — Of marriage settlement.—Original rectified in other instrument.]—Where a marriage settlement executed many years ago was lost, but a draft of it was produced, & it was recited, though not accurately, in an instrument purporting to be the execution of a power given by it, & also in a will:—*Held*: the settlement must be acted on, & must be taken to have been in conformity with the draft.—*GREEN v. BAILEY* (1817), 15 Sim. 542; 11 Jur. 258; 60 E. R. 729.

2092. — Deed.]—*SPEARS v. HARLING* (1854), 24 L. T. O. S. 59.

2093. — Mortgage deed.—Produced from proper custody.—Information relating to original indorsed.]—*WALDY v. GRAY*, No. 2054, *ante*.

in the handwriting of a deceased family solr. of the person claiming under the lost instrument, that he has compared the copy with the instrument, & knows the handwriting of the witnesses to the original, & of one of the parties to be genuine.—*KEIR v. DAVOREN* (1861), 12 L. Ch. R. 352.—*IR*.

2086 i. Of will.]—An illiterate testator executed & retained in his possession two wills, & declared his intention of burning the earlier, which was revoked by the latter. After his death the first will was found, but the second could not be found, & it was presumed he had by mistake destroyed the second instead of the first. Upon notice to the parties whose interests under the first will were affected by the second, & upon evidence of his intentions & of the similarity of appearance of the two papers, probate granted of a fair copy draft of the second will.—*Re HEALEY'S WILL* (1883), 9 V. L. R. 43.—*AUS*.

2086 ii. —.]—Where it was proved that deceased made a will, that it existed after his death & that it was now lost, or destroyed, a copy made from memory & well proved by disinterested witnesses to correspond in effect with the lost will was admitted & administration granted.—*Re CULLEN'S ESTATE* (1852), 3 Nud. L. R. 308.—*NFLD*.

2088 i. Of abstract of lost deed.]—When a person has made extracts from a paper, he may, after the loss of the original, refresh his memory by reference to such extracts; & where other secondary evidence is produced of the whole instrument, a witness may speak to the contents of a part which he has abstracted although he has not seen or does not recollect the remainder.

v. JACK (1849), 1 All. 476.—*CAN*.

a. Of plan.]—To prove the lost plan of a reservoir which had been deposited as required by Standing Orders in the office of the Board of Land & Works, the ct. admitted as secondary evidence a similar plan lodged with the clerk of the Legislative

Assembly.—*CONNOLLY v. BEECHWORTH* (SHIRE OF) (1876), 2 V. L. R. 1.—*AUS*.

b. Sworn copy.]—A paper sworn by the registrar to be an accurate copy of the registry was admitted as secondary evidence:—*Held*: the evidence was properly received.—*HAZELL v. DYAS* (1876), 2 R. & C. 36.—*CAN*.

c. Of insurance policy.]—A policy of insurance had been destroyed, & no copy kept, but a form was produced proved to be the form then in use, & filled up from the application:—*Held*: good secondary evidence of the policy, as regarded the conditions, etc., but not as regarded the description of the property, which differed from that in the application.—*JOHNSTON v. CANADA FARMERS' MUTUAL FIRE INSURANCE CO.* (1877), 28 C. P. 211.—*CAN*.

d. Certified copy.]—On the trial of an action to recover possession of land pfts. put in as part of their title a certified copy of a deed without showing that the original was not in their possession:—*Held*: this was a matter as to which pfts. should be permitted to amend by filing the usual statutory affidavit.—*DOULL v. KEEFE* (1901), 34 N. S. R. 15.—*CAN*.

e. —.]—In a case falling under Evidence Act, s. 65 (a), (c), (f), any secondary evidence is admissible.—*Re AYA & BREXILDA COLLISION* (1879), 1 L. R. 5 Cal. 568.—*IND*.

f. —.]—The rule laid down in Evidence Act, s. 65, that a certified copy is the only secondary evidence admissible when the original is a document of which a certified copy is permitted by law to be given in evidence, does not apply where the original has been lost or destroyed.—*KALANDAN v. KUNHUNNI* (1882), 1 L. R. 6 Mad. 80.—*IND*.

g. Stamped copy.—Of lost unstamped original.]—A stamped copy of a lost unstamped original document cannot be received in evidence.—*CONNOR v. CROXIN* (1858), 7 I. C. L. R. 480.—*IR*.

h. —.]—*Semble*: a stamped copy of a lost unstamped document,

requiring a stamp, is admissible in evidence.—*HERBERT v. RAE* (1862), 13 L. Ch. R. 25.—*IR*.

k. Of deed.]—A document purporting to be an old copy of a lost deed, whereby certain charges on land were created, coming from the custody of the owner of one of these charges, is not admissible in evidence against the owner of the land without being proved.—*Re COAKE* (1863), 9 L. T. 54.—*IR*.

l. Of decree.]—After an appeal was filed, the decree was destroyed:—*Held*: a copy in the possession of applt. might be received upon evidence being given of its authenticity.—*BHENDRYAL SINGH v. KHADREMA* (1862), Marsh. 213; 1 Hay, 554.—*IND*.

m. Press copy.]—Evidence that a principal letter could not be recovered:—*Held*: sufficient to warrant the admission in evidence of a press copy.—*CLEMENTS v. MACAULAY* (1866), 4 Macph. (Ct. of Sess.) 543; 38 Sc. Jur. 277.—*SCOT*.

PART IV. SECT. 5, SUB-SECT. 5.—E. (c).

n. Draft.—Of will.]—A will had been duly executed, but could not be found at the death of testatrix. Upon proof that the draft contained a true copy of the will, & that testatrix had a few hours prior to her death spoken of the existence of the will, the ct. granted probate, although the same did not carry out the instructions given by testatrix for the preparation of the will.—*Re COTTERILL'S WILL* (1904), 4 S. R. N. S. W. 617; 21 N. S. W. N. 145.—*AUS*.

o. —.]—There was no evidence that a lost will was duly executed:—*Held*: probate should not be granted of a draft.—*GAIR v. BOWEN* (1909), 9 C. L. R. 510.—*AUS*.

p. — Of disposition.]—A party having burnt a disposition:—*Held*: competent in a question with him, to refer to a draft of it, in order to prove that it contained a reserved right of

2094. Counterpart—Lease of mortgaged property—Proof of execution of lease by mortgagee.]—The counterpart of a lease purporting to have been executed by a lessee of a lease granted by the mtgor., in conjunction with the mtgee. of certain premises cannot be read in evidence as against one who derives title under the mtgee., without some evidence of the execution of the original lease, which has been lost, by the mtgee.; but proof that the original lease was signed by the mtgee., the subscribing witnesses not being known, would be sufficient to warrant the reading of the counterpart.—*DOE v. CLARK v. TRAPAUD* (1810), 1 Stark. 281, N. P.

2095. ——— Apprenticeship deed.]—*R. v. HINCKLEY OVERSEERS*, No. 2039, ante.

(d) *Parol Evidence.*

2096. General rule—Parol evidence admissible.]—*LEYFIELD'S CASE*, No. 1849, ante.

2097. ———.]—All deeds, etc., must be proved unless in hands of adverse party, or destroyed; then parol evidence of contents will be allowed.—*COLE v. GIBSON* (1750), 1 Ves. Sen. 503; 27 E. R. 1169, L. C.
Annotation:—Mentd. *Hermann v. Charlesworth*, [1905] 2 K. B. 123.

2098. Lease—By witnesses who saw the lease.]—*MORETON v. HORTON & THORNER* (1669), 2 Keb. 483; 84 E. R. 303.

2099. ——— Nine years expired.]—*R. v. NORTH BEDBURN (INHABITANTS)* (1784), Cald. Mag. Cas. 452.

Annotations:—Refd. *Hall v. Ball* (1841), 3 Scott, N. R. 577. *Mentd.* *R. v. Minworth* (1802), 2 East, 199.

2100. ——— Assignment of.]—*METTERS v. BROWN*, No. 2061, ante.

2101. Jointure.]—*HAINES BARLEY'S CASE*, No. 2728, post.

2102. Court rolls.]—*ANDREWS v. WALLER*, No. 1974, ante.

2103. Order of removal.]—Parol evidence of an order of removal proved to be lost, is sufficient.—*R. v. METHERINGHAM (INHABITANTS)* (1796), 6 Term Rep. 556; 101 E. R. 700.

2104. Account vouchers.]—As, in the case of accounts in some sense settled, & a considerable period elapsing before they were impeached, vouchers might have been delivered up or lost, the oath of the party is admitted as evidence as to the existence & import of such vouchers.—*MORGAN v. LEWES* (1816), 4 Dow. 29; 3 E. R.

1079; *sub nom.* *LEWES v. MORGAN*, 5 Price, 42, 139, H. L.

Annotations:—Mentd. *Hare v. Bruford* (1824), 13 Price, 277; *Hiles v. Moore* (1848), 17 L. J. Ch. 385; *Blagrove v. Routh* (1856), 2 K. & J. 509; *Gresley v. Mousley* (1862), 3 De G. F. & J. 433; *Seaward v. Paterson*, [1897] 1 Ch. 545; *Bateman v. Hunt*, [1904] 2 K. B. 530; *Cheese v. Keen*, [1908] 1 Ch. 245.

2105. Acknowledgment of a debt—Where debt barred by Stat. Limitations.]—Where a written promise to pay a debt barred by Stat. Limitations has been lost, oral evidence of the contents of the writing may be given.—*HAYDON v. WILLIAMS* (1830), 7 Bing. 163; 4 Moo. & P. 811; 9 L. J. O. S. C. P. 16; 131 E. R. 63.

Annotations:—Fold. *Read v. Price*, [1909] 2 K. B. 724. *Refd.* *Baldon v. Walton* (1847), 17 L. J. Ex. 357. *Mentd.* *Brigstocke v. Smith* (1833), 1 Cr. & M. 483; *Irving v. Veltch* (1837), 3 M. & W. 90; *Courtenay v. Williams* (1844), 3 Hare, 539.

2106. ——— Within Civil Procedure Act, 1833 (c. 42), s. 5.]—Obligors under a bond dated in 1879 bound themselves jointly & severally for the repayment of a sum of money advanced with interest. One of them, the principal debtor, died in 1905. The deceased co-obligor had been in the habit of sending down to the year in which he died, the half-yearly interest by cheques inclosed in letters. The person who received these letters stated in evidence that the letters had been destroyed, but said that they contained, in addition to the cheques, acknowledgments of the existence of the bond, & it was accepted that they did contain such acknowledgments.—*Held:* although above sect. required an acknowledgment to be in writing, yet the existence of the writing when it had been lost & proof of the loss was satisfactory to the ct. might be proved, & secondary evidence might be given of the lost document.—*READ v. PRICE*, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 101 L. T. 60; 25 T. L. R. 701, C. A.

2107. Sheriff's warrant—Though book in which entered not produced—To connect sheriff with officer executing warrant.]—In an action of trover against a sheriff, if it appear that the officer's warrant is lost, parol evidence may be given of its contents, with a view of connecting the sheriff with the officer, although it appear that a book is kept at the sheriff's office in which an entry is made of all warrants granted by the sheriff, & this book is neither produced nor called for on the part of pltf.—*MOON v. RAPHAEL* (1835),

servitude against him.—*ROSS v. FISHER* (1833), 11 Sh. (Cl. of Sess.) 467.—*SCOT.*

q. Counterpart — Of lease.]—A document was produced which was said to be a counterpart of an agreement of letting. It was not registered; *Held:* it was inadmissible in evidence.—*YESHWADABAI & GOPIKABAI v. RAM CHANDRA TUKARAM* (1893), 1 L. R. 18 Bom. 66.—*IND.*

PART IV. SECT. 5. SUB-SECT. 5.—
E. (d).

2105 I. Acknowledgment of a debt—Where debt barred by Statute of Limitations.]—In a suit for the recovery of a sum of money due on a balance of accounts, pltf. alleged that defts. had given a written acknowledgment of the debt. The material issue upon the pleadings was whether there was any such acknowledgment. The acknowledgment was alleged to have been lost & the question arose whether secondary evidence of its contents could be received.—*Held:* Limitation Act, 1877, s. 19 (2), belongs to that branch of the law of evidence which is dealt with by Act I. of 1872, s. 91, & ought not to be read in derogation of the

general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed.—*SHAMBU NATH NATH v. RAM CHANDRA SHABA* (1885), 1 L. R. 12 Cal. 267.—*IND.*

r. Letter.]—A person who has received a letter, part only of which, he stated, related to the subject matter of the suit, may, after the destruction of the letter, testify as to the contents of that part, though he cannot state the words of the remainder of it, except generally, that it had no reference to the question involved in the suit.—*McGIBBON v. BURRIS* (1885), 25 N. B. R. 81.—*CAN.*

s. ———.]—An objection was taken to the production of the deposition of a haver to prove that a letter could not be recovered, & it was proposed to prove the contents by a witness.—*Held:* the evidence proved that a letter was written at the time, & that it was not to be found. When a principal writing is not to be found, a copy is the next best evidence, & then parol testimony. The party was entitled to parol evidence of its contents.—*SCOTT v. MILLER & KERN*

(1830), 5 Murr. 236.—*SCOT.*

t. ——— Containing defamatory matter.]—Where a letter alleged to contain defamatory matter is lost, & secondary evidence of its contents is admitted, the very words of the alleged libel must be proved, & general evidence as to what the witness believes to be the substance or effect of them is insufficient.—*SUTHERLAND v. NEILL* (1887), 6 N. Z. L. R. 5.—*N.Z.*

u. Agreement.]—Evidence should not be allowed to prove the terms of a verbal agreement between the parties, when they subsequently entered into a written agreement relating to the same subject matter, although the latter has been lost & it cannot be proved by a copy; & when pltf. claiming under the verbal agreement cannot remember the contents of the written agreement, & the evidence on the part of deft. as to such contents is not credited by the trial judge, the result is that no agreement is proved, & pltf. must fail.—*WICKS v. MILLER* (1911), 21 Man. L. R. 534.—*CAN.*

v. Ancient deed.]—*Qu.*: whether the contents of an ancient deed can be proved by parol evidence or

Sect. 5.—Secondary evidence: Sub-sect. 5, E. (d) & F.; sub-sect. 6, A. (a).]

7 C. & P. 115, N. P.; *subsequent proceedings*, 2 Bing. N. C. 310.

Annotations:—Mentd. Bodley v. Reynolds (1846), 15 L. J. Q. B. 219; Edmondson v. Nuttall (1864), 17 C. B. N. S. 280.

2108. Paper authorising distress—Copy given to distraintee—Such copy not accounted for.]—(1) A person who made a distress received a paper from the person by whose authority he distrained, & made a copy of it; which he gave to the person distrained on. The original was lost:—*Held*: parol evidence might be given of its contents, without producing or accounting for the copy given to the party distrained on.

(2) A mother & son were in possession of a house, for which house a declaration in ejectment was served on the son, who let judgment go by default, & also on the mother who defended:—*Held*: on the trial of the ejectment against the mother, an examined copy of a judgment, recovered against the son by the lessor of *pltf.* for use & occupation of the house, was not receivable in evidence.—*Doe d. MOISE v. WILLIAMS* (1842), Car. & M. 615, N. P.

2109. Bill book.]—CHESTON v. GIBBS (1844), 3 L. T. O. S. 38.

Contents of will—Declaration of testator.]—*See, generally, EXECUTORS; WILLS.*

2110. Letter—Showing intention as to disposal of property.]—BEECHER v. MAJOR, No. 1982, *ante*.

2111. ——— Containing threat—Divorce proceedings.]—MAXWELL'S DIVORCE BILL, [1911] W. N. 220, II. L.

2112. Agreement—Supply of gas.]—GRAYS GAS CO. v. BROMLEY GAS CONSUMERS' CO. (1901), *Times*, Mar. 23, C. A.

Willful destruction.]—*See Sub-sect. 5, F., post.*

F. Willful Destruction.

2113. Destruction by person bound by document—Admissibility of secondary evidence—Sworn copy.]—If a man destroys a thing that is designed to be evidence against himself a small matter will supply it. Deft. having torn his own note signed by him a copy sworn was admitted to be good evidence to prove it.—*ANON.* (1698), 1 Ld. Raym. 731; 91 E. R. 1388.

2114. ——— Parol evidence.]—Where a deed is wilfully destroyed, everything is to be presumed

against the party, *in odium spoliatoris*; & therefore, the parol evidence of the person who prepared the draft, though at the distance of several years, is admissible to prove the general contents of it.—*DELANEY v. TENISON* (1758), 3 Bro. Parl. Cas. 659; 1 E. R. 1559, H. L.

2115. ——— Marriage settlement.]—

In 1860 a husband, through the intervention of his wife, obtained possession of their marriage settlement from their trustee. The husband, then, in order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, & was proceeding to sell other parts of it. In Apr. 1864, the trustee filed a bill to restrain the intended sale, & prayed a declaration that the cancelled settlement should be established, & the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement: but *pltf.* & the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, & the precise contents of it. No draft or other copy of the settlement was produced to the ct.; but there was the evidence of the trustee, & the wife on the one side, & that of the husband & other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solr. who had prepared the settlement, & who had acted as solr. to the husband, in the mtge. transaction, & in the proposed sale of part of the settled property:—*Held*: upon a full consideration of all the evidence in the case, *pltf.* was now entitled to the relief he sought.—*BRANDON v. BARLOW* (1865), 13 L. T. 6.

2116. ——— Libellous letter.]—Deft., after the publication of a libel, & before the action was brought, destroyed the letter containing the libellous words:—*Held*: as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible.—*RAINY v. BRAVO* (1872), L. R. 4 P. C. 287; 9 Moo. P. C. C. N. S. 35; 27 L. T. 249; 36 J. P. 788; 20 W. R. 873; 17 E. R. 427, P. C.

2117. ———.]—O. ordered animals, bought at a market in the county of S., to be forwarded to T., in the county of C. A form of certificate was there given to the drover, who showed it in the course of the journey to railway porters & others

whether the deed itself must not be produced.—*EDGETT v. STILES* (1841), 1 Kerr, 338.—*CAN.*

c. Document showing composition of company.—*By witness who read document.]—**Pltf.* sued defts. for work done for B. Co., & together with other evidence produced a witness who said he had been one of a deputation that had called upon the manager of the co. to ascertain of whom it was composed, & that said manager had produced a document & read it, stating that T. & J., the parties sued, with others whom he named, were the parties concerned in the co.; that the document was then handed to witness who read part of it to the company present who were quite satisfied that there was such a co.:—*Held*: this statement was admissible as secondary evidence of the document.—*LOCKHART v. WATSON* (1879), 3 L. & C. 543.—*CAN.*

d. Contents of deed—Partially destroyed by insects.]—Parol evidence admitted to supply words in an old deed, lost in consequence of the parts on which they were written having been eaten by insects.—*BENEDICTE LALL ROY v. DULLOO SIRCAR* (1863), Marsh. 620.—*IND.*

PART IV. SECT. 5, SUB-SECT. 5.—F.

2114 i. Destruction by person bound by document—Admissibility of secondary evidence—Parol evidence.]—A young man under twenty-one made an offer of marriage by letter to a young woman, & in the letter promised that if she would marry him he would, after the marriage, give her all the property he had, meaning real property, describing it as "my farm in O.," & "my property in E." She accepted the offer unconditionally, also by letter; the marriage took place; & he afterwards conveyed the two properties to her. After the conveyances the parties, voluntarily & without any evil intent, destroyed the letters, believing that they had no longer any use for them:—*Held*: the letters formed a pre-nuptial contract, enforceable in spite of their destruction, upon satisfactory evidence of their contents being given.—*STUART v. THOMSON* (1893), 23 O. R. 503.—*CAN.*

2114 ii. ———.]—In a suit to redeem a mtge. it was proved that the mtgees. & their assignee had fraudulently destroyed the deed by which the property was mortgaged:—*Held*: the mtgees. could not be per-

mitted to prove the contents of the deed of the amount of mortgage debt by secondary evidence.—*SIEK ABDULLA v. SIEK MUHAMMAD* (1864), 1 Bom. 177.—*IND.*

2114 iii. ———.]—A cautioner, desiring to terminate his liability to a bank under limited guarantee, paid to the bank the full amount for which he was liable. The bank having written on the back of the letter of guarantee a receipt for the payment, which contained a reservation of his right to claim on the estate of the principal debtor for the full amount of his indebtedness, delivered the letter of guarantee to the cautioner, who intentionally destroyed it. The principal debtor having thereafter become bkpt., the bank made a claim for a ranking in the bkpy. proceedings & a question having arisen as to the amount for which the bank was entitled to rank, the bank sought to prove the terms of the letter of guarantee & receipt:—*Held*: there was no *casus amissionis* disclosed which could entitle the bank to prove the tenor of the destroyed document.—*MACKINNON'S TRUSTEE v. BANK OF SCOTLAND*, [1915] S. C. 411.—*SCOT.*

at two places in the county of C., but it was destroyed by order of O. On O. being charged for uttering a false certificate, & notice to produce the original being served:—*Held*: the justices at T. were right in receiving secondary evidence of the certificate.—*Oakey v. Stretton* (1884), 48 J. P. 709, D. C.

SUB-SECT. 6.—DOCUMENT IN POSSESSION OF ADVERSARY—NOTICE TO PRODUCE.

A. Conditions Precedent to Admissibility.

(a) Service of Notice.

2118. Notice essential—Prior to admission of secondary evidence.—*R. v. Doran* (1791), 1 Esp. 125, N. P.

2119. ————*]*—You cannot ask a witness what the opposite party has said as to the contents of deeds executed by him, without such party has had notice to produce such deeds.—*Bloxam v. Elsee* (1825), 1 C. & P. 558; 1 Carp. Pat. Cas. 434; Ry. & M. 187; 3 L. J. O. S. K. B. 93, N. P. *Annotations*.—*Consd.* *Slatterie v. Pooley* (1840), 6 M. & W. 664. *Mentd.* *Neilson v. Harford* (1841), 8 M. & W. 806; *Allen v. Rawson* (1845), 1 C. B. 551; *Beard v. Egerton* (1846), 3 C. B. 97; *Palmer v. Wagstaff* (1854), 9 Exch. 494; *Ward v. Hill* (1903), 20 R. P. C. 189.

2120. ————*]*—(1) A party cannot, at the hearing, give secondary evidence of the contents of a document in his adversary's possession, unless he has given him notice to produce it.

(2) The depositions are not sufficient notice.—*Stulz v. Stulz* (1832), 5 Sim. 460; 2 L. J. Ch. 39; 58 E. R. 410.

2121. ————*]*—In debt for rent by the assignee of the reversion against the assignee of the term, pltf.'s attorney was called by his client to prove the execution of a deed. On cross-examination he admitted that there had been another deed between the same parties, relating to the demised premises, executed after the former, & that he had that deed in ct.; but he refused to produce it, relying on his privilege. Def't. then offered to produce parol evidence of the contents of the deed, without stating what evidence. No notice to produce had been given:—*Held*: parol evidence was rightly rejected.—*Bate v. Kinsey* (1834), 1 Cr. M. & R. 38; 4 Tyr. 602; 3 L. J. Ex. 304.

Annotation.—*Consd.* *Dwyer v. Collins* (1852), 7 Exch. 639.

2122. ————*]*—In *assumpsit* by the drawer against the acceptor of a bill of exchange def't. pleaded that at the time of the acceptance he was a bkpt., & indebted to pltf. in a certain sum, which debt was proveable by pltf. under the *fiat*, & was barred by def't.'s certificate, since obtained, & that def't. accepted the bill as part payment of the debt due to pltf. in consideration that pltf. would prove his debt under the *fiat*. Replication, that def't.

did not accept the bill by way of part payment of any debt proveable under the *fiat modo et forma*. Issue thereon:—*Held*: def't. could not give secondary evidence of the bill to show that it was accepted under the circumstances alleged, without a notice to produce.—*Goodered v. Armour* (1842), 3 Q. B. 956; 3 Gal. & Dav. 206; 12 L. J. Q. B. 56; 6 Jur. 1062; 114 E. R. 778.

Annotation.—*Consd.* *Dwyer v. Collins* (1852), 7 Exch. 639.

2123. ————*]*—*Jones v. Tarleton*, No. 1807, *ante*.

2124. ————*]*—*R. v. Hinley*, No. 1073, *ante*.

2125. ————*]*—*R. v. Fenton* (1846), cited 3 C. B. 760.

2126. ————*]*—In an appeal against a rate where the practice of the sessions is for appts. to begin & prove the making of the rate, appts. cannot, upon non-production of the rate by resps., give secondary evidence of it, unless they have given resps. notice to produce the rate.—*R. v. Lichfield (Recorder)* (1849), 13 L. T. O. S. 255; 13 J. P. Jo. 393.

2127. ————*]*—In an action upon a contract, in which the consideration was a bill of exchange given by pltf. to def't., who had notice to produce it, but on the *voir dire* stated that before the notice he had discounted it with his banker:—*Held*: it must be proved either by production or secondary evidence under the notice to produce. *Qu.*: whether such secondary evidence was admissible. *Semble*: it was not, & pltf.'s course was to have had a discovery of its custody, & served the banker with a *subpoena duces tecum*.—*Wright v. Bunyard* (1860), 2 F. & F. 193.

2128. ————*]*—*R. v. Farr*, No. 2135, *post*.

2129. ————*]*—Upon an indictment for perjury in falsely swearing on a former trial that there was no draft of a statutory declaration, the materiality of the existence of such draft turned upon its contents & the fact of certain alterations having been made in it. Parol evidence was admitted, not only of the fact of the existence of the draft, but of its contents & alterations made in it which were not in the declaration itself, without any notice to produce the draft having been given to prisoner:—*Held*: (1) such parol evidence of the draft & its contents was inadmissible; (2) the nature of the indictment was not such as of itself to operate as a notice to produce.

(3) It has been held that, in an action for trover for a deed or other writing, notice may be dispensed with, on the ground that the action itself is notice to def't. of the nature & contents of the document. In a criminal prosecution for stealing a document, it has been held unnecessary to give notice to produce (*Kelly, C.B.*).—*R. v. Elworthy* (1867), L. R. 1 C. C. R. 103; 37 L. J. M. C. 3; 17 L. T. 293; 32 J. P. 54; 16 W. R. 207; 10 Cox, C. C. 579, C. C. R.

PART IV. SECT. 5. SUB-SECT. 6.—

A. (a).

2118 i. Notice essential—Prior to admission of secondary evidence.—Before parol or secondary evidence can be given of a note being received by pltfs. in satisfaction of claim for work done, def't. must prove notice to pltf. to produce the note.—*Hewak v. McDougall* (1834), 3 O. S. 647.—*CAN.*

2118 ii. ————*]*—Where a pltf. in ejectment proves no documentary or promissory title but relies upon the estoppel arising from his having let def't. into possession of the land, & it appears in pltf.'s case that def't. took possession under a written agreement, pltf. cannot recover without producing the agreement or giving secondary

evidence of it after notice to produce.—*Doe v. Blanche* (1855), 3 All. 189.—*CAN.*

2118 iii. ————*]*—Where to an action on a note against the makers, def'ts. pleaded fraud:—*Held*: the note must be proved, & as def'ts. had given no notice to produce, & it was not shown that pltfs. or their attorney had the note in ct., the defence could not be gone into.—*BANK OF MONTREAL v. Snyder* (1859), 18 U. C. R. 492.—*CAN.*

2118 iv. ————*]*—A report of the circumstances of a loss under policy of insurance, made to def'ts. by their agent, a copy of which had been given to pltf., is not evidence without notice to produce.—*Duffy v. Strymer* (1861),

50 All. 197.—*CAN.*

2118 v. ————*]*—Pltf. having deposed in evidence that he wrote a letter about his affairs to def't., calling on him to sell goods which he had seized under an execution against def't.'s principal, & that he, pltf., or somebody for him, posted it, & evidence having been given that def't. had held a conversation with a third person, in which he stated that he had been so called upon, & during which conversation he held a letter in his hand which he did not read, but which he said he had received on the subject:—*Held*: sufficient ground to admit secondary evidence of the letter written by pltf., a notice to produce having been served.—*Spencer v. Thompson* (1856), 61 C. L. R. 537; 10 Ir. Jur. 258.—*IR.*

Sect. 5.—Secondary evidence: Sub-sect. 6, A. (a) & (b) i. & ii.]

When notice not necessary.]—*See Sub-sect. 6, E., post.*

2130. Object of serving notice.]—DWYER v. COLLINS, No. 2160, *post*.

(b) *Possession of Document by Adversary.*
i. *In General.*

2131. Adversary must have possession—Possession by third party—Under whom adversary justifies.]—In an action of trespass, notice having been given to deft. to produce a written paper which had been delivered to A. under whom deft. justified, & under whose directions he acted:—*Held:* pltf. was not entitled to give secondary evidence of the contents.—EVANS v. SWEET (1824), as reported in Ry. & M. 83, N. P.

Annotations:—Mentd. Doe d. Morgan v. Frisby (1825), 10 Moore, C. P. 574; Hamilton v. Jones (1830), 4 Moo. & P. 454; Keeling v. Austin (1831), 5 Moo. & P. 599; Corsar v. Reed (1851), 2 L. M. & P. 646.

2132. ——— Stakeholder.]—Secondary evidence of a document, to produce which notice has been given, is not admissible, where the document is held by a stakeholder between the party in the cause & a third person.—PARRY v. MAY & MORRIS (1833), 1 Mood. & R. 279, N. P.

2133. ———.]—Where of two defts., G. & L., L. had suffered judgment by default, a judge's order of admission was made on notice that deft. G. proposed to adduce the documents specified, which might be inspected, & that pltf. would be required to admit that they were copies of, or extracts from, original documents, as they purported to be; & the documents were described as "copies of, or extracts from letter from pltf. to deft. dated, etc."—*Held:* this did not authorise the giving in evidence such copy without further proof of the original, though notice had been given to produce, it not being proved that pltf. had the original.—SHARPE v. LAMB (1840), 11 Ad. & El. 805; 3 Per. & Dav. 454; 9 L. J. Q. B. 185; 4 Jur. 905; 113 E. R. 620.

2134. ———.]—LAXTON v. REYNOLDS, No. 2190, *post*.

2135. ———.]—On an indictment against two prisoners, A. & B., for burglary, one of the articles stolen, the only one directly proved to have been in the possession of either of them, being a ring, which was described particularly by prosecutor, & proved to have had an inscription upon it, & to have been just like one he produced; & one of prisoners being proved to have shown, soon after the burglary, a ring which was proved to have been just like that produced, & to have had an inscription upon it, but no notice to produce which had been given:—*Held:* the contents of the inscription on prosecutor's ring could not be proved as there had been no notice given to prisoner to produce the ring shown by him to the witness, the contents of the inscription upon it could not be proved.

The contents of a writing on any document or portable article cannot be proved without its production, or without showing it to be in the possession or power of prisoner or opposite party, & no notice to him to produce it (CHANNEL, B.).—R. v. FARR (1864), 4 F. & F. 336.

2136. Whether adversary may deny possession—

PART IV. SECT. 5, SUB-SECT. 6.—
A. (b) (i).

e. *Adversary must have possession by third party—Bailor of note.]—*Pltf.'s counsel, in opening the case, stated that the notes

were left by pltf. with deft. as security, & that they had been given up by him to the makers improperly, before any demand on deft. or refusal on his part to return them:—*Held:* no notice to deft. to produce was necessary.

Before secondary evidence considered.]—Deft. had written a letter to H., pltf.'s attorney, who stated in evidence that he had written a letter in answer to it, which he gave to deft. at his, H.'s, office on Apr. 4. This letter of Apr. 4 being called for under a notice to produce, deft.'s counsel stated that there was no such letter, & proposed to show by evidence that H. had not given his letter to deft. on Apr. 4, at his office, as stated, because deft. was at another place, & also because H.'s letter was dated on Apr. 6, & was sent by post on that day. The judge received the evidence thus proposed to be given for deft. before allowing pltf. to go into secondary evidence of H.'s letter of Apr. 4:—*Held:* such evidence was not evidence to the jury, but to himself only, & any part of it which was written evidence should not be read by the officer of the ct., but should be handed to the judge & then shown to the opposite counsel.—SMITH v. SLEAP (1843), 1 Car. & Kir. 48, N. P.

2137. ———.]—ELMES v. OGLE, No. 2186, *post*.

2138. ———.]—The issue in an action on a policy being the execution of the policy pltf's., having given defts. notice to produce the policy, tendered in evidence a document which he had received from defts. purporting to be a copy of the policy. Deft.'s counsel then tendered evidence to show that no such policy had ever been executed, & asked the judge to decide whether that were so or not, as a necessary preliminary to the admissibility of the copy. The judge refused to do so, & admitted the copy, leaving the question whether the policy had ever been executed ultimately to the jury:—*Held:* he was right in so doing.—STOWE v. QUERNER (1870), L. R. 5 Exch. 155; 39 L. J. Ex. 60; 22 L. T. 29; 18 W. R. 466; 3 Mar. L. C. 341.

ii. *What amounts to Possession.*

2139. Of ship's captain—Action against owner.]—Notice to deft. to produce an order relating to the ship which it appears deft. has delivered to the captain is sufficient, in default of production, to enable pltf's. to give parol evidence of the order, since the possession of the captain is for this purpose the possession of deft.—BALDNEY v. RITCHIE (1816), 1 Stark. 338, N. P.

Annotation:—Mentd. De Mautort v. Saunders (1830), 1 B. & Ad. 398.

2140. Of agent of adversary.]—If a paper be traced to the hands of the agent of a party in a suit, & notice has been given to such party to produce it, he is bound to do so, & the other side are not bound to call the agent; & if he has delivered it to the stamp office to get certain duties allowed, & does not tell the party serving the notice to produce, of that circumstance, parol evidence of the contents may be given.—SINCLAIR v. STEVENSON (1824), 1 C. & P. 582, N. P.

Annotations:—Consd. Elmes v. Ogle (1851), 15 Jur. 180. *Mentd.* Burgess v. Bennett (1872), 20 W. R. 720.

2141. Of banker — Adversary's cheque.]—Notice to a deft. to produce a cheque drawn by him & paid by his banker, is sufficient to entitle pltf. to give secondary evidence of its contents, although the cheque remains in the banker's hands.—PARTRIDGE v. COATES (1824), 1 C. & P. 534; Ry. & M. 153, N. P.

Pltf. was entitled to prove the contents of the notes without showing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence.—TILLY v. FISHER (1852), 10 U. C. R. 32.—CAN.

2142. ———.]-If a cheque, drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party, having been paid, the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce.—*BURTON v. PAYNE* (1827), 2 C. & P. 520, N. P.

2143. Of court.—After order to deliver out.]-A document deposited in a ct. of equity by a party to a suit there, & scheduled in his answer but which remains with an officer of that ct., after an order to deliver it to the party, is sufficiently in the control & power of such party to let in secondary evidence after notice to produce, & non-production thereof by the party.—*RUSH v. PEACOCK* (1838), 2 Mood. & R. 162, N. P.

2144. ———. **Clerk of records.**]-*R. v. GORDON* (1844), 4 L. T. O. S. 196.

2145. Of member of committee.—Not joined as party.]-Pltf. was employed as secretary to the committee of a charitable society, pursuant to a resolution entered in the book of the committee, of which during his service he had the care. The society being afterwards dissolved, pltf. sued some of the members of the committee for his salary:—*Held*: he ought to produce the book containing the resolution under which he was engaged; & that book appearing to be in the possession of a member of the committee who had not been joined in the action, notice to defts. to produce it was not sufficient to entitle pltf. to give secondary evidence of its contents.—*WHITFORD v. TUTIN* (1834), 10 Bing. 395; 4 Moo. & S. 166; 3 L. J. C. P. 106; 131 E. R. 957.

2146. ———. **Action against chairman.**]-Where several persons, among whom was deft., had attended meetings for the purpose of forming a co., & deft. had acted as chairman & signed the minutes, which were afterwards entered in a book, which book was given into the possession of another member of the committee in deft.'s absence:—*Held*: a notice to produce the book & minutes given to deft. was sufficient to let in secondary evidence of its contents.—*WIEB v. HARRIES* (1848), 12 L. T. O. S. 275.

2147. Of sheriff.—Levy for estreated recognisances.]-*R. v. HAMP*, No. 2266, *post*.

2148. Of cestui que trust.—Action against trustee.]-The doctrine of "open & apparent easement," applied to all ways marked on a plan shown by lessor to lessee before the execution of the lease, & also applied to a plan shown by *cestui que trust* of lessor in his presence:—*Held*: this was sufficient *prima facie* proof of possession by him, so as to let in secondary evidence of the plan, after notice to him to produce it, he being deft. in the action.—*SPANTON v. HINNES* (1862), 3 F. & F. 52.

2149. Of attorney of adversary.—Penal action.]-It is not necessary in penal actions to give notice to deft. himself to produce papers, etc. Notice to his agent or attorney is sufficient.—*CATES v. WINTER* (1789), 3 Term Rep. 306; 100 E. R. 590.

2150. ———. **Notice of non-possession.—To party serving notice.**]-After a notice to produce a lease & a nonsuit on the trial of the cause, deft. assigned the lease without the privity of his attorney on record. A second action was afterwards brought, & another notice to produce the lease was served upon the attorney, who informed the person serving the notice that the lease had been assigned, & that the assignment was made without his privity. Pltf. being acquainted with

the place of deft.'s residence:—*Held*: it was incumbent upon him to have inquired of deft., in whose possession the lease was, in order to render secondary evidence of its contents admissible.

In a case circumstanced as this is, notice to the attorney cannot be sufficient, since the lease not only was not in his possession but had been assigned after the last trial, & the person who served the notice was informed that the attorney for deft. was not privy to the assignment (*DALLAS, C.J.*).—*KNIGHT v. MARTIN* (1819), Gow, 103, N. P.

2151. ———. **Action against sheriff.**]-Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the undersheriff while the sheriff was yet in office, & the bailiff, upon being called as a witness, did not produce it:—*Held*: proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents.—*TAPLIN v. ATTY* (1825), 3 Bing. 164; 10 Moore, C. P. 564; 3 L. J. O. S. C. P. 218; 130 E. R. 476.

2152. ———.]-In an action against a sheriff for not arresting under a *ca. sa.*, in order to connect the sheriff with the transaction the bailiff, who had not been served with a *subpoena duces tecum*, proved, that when deft. went out of office the warrant was sent to the persons who while deft. was sheriff acted as the London agents, & who were also his attorneys on the record:—*Held*: notice to them to produce the warrant, after deft. had gone out of office, was sufficient to entitle pltf. to give secondary evidence of its contents.—*SUTER v. BURRELL* (1858), 2 H. & N. 867; 27 L. J. Ex. 193.

2153. ———.]-A notice to produce, served on the attorney of a deft. to an indictment, is good. Search in the proper place at the Bankrupt Office, & notice to produce served on the bankrupt deft., sufficient to let in secondary evidence of bkpt.'s papers.—*R. v. BENT* (1843), 2 L. T. O. S. 168.

2154. ———.]-In an action on the case for the obstruction of pltf.'s lights by the erection of a club house, the builder was called to prove that he contracted with defts., who were sued as the trustees of the club. It appearing that there was but one contract, which the witness gave to the attorney of the club, after executing it, & that there was notice to produce, which was not complied with:—*Held*: the attorney, having been served with a *subpoena duces tecum*, pltf. might go into secondary evidence of the contents of the contract so delivered to the attorney of the club, as his possession must be taken to be that of his clients, & they were bound to ask him to deliver it to them on the instant.—*BATEY v. WATSON* (1849), 14 L. T. O. S. 257.

2155. ———.]-Where a document was proved to have been in the actual possession of a party to the action, or to be now in the possession of his attorney in another action:—*Held*: secondary evidence was admissible notice having been given to that attorney to produce it. *Semble*: it would have been so even without such notice to the attorney.

The possession of pltf.'s attorney is the possession of pltf. Generally, documents of any value are in the actual custody of bankers, or attorneys or agents of some kind; & though they might perhaps be subpoenaed, it is not necessary to subpoena them; when the principal is a party to the suit, it is sufficient to give the party notice to produce the document, & if he does not do so, then secondary evidence is sufficient (*POLLOCK, C.B.*).—*IRWIN v. LEVER* (1860), 2 F. & F. 296.

Sect. 5.—Secondary evidence: Sub-sect. 6, A. (b) iii. & B.]

iii. Proof of Possession.

2156. Questioning attorney of adversary—As to his possession of document.]—Where notice to produce a letter has been served, the attorney for the opposite party may be asked, whether he has that letter, in order to let in secondary evidence of it, if not produced.—*BEVAN v. WATERS* (1828), 3 C. & P. 520; *Mood. & M.* 235, N. P. *Annotations:—**Refd.* *Coates v. Birch* (1811), 2 Q. B. 252; *Dwyer v. Collins* (1852), 7 Exch. 639; *Troupell v. Haws* (1863), 3 F. & F. 784. *Mentd.* *Judson v. Ethoridoe* (1833), 3 Tyr. 954; *Sanderson v. Bell* (1834), 2 Cr. & M. 304; *Scarfe v. Morgan* (1838), 4 M. & W. 270; *Jackson v. Cummins* (1839), 5 M. & W. 342.

2157. ———.]—For the purpose of letting in secondary evidence, the attorney of the hostile party may be asked whether he has possession of a document, though it appears that he obtained it from his client only in the course of communication with reference to the cause.—*COATES v. BIRCH* (1811), 2 Q. B. 252; 1 Gal. & Dav. 647; 11 L. J. Q. B. 1; 5 Jur. 1009; 114 E. R. 98; *sub nom.* *COATES v. MUDGE*, 1 Dowl. N. S. 540. *Annotation:—**Consd.* *Dwyer v. Collins* (1852), 7 Exch. 639.

2158. ———.]—A solr. to one of the parties to a suit may be called by the opposite party & asked respecting the possession of documents connected with an estate, which he had received in professional confidence; &, for the purpose of identifying such documents, the date & names of the parties to them may be given so as to give secondary evidence of it if it should not be produced in obedience to the notice given to the party for that purpose.—*DOE d. MARKYAT v. MAIDMERIT* (1845), 5 L. T. O. S. 333.

2159. ———. Whether document in court.]—*WISE v. COLLETT* (1852), 19 L. T. O. S. 67.

2160. ———.]—(1) The object of a notice to produce a document is merely to give the opposite party sufficient opportunity to produce it if he pleases, & not that he may be enabled to prepare evidence to explain, nullify, or confirm it; &, therefore, where the document is in ct. at the time of the trial, a notice to produce it immediately is sufficient to render secondary evidence of its contents admissible if it be not produced.

(2) The attorney of a party to a suit may be asked, & is bound to answer, whether a document which he has received from his client in the course of his professional employment is in his possession or elsewhere in the ct.—*DWYER v. COLLINS* (1852), 7 Exch. 639; 21 L. J. Ex. 225; 19 L. T. O. S. 186; 16 Jur. 569; 155 E. R. 1104.

*Annotations:—**As to (1) Refd.* *Meynell v. Bone* (1853), 21 L. T. O. S. 158; *Beaton v. Skene* (1860), 29 L. J. Ex. 430. *As to (2) Refd.* *Marriott v. Anchor Reversionary Co.* (1861), 3 Giff. 304; *Re Cutts, Ex p. Ibbetson* (1867), 16 L. T. 713.

2161. Other possible possessors not exhausted—Document relating to pauper settlement—Alleged owner deceased—No examination of representations or search.]—An indenture of apprenticeship, made 1797, having been signed only by one overseer of appellant parish, respondent parish, to show that only one had been appointed in that year, called upon appts. to produce the original appointment, having given them notice to produce all books & writings relating thereto; one book only was produced, & that was not for the year 1797:—*Held*: resps., not having taken any

means to procure the testimony of the overseer himself, who must be presumed to have the custody of the original appointment, were not entitled to give secondary evidence of its contents.—*R. v. STOKE GOLDING (INHABITANTS)* (1817), 1 B. & Ald. 173; 106 E. R. 64.

2162. ———. No inquiry of primâ facie order.]—Resps. proved that a deceased rated inhabitant had stated several times to the pauper, that appellant parish had taken a bond from B., touching the support of a child of the pauper's wife; & that he, the rated inhabitant, had the bond in his possession. This person did not appear to have ever been a parish officer. Notice had been given to appts. to produce the bond; but it did not appear that any search had been made among the papers of deceased, nor were his representatives examined:—*Held*: parol evidence of the contents of the bond was not admissible.—*R. v. HINCKLEY (INHABITANTS)* (1831), 9 L. J. O. S. M. C. 75.

2163. Presumption of possession—Based on statement of party's counsel.]—*DUNCOMBE v. DANIELL*, No. 2177, *post*.

B. Effect of Refusal to Produce.

2164. Secondary evidence admissible—At what stage of proceedings.]—*GRAHAM v. DYSTER* (1816), 2 Stark. 21, N. P.; *subsequent proceedings* (1817), 6 M. & S. 1.

*Annotations:—**Mentd.* *Hornby v. Lacy* (1817), 6 M. & S. 166; *Smart v. Sanders* (1848), 5 C. B. 895.

2165. ———. Ejectment.]—Pltf. in ejectment may give parol evidence of the contents of a deed in the hands of deft., after notice & refusal to produce it.—*SEYMOUR'S CASE* (1710), 10 Mod. Rep. 8; 88 E. R. 600.

*Annotation:—**Refd.* *R. v. Arnold* (1718), 1 Stra. 101.

2166. ———.]—Tenant for life, under a devise with a leasing power, let to deft. by a lease not noticing the power. After the death of lessor, a succeeding tenant for life, under the same devise, brought ejectment against deft. on the ground that the lease was not a valid execution of the power. To prove the term, deft. called for the production of the deed creating it. The witness called upon stated that he held the deed as attorney for a mtgee. of the land, & that his client refused to produce it; & the witness himself declined to produce it, or to give oral evidence of the contents. Deft. then called as a witness the attorney of a party who had made a contract with the lessor of pltf. for exchange of lands: & he stated that on making the contract the attorney for the lessor of pltf. had furnished him with an abstract referring to the deed in question, which abstract he had compared with the original; that he held the abstract as evidence of the contract; that he had no instructions from his client, but would produce the abstract if the judge thought he ought to do so. The judge said, that he thought there was no sufficient reason why the witness should not; & it was produced as secondary evidence of the deed creating the term:—*Held*: the evidence was properly produced.—*DOE d. EGREMONT (EARL) v. LANGDON* (1848), 12 Q. B. 711; 18 L. J. Q. B. 17; 12 L. T. O. S. 84; 13 Jur. 96; 116 E. R. 1037.

2167. ———.]—If on proper notice, a party refuse to produce a deed necessary to prove the issue the

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2167i. Secondary evidence admissible.]—*CARTE v. DENNIS* (1901), 21 C. L. T. 267; 5 Terr. L. R. 30.—*CAN.*

2167ii. ———.]—An original document

upon which pltf. based his suit was proved to be in the possession of deft. In a previous suit deft.'s mother had filed the document, & on removing it had, according to the rules of practice, placed a copy there instead. Deft.,

on being summoned, failed to produce the same:—*Held*: a copy of such copy, so filed in ct., was admissible evidence.—*MAKBUL ALI v. SRIMATI MASNAD BIBI* (1869), 3 B. L. R. A. C. 51; 11 W. R. 396.—*IND.*

other party may give parol evidence of its contents.—**BARTLETT v. GAWLER** (1741), 7 Mod. Rep. 343; 87 E. R. 1281.

2168. —[.]—A merchant's copybook of letters has been allowed to be read, where a person who has the original letters refuses to produce them.—**STURT v. MELLISH** (1743), 2 Atk. 610; 26 E. R. 765, L. C.

*Annotation:—***Mentd.** **Wilson v. Bury** (1880), 5 Q. B. D. 518.

2169. — **Information.**—[A.-G. v. **LE MERCHANT** (1772), 2 Term Rep. 201, n.; 1 Leach, 300, n.; 100 E. R. 109.

*Annotations:—***N.F. R. v. Kitson** (1853), 22 L. J. M. C. 118. **Exfld. & Distd. R. v. Elworthy** (1867), 37 L. J. M. C. 3. **Refd. Wilson v. Rastall** (1792), 4 Term Rep. 753. **Mentd.** **Cates v. Winter** (1789), 3 Term Rep. 306; **R. v. Downham** (1858), 1 F. & F. 386.

2170. —[.]—It has been determined that in a criminal prosecution you may give notice to deft. to produce a paper in his possession; & in case he neglects to produce it you may give other evidence of it (**BULLER, J.**).—**R. v. WATSON** (1788), 2 Term Rep. 199; 100 E. R. 108.

*Annotations:—***Mentd.** **A.-G. v. Carmarthen Corp.** (1805), Coop. G. 30; **Mill v. Hawker** (1874), L. R. 9 Exch. 309.

2171. —[.]—Where a letter has been written by plff. to a witness, & the witness has had a *subpoena duces tecum*, but has previously delivered the letter to plff., who refuses to produce it, parol evidence of its contents is admissible.—**LEEDS v. COOK** (1803), 4 Esp. 256, N. P.

*Annotation:—***Mentd.** **Hall v. Wright** (1859), E. B. & E. 765.

2172. —[.]—If two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse on notice to produce the stamped part.—**GARNONS v. SWIFT** (1809), 1 Taunt. 507; 127 E. R. 930.

*Annotation:—***Folld.** **Munn v. Godbold** (1825), 3 Bing. 292.

2173. —[.]—Where a trustee has possession of the counterpart of a lease, & refuses to produce it, the ct. will grant a rule to show cause why an attested copy being annexed to the notice under 1 Geo. 4, c. 87, should not be sufficient.—**DOE d. TIDD v. ROE** (1822), 1 L. J. O. S. K. B. 6.

2174. —[.]—**DAMER v. LANGTON**, No. 1828, ante.

2175. —[.]—(1) On an indictment for uttering a forged deed, it appeared that the deed alleged to have been forged was produced in evidence by prisoner's attorney on the trial of an ejectment in which prisoner was lessor of plff.; & that, after the trial, it was returned to prisoner's attorney:—**Held:** if prisoner did not produce the deed, he having had notice to produce it, secondary evidence might be given of its contents, without calling his attorney to prove what he had done with the deed.

(2) If, as secondary evidence of the contents of the deed, the draft be given in evidence, & in

the draft words be abbreviated, which, in the setting out of the deed in the indictment, are put in words at length, it will be for the jury to say whether they think that the words abbreviated in the draft were inserted at length in the deed itself.—**R. v. HUNTER** (1829), 4 C. & P. 128.

2176. — **Actions against executors.**—(1) If an instrument offered in evidence is objected to as being improperly stamped, the party offering it may either go into the rest of his evidence & send the instrument to the stamp office to be stamped anew, taking the chance of its coming back sufficiently early, or his counsel may argue the objection, taking the stamp as it is; but if the instrument be sent away to the stamp office, the judge will not allow any argument as to the original stamp being proper.

(2) In an action against A. & B. as exors., A. had suffered judgment by default. The probate of the will was produced, & notice had been given to both defts. to produce a receipt which had been given to A. as one of the exors.:—**Held:** if it was not produced, secondary evidence might be given of its contents, & A.'s having suffered judgment by default made no difference.—**BECKWITH v. BENNER** (1834), 6 C. & P. 681, N. P.

2177. — **Cheque.**—In opening a case of libel relating to a cheque, in which deft. pleaded a justification, that the imputations of the libel were true, plff.'s counsel made a full opening of the facts as to the cheque, which he stated plff. to have paid, but adduced no evidence on this part of plff.'s case:—**Held:** deft.'s counsel was entitled to call for the production of the cheque, on a notice to produce, without showing that it was in plff.'s possession in any other way than by the opening of his own counsel, & if the cheque was not produced, secondary evidence was admissible.—**DUNCOMBE v. DANIELL** (1837), 8 C. & P. 222; 2 Jur. 33, N. P.

*Annotations:—***Refd.** **Kirkman v. Jervis** (1839), 7 Dowl. 678; **Haller v. Worman** (1861), 3 L. T. 741. **Mentd.** **Pankhurst v. Hamilton** (1887), 3 T. L. R. 500.

2178. — **Agreement for work & labour.**—**SPENCER v. COLLINS** (1837), 1 Jur. 21.

2179. — **Action against surety.**—[Deft., as surety for N., having received & promised to pay an account which he was informed had been agreed to by N., & refusing to produce it on the trial of an action brought against him by plff., the employer of N.:—**Held:** without calling N., plff. might prove by the witness who produced a duplicate, that that was the account N. had gone over, & that he had said it was correct.—**WARD v. SUFFIELD** (1839), 5 Bing. N. C. 381; 2 Arn. 4; 7 Scott, 352; 8 L. J. C. P. 207; 2 Jur. 377; 132 E. R. 1145.

2180. —[.]—**RIGBY v. JEFFRYS**, No. 1837, ante.

2181. —[.]—Where notice to produce a document had been given to deft., & there was merely evidence to go to the jury that such document

2187 iii. —[.]—Where a deft. out of the jurisdiction of the ct. was summoned to produce a letter & did not comply with the summons, but appeared by pleader at the last moment at the hearing of the suit, & service of notice on the pleader to produce the letter would have been nugatory, secondary evidence of the contents of the letter was admitted.—**MELLUS v. MALABAR** (VICAR APOSTOLIC OF) (1879), L. R. 2 Mad. 295.—**IND.**

2187 iv. —[.]—In an action against deft. as chairman of a relief committee for the price of work, executed by plffs. pursuant to a resolution signed by deft., the terms upon which

the work was to be done were contained in a letter written by plffs. at the request of W., then acting as the agent of the relief committee, & handed to him as such agent. Deft. was served with notice to produce this letter, & W. was served with a *subpoena duces tecum*:—**Held:** plffs. had entitled themselves to give secondary evidence of the contents of this letter.—**MARTIN v. BARRY** (1850), 2 Jr. Jur. 30.—**IR.**

2187 v. —[.]—A party may prove the contents of a written document regularly called for, but not produced by the opposite party.—**ARMSTRONG v. VAIR** (1823), 3 Murr. 317.—**SCOT.**

1. — *In criminal proceedings.*—On the trial of a prisoner at a circuit ct. for forging & uttering, the forged cheque was proved to have been last in the possession of prisoner. Notice to produce the cheque had been served on prisoner. The notice was signed by the Crown Solr.'s clerk, who was attending the circuit ct. The cheque not being produced secondary evidence was admitted:—**Held:** notice to produce was good & therefore secondary evidence was rightly admitted.—**R. v. JORDAN** (1876), 14 N. S. W. S. C. R. 295.—**AUS.**

2. — *Subsequent production by party refusing rejected.*—[Deft.'s counsel

ence: Sub-sect. 6, B. & C.]

was in his possession:—*Held*: the document not having been produced when called for, *pltf.* might give secondary evidence thereof.—*ROBB v. STARKEY* (1845), 2 Car. & Kir. 143, N. P.

2182. — *Written contract.*—*BATEY v. WATSON*, No. 2154, *ante*.

2183. — *Recovery of deposit.*—*CHAPLIN v. CLARKE*, No. 1965, *ante*.

2184. — *Replevin bond—Original tender after refusal.*—At the trial of an action against the sheriff for taking an insufficient replevin bond, *pltf.'s* counsel called for the original bond. *Defts.'s* counsel refusing to produce it, a copy was tendered, & was about to be read; *defts.'s* counsel then produced the original, & objected to its being read without the evidence of an attesting witness. The judge allowed it to be read:—*Held*: *pltf.* was entitled to read the copy, & the copy must be taken to have been read.—*EDMONDS v. CHALLIS* (1849), 7 C. B. 413; 6 Dow. & L. 581; *Rob. L. & W.* 47; *Cox, M. & H.* 216; 18 L. J. C. P. 164; 13 L. T. O. S. 92; 13 Jur. 389; 137 E. R. 104.

Annotation:—*Reid, Edwards v. Camerons, etc. Ry.* (1850), 16 L. T. O. S. 197.

2185. — *Accounts.*—(1) Notice had been given to *deft.* to produce a statement of account delivered by *t.* & all other statements relating to the action. The account was delivered by *H.* *Semble*: secondary evidence of such statement was admissible.

(2) An attested document was produced, but the attesting witness was absent. In consequence of a wish to see it expressed by the jury, it was handed to them by the opposing counsel, & read by them:—*Held*: it was thus made evidence.—*COBHAM v. BALL* (1850), 16 L. T. O. S. 245, N. P.

2186. — *Minute book of company.*—In an action against one of the directors of a joint-stock co., which had ceased working, for salary due to *pltf.* as its clerk, notice was given to *deft.* to produce the minute-book of its proceedings, kept by the secretary, which contained, as was said, entries of the occasions on which *deft.* had attended the meetings of the co., & also the terms of the resolution under which *pltf.* had entered into its employ. *Deft.* having refused to produce this book:—*Held*: (1) secondary evidence of its contents was *prima facie* admissible; (2) *deft.* might interpose with proof to exclude it, by showing that the book was not in his power or control, & that he had communicated this fact to *pltf.* in sufficient time before the trial to enable him to apply for it elsewhere.—*ELMES v. OGLE* (1851), 15 Jur. 180.

2187. — *IRWIN v. LEVER*, No. 2155, *ante*.

2188. — *Ratepayer's books.*—Upon appeal

refused to produce a lease at the trial after notice to produce, & *pltf.* was compelled to prove it by secondary evidence. Later, *deft.* offered the lease in evidence, & upon its rejection offered secondary evidence by oral testimony, which was also rejected:—*Held*: the evidence was properly rejected. *Deft.*, after refusing to produce a document in his possession when called for by *pltf.*, could not afterwards put it in evidence for his own advantage.—*CYR v. DE ROSIER* (1910), 40 N. B. R. 373; 9 E. L. R. 550.—*CAN.*

h. — *Provided document not proved unstamped when last seen.*—Secondary evidence tendered to prove the contents of an instrument which is retained by the opposite party after notice to produce it can only be admitted in the absence of evidence to

show that it was unstamped when last seen.—*SENNANDAN v. KOLLAKIRAN* (1880), 1 L. R. 2 Mad. 208.—*IND.*

k. — *On appeal.*—A party claimed to be registered by virtue of a lease made to him by *A.* for 36 years, provided the interest of *A.*, under a lease thereof made to him by *C.*, should so long continue. The lease from *C.* to *A.* was for 46 years, provided *C.'s* interest in a certain other lease, by which he held the lands, should so long continue. No evidence of *C.'s* interest having been given in the ct. below, claimant was rejected for want of title. On the appeal, he proved that he had made an application to *C.* for the production of the lease made to him (*C.*) & a refusal by *C.*:—*Held*: secondary evidence of *C.'s* interest was admissible.—*Re MURPHY* (1842), 1r. Cir. Rep. 379.—*IR.*

to sessions against a rate in respect of premises occupied as a racecourse resps. have a right to call for the production & upon non-production to prove the contents of applt.'s books of account as an element in ascertaining the ratable value of the occupation.—*R. v. VERRALL* (1875), 1 Q. B. D. 9; 45 L. J. M. C. 29; 24 W. R. 139; *sub nom.* *VERRALL v. CROYDON UNION*, 33 L. T. 379; *sub nom.* *CROYDON UNION GUARDIANS v. VERRALL*, 40 J. P. 550.

Annotations:—*Folld. Clark v. Fisherton-Angar* (1880), 6 Q. B. D. 139. *Consd. Mersey Docks & Harbour Board v. Birkenhead Assmt. Com.*, [1900] 1 Q. B. 143. *Refd. Parr v. Leigh Union* (1905), 1 Konst. Rat. App. 211. *Mentd. Dodds v. South Shields Union Assmt. Com.* (1895), 72 L. T. 645; *Bode & Compton v. Hackney Union* (1900), Ryde & K. Rat. App. 38; *Cartwright v. Sealecoates Union* (1900), Ryde & K. Rat. App. 167.

2189. *Document not subsequently admissible.*—Where a party refuses to produce a document after notice, & secondary evidence is in consequence given, he cannot afterwards put in the document as part of his own case.—*DOE d. THOMPSON v. HODGSON* (1840), 12 Ad. & El. 135; 2 Mood. & R. 283; 4 Per. & Dav. 142; 9 L. J. Q. B. 327; 4 Jur. 1202; 113 E. R. 762.

2190. — *(1)* A party cannot be called on to produce a document for the purpose of evidence unless it is shown that he is bound to do so; i.e. that it is in his possession.

(2) A party who refused to produce a document when called on cannot afterwards produce it for his own evidence.

(3) A party declining to produce a document ought simply to answer that he does not produce it, & should not enter into a statement of the reasons why he does not produce it.—*LAXTON v. REYNOLDS* (1854), 18 Jur. 963.

2191. — *(1)*—Where, at the trial, a document is called for & its production declined, the party so declining to produce it cannot afterwards make use of it for any purpose.—*COLLINS v. GASHON* (1860), 2 F. & F. 47, N. P.

2192. — *(1)*—A person in possession of a deed, & declining to produce it when properly called upon to do so, cannot afterwards put it in (*MARTIN, B.*)—*ROUPELL v. WAITE* (1862), 3 F. & F. 511, N. P.

C. What Secondary Evidence Admissible.

2193. *Copy—Order of removal—Proved to be true copy.*—*R. v. KIRKBY STEPHEN* (1770), Burr. S. C. 664; 2 Bott. 6th ed. 712.

Annotations:—*Mentd. R. v. Nantwich* (1812), 16 East, 228; *R. v. Bishop Wearmouth* (1834), 5 B. & Ad. 942; *R. v. Oldbury* (1835), 5 Nev. & M. K. B. 547.

2194. — *(1)*—On an appeal against an order of removal it is the duty of applts. to produce the original order, & if it is in the hands of resps., applts. cannot put in evidence the copy which has

PART IV. SECT. 5, SUB-SECT. 6.—C.

1. Copy—Of an abstract.—In an action for dower in three lots of land, to prove that *deft.* was tenant of the freehold, a witness was called, who stated that he had occupied one of the lots as tenant to *deft.*; & about ten years ago conveyed all three lots to one *H.*, who swore that he had conveyed to *deft.* after having occupied as owner & built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to *deft.*:—*Held*: sufficient evidence to go to the jury. *FISHER v. HARTY* (1864), 23 U. C. R. 408.—*CAN.*

m. — *Certified copy.*—*Re AVA & BRENHILDA COLLISION* (1879), 1 L. R. 5 Calc. 568.—*IND.*

n. — *& service of original docu-*

been served upon them, unless they have given notice to resps. to produce the original.—*R. v. SUSSEX JJ.* (1840), 9 Dowl. 125; Woll. 47.

Annotations.—*Consd.* *R. v. Manchester* (1851), 16 J. P. 73. *Refd.* *R. v. Townstal, R. v. Stayley* (1843), 3 Q. B. 359; *R. v. Lichfield* (1849), 13 J. P. Jo. 393; *R. v. Peterborough JJ.* (1849), 3 New Sess. Cas. 365.

2195. ———. ———.]—It is not an essential preliminary to the hearing of an appeal against an order of removal, that the original order of removal should be in ct. *Semble*: it is sufficient for applt. to file a copy of the order with the officer of the ct. when the appeal is entered, & give notice to resps. to produce the original order.—*R. v. MANCHESTER RECORDER* (1851), 17 L. T. O. S. 170; 16 J. P. 73; 15 Jur. 729.

2196. ———. *Examined copy—Deed—Part only not produced.*]—(1) When a deed is in the possession of deft., who had notice to produce it, but does not, an examined copy is evidence without proof of deft.'s execution of it.

(2) Though there are more parts of a deed than one which is in deft.'s possession, but who does not produce it after notice, pltf. is not obliged to produce in evidence one of the originals, but may give a copy in evidence.—*DOXON v. HAIGH* (1795), 1 Esp. 409, N. P.

2197. ———. ———. *Without proof of execution.*]—*DOXON v. HAIGH*, No. 2196, *ante*.

2198. ———. *A letter—Notifying dishonour of bill.*]—Where notice of the dishonour of a bill has been given by letter, a copy of the letter cannot be given in evidence, as proof of notice of the bill having been dishonoured, unless notice has been given to produce it.—*LANGDON v. HULLS* (1804), 5 Esp. 156, N. P.

2199. ———. ———. ———.]—An examined copy of a letter, containing notice of the dishonour of a bill of exchange which is not produced, nor the subject matter of the action, is not admissible without notice to produce the letter sent.—*LANAUZE v. PALMER* (1827), Mood. & M. 31, N. P. *Annotation*.—*Refd.* *Robinson v. Brown* (1846), 16 L. J. C. P. 46.

2200. ———. *Letter book.*]—A book containing the copy of a letter had, by consent of the parties to a Chancery suit, been inspected at the office of the attorney of the party who had the possession of it, instead of being deposited with the master; & on that occasion a copy of the entry in the book was taken by the party who inspected. On a trial at law between parties in the same interest:—*Held*: upon notice to produce this book, evidence of the copy so taken was admissible, without reading the answer in the suit in which it was produced, & which answer referred to it, & was the cause of its inspection.—*LONG v. CHAMPION* (1831), 2 B. & Ad. 284; 9 L. J. O. S. K. B. 248; 109 E. R. 1149.

2201. ———. *Taxed bill of costs.*]—*DAVENPORT v. RACKSTROW* (1823), 1 C. & P. 89, N. P.

ment—Admitted in evidence on commission—Admissible at trial.]—A commission to take evidence in Western Australia was issued in an action in the Supreme Ct. of New Zealand between parties resident in New Zealand. Defts. desired to give evidence before the commission in Western Australia of the service of a document upon pltf. in Western Australia. Before the taking of evidence before the commission they gave notice to pltf.'s agents in Western Australia to produce the original document, but they had not then given notice to produce to pltf. or his solrs. in New Zealand. They proved a copy of the document & service of the original by evidence before the commission. Afterwards,

& before the trial, they gave notice to produce to pltf.'s solrs. in New Zealand. The document was not produced at the trial:—*Held*: the secondary evidence given before the commission was admissible at the trial.—*WILKIE v. WILKIE* (No. 2) (1900), 18 N. Z. L. R. 734.—N. Z.

2201 i. *Parol evidence.*]—A state of rents due by the tenant, rendered by the factor to the landlord, & retained by him, is competent evidence in favour of the tenant, & the landlord having failed to produce it, being required, parol evidence of its contents is competent.—*MITCHELL v. BERWICK* (1845), 7 Dowl. (Ct. of Sess.) 382.—SCOT.

2202. ———. *Of song—Action for libel.*]—In an action for a libel contained in a song which had been published by singing in the streets, a witness who had sung it was called, but the identical copy from which he had sung it could not be produced. Notice to produce the original having been given:—*Held*: proof that a copy produced was similar to that which had been sung, & that the manuscript had been delivered by H. one of defts., to M. the other, to print; that M. accordingly printed a thousand copies, & sent three hundred of them to H. & that several were delivered by him to the witness, was sufficient evidence from which a jury might infer a joint publication by both defts.—*JOHNSON v. HUDSON & MORGAN* (1836), 7 Ad. & El. 233, n.; 1 Har. & W. 680; 5 L. J. K. B. 95; 112 E. R. 459.

Annotation.—*Mentd.* *Watts v. Fraser* (1837), 7 Ad. & El. 223.

2203. ———. *Of a card.*]—To make a deft.'s card evidence, you must give him notice to produce his cards, & put in one as a copy unless the one to be put in can be proved to have been given to the witness by deft. himself.

This card cannot be given in evidence unless it was received from deft. himself. The proper way is to give deft. notice to produce his cards & then prove one as a copy or give parol evidence of its contents (*ABBOTT, C.J.*).—*CLARK v. CAPP* (1824), 1 C. & P. 199, N. P.

2204. ———. *Of a copy.*]—(1) After notice to produce a letter written by pltf. to deft., parol evidence of its contents may be given by any one who recollects the contents, although it is in pltf.'s power to produce the clerk who wrote the

(2) In such case, the contents cannot be proved by the production of a copy of the original copy.—*LIEBMAN v. POOLEY* (1816), 1 Stark. 167, N. P.

2205. ———. ———.]—The contents of a document refused to be produced after notice, cannot be proved by the production of a copy of a copy of the document. The first copy ought to be produced.—*EVERINGHAM v. ROUNDELL* (1838), 2 Mood. & R. 138.

2206. *Memorial—Of a registered deed.*]—The memorial of a conveyance that has been registered, is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance.—*MOLTON v. HARRIS* (1797), 2 Esp. 549, N. P.

Annotation.—*Refd.* *Boulter v. Peplow* (1850), 9 C. B. 493.

2207. *Draft—Abbreviations used—Effect of.*]—*R. v. HUNTER*, No. 2175, *ante*.

2208. *Parol evidence.*]—*SALTERN v. MELHUISS*, No. 1979, *ante*.

2209. ———. *Letter—Notifying dishonour of bill.*]—Parol evidence of a letter containing an account of the dishonour of a note of hand, is not admissible, unless notice has been given to produce such

o. Abstract—Of will—Registered by party.]—In ejectment, pltf. claimed under the heir of B., who died in 1826, leaving a will which was shown to be in deft.'s possession, who declined to produce it on notice. Two memorials were then offered as secondary evidence, but rejected on the ground that they were not shown to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848 between the four sons of B., by which the land in question went to I., under whom deft. claimed; & the memorial of the will purported to be executed by S., another of the four sons, as a devisee:—*Held*: the memorials when tendered, were rightly

-Secondary evidence: Sub-sect. 6, C. & .

letter.—*SHAW v. MARKHAM* (1792), Peake, 221, N. P.

2210. ——— **By anyone having knowledge of contents.]**—*LIEBMAN v. POOLEY*, No. 2204, *ante*.

2211. ——— **Although witness has copy of letter.]**—*BROWN v. WOODMAN*, No. 1845, *ante*.

2212. ——— **Where witness has duplicate original.]**—*BROWN v. WOODMAN*, No. 1845, *ante*.

2213. ——— **Books of account.]**—If upon a notice to produce books of account, they are not produced, this circumstance affords no legal ground for any inference respecting their contents, & merely entitles the opposite party to prove their contents by parol evidence.—*COOPER v. GIBBONS* (1813), 3 Camp. 363, N. P.

2214. ——— **Certificate of discharge—Of bankrupt.]**—(1) To prove the allowance of bkpt.'s certificate by the Lord Chancellor, the book kept in the office of the secretary of bkpts., in which entries are made of the allowance of certificates, is not secondary evidence.

(2) To prove that deft. who pleads his bkpey. had been before discharged as a bkpt., after notice to produce the former certificate, it is enough if witnesses state they were employed by him to solicit that certificate, & that looking at the entries in their books they have no doubt it was allowed by the Lord Chancellor.—*HENRY v. LEIGH* (1813), 3 Camp. 499, N. P.

2215. ——— **Card.]**—*CLARK v. CAPP*, No. 2203, *ante*.

2216. ——— **Lease—Although counterpart not produced.]**—*HALL v. BAILL*, No. 1847, *ante*.

*D. Sufficiency of Notice.**(a) In General.*

See R. S. C., Ord. 66, r. 1.

2217. Must be sufficient.]—In an action of trespass against the sheriff for the wrongful act of a bailiff, it is not enough, in order to affect the sheriff, to prove him a general bailiff, & that he had given a bond of indemnity to the sheriff as such together with proving the copy of the warrant under which he entered & seized pltf.'s goods; but the privity between such bailiff & the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution directed by the sheriff to such bailiff; or at least by proving such notice to produce it as will, in case of non-production, let in the secondary evidence of its contents.—*DRAKE v. SIKES* (1797), 7 Term Rep. 113; 101 E. R. 883.

Annotation:—Mentd. Snowball v. Goodricke (1833), 4 B. & Ad. 541.

-What is sufficient notice.]—*See Sub-sect. 6, D. (b), post.*

2218. Form—How entitled.]—In an action by pltf., A. & B., as assignees of C. v. E., a notice to produce a document was entitled A. & B. assignees of C. & D. v. E.:—*Held*: this was insufficient, although A. & B. were, in fact,

rejected, for the reason given, though they would have been admissible after the subsequent evidence.—*HAYBALL v. SHEPARD* (1866), 25 U. C. R. 536.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 6.—D. (a).

p. Must be precise—Generality must be objected to before admission of

evidence.]—If secondary evidence of a paper is admitted without objection from the party on whom a notice to produce has been served, he cannot afterwards, on motion for a new trial, object that the notice to produce was too general.—*ROSE v. LINDSAY* (1848), 3 Kerr. 645.—*CAN.*

q. Subpoena—Served on attorney of party.]—*Semle*: a subpoena duces

assignees of C. & D.—*HARVEY v. MORGAN* (1816), 2 Stark. 17.

Annotation:—Refd. Lawrence v. Clark (1845), 14 M. & W. 250.

2219. Must be in writing—Secondary evidence of deed.]—Notice to produce a deed must be proved to be given in writing before parol evidence of the deed can be allowed.—*GLOUCESTERSHIRE CASE* (circa 1800), Orme's Election Laws, p. 474.

2220. Must be precise.]—*ROCHESTER CORPN. v. LEVI* (1845), 9 J. P. Jo. 114.

Proof of service.]—*See R. S. C., Ord. 32, r. 8.*

(b) What is Good Notice.

See R. S. C., Ord. 66, r. 1.

2221. General notice—Documents relating to cause.]—"Notice to produce letters, & copies of letters, also all books relating to this cause," is insufficient, & will not let in parol evidence of the contents of a letter alleged to have been written nine years before, & not produced.—*JONES v. EDWARDS* (1825), M'Cle. & Yo. 139; 148 E. R. 358.

Annotation:—Distd. Jacob v. Lee (1837), 2 Mood. & R. 33.

2222. ——— **—**—**]**—In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; notice to produce "all letters, papers & documents touching or concerning the bill of exchange mentioned in the declaration, & the debt sought to be recovered" is too general.—*FRANCE v. LUCY* (1825), Ry. & M. 341, N. P.

Annotations:—Distd. Jacob v. Lee (1837), 2 Mood. & R. 33. *Refd. Smith v. Sundeman* (1847), 9 L. T. O. S. 202.

2223. ——— **—**—**]**—A notice to produce "all & every letters written by pltf. to deft., relating to the matters in dispute in the action," is sufficient to let in secondary evidence of a particular letter, though it do not specify the date of such letter.—*JACOB v. LEE* (1837), 2 Mood. & R. 33, N. P.

2224. ——— **—**—**]**—In an action for work & labour, a notice to produce "all accounts relating to the matters in question in this cause," is sufficient to let in secondary evidence of an account of work done, given by pltf. to deft., without specifying it by date or otherwise.—*ROGERS v. CUSTANCE* (1839), 2 Mood. & R. 179, N. P.; *subsequent proceedings* (1841), 1 Q. B. 77.

2225. ——— **—**—**]**—*ANON.* (1899), 44 Sol. Jo. 95.

2226. ——— **Documents between certain dates.]**—A notice to produce all letters written by the one party to, & received by, the other, between the years 1837 & 1841 both inclusive:—*Held*: sufficient to call for a particular letter.—*MORRIS v. HAUSER & M'KNIGHT* (1841), 2 Mood. & R. 392, N. P.

2227. ——— **Coupled with specific notice—As to certain documents—Only latter notice valid.]**

Notice was given to pltf. to produce "the letters hereunder specified, & all letters relating to the matter in question." Three letters were specified below, & those three letters were produced by pltf.:—*Semle*: secondary evidence of a letter not being one of the three specified, was not admissible in evidence under the general words in

tecum, served on the attorney of a party, requiring him to produce a document, is sufficient notice to let in secondary evidence of the contents of the document. An attorney must tell whether he has in his possession a letter addressed to his client so as to let in secondary evidence of its contents, after service of a subpoena duces tecum on him to produce it.—*CASH v. TREVOR* (1840), Arm. M. & O. 60.—*IR.*

the notice.—**SMITH v. SANDEMAN** (1847), 9 L. T. O. S. 202; 2 Cox, C. C. 239.

2228. Depositions.—(1) Answer to a bill by a rector for an account of tithes, setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness, one of the patrons of the living, to pltf., previous to his admission to the living, containing the terms of the agreement, which were afterwards accepted, & the letter, containing such acceptance, had been subsequently returned to pltf., & destroyed by him. On an objection to the admissibility of evidence of the letter containing the proposal, on the ground of want of notice to pltf. to produce the original:—*Held*: the evidence was admissible, the depositions being sufficient notice.

(2) At law, such evidence would not be admissible without notice, because, it not being known till the time of the trial what evidence will be offered on either side, *non constat*, otherwise, that the original might not be produced.

(3) But even at law notice is not necessary, where, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question.—**WOOD v. STRICKLAND** (1817), 2 Mer. 461; 35 E. R. 1016.

Annotations:—As to (1) **Consd.** **Stulz v. Stulz** (1832), 5 Sim. 460; **Knight v. Waterford** (1841), 4 Y. & C. Ex. 283.

2229. ———.]—**STULZ v. STULZ**, No. 2120, *ante*.

2230. Notice served on first attorney—Subsequent change of attorney—No fresh notice required.]

—Where the attorney in a cause has been changed, a notice to produce, served, before the change, on the first attorney, is sufficient to call for production of the paper on the trial, without fresh service on the second attorney.—**DOE d. MARTIN v. MARTIN** (1832), 1 Mood. & R. 242, N. P.

2231. Signed summons by magistrate.]—A justice has no power to issue a summons, calling on the overseer of a parish to produce the rate books at petty sessions, for the purpose of proving that a pauper has been assessed to the poor rate; & service of such a summons on the overseer will not authorise the reception of secondary evidence of the contents of the rate books.—**R. v. ORTON (INHABITANTS)** (1845), 7 Q. B. 120; 1 New Mag. Cas. 243; 1 New Sess. Cas. 567; 14 L. J. M. C. 89; 5 L. T. O. S. 53; 9 J. P. 520; 9 Jur. 441; 115 E. R. 433.

2232. Notices given for previous trial—Where new trial granted.]—A notice to produce “upon the trial of the cause” applies not merely to the trial which it immediately precedes but to every subsequent trial which may take place. Upon the second trial of a cause, therefore, secondary evidence of a document, the only notice to produce which was served before the first trial was held properly admitted.—**HOPE v. BEADON** (1851), 17 Q. B. 509; 2 L. M. & P. 593; 21 L. J. Q. B. 25; 18 L. T. O. S. 72; 16 Jur. 80; 117 E. R. 1377.

2233. Notice to produce another document—Referring to document required.]—Under a notice to produce a letter, which is produced, & mentions that it covers other papers, those papers are not thereby made evidence, unless they are referred to in the letter.—**JOHNSON v. GILSON** (1801), 4 Esp. 21, N. P.

2234. ———.]—**COOMBS v. BRISTOL & EXETER RY. CO.**, No. 2254, *post*.

2235. ———.]—Notice to produce a letter which refers to an enclosed account is sufficient to entitle the sender to give secondary evidence of the enclosed account if it be not produced.—**ENGALL v. DRUCE** (1861), 9 W. R. 536.

2236. Indictment.]—**R. v. ELWORTHY**, No 2129, *ante*.

(c) *Time of Service.*

i. *In General.*

See R. S. C., Ord. 64, r. 11.

2237. No general rule—Each case governed by own circumstances.]—A cause was tried at the assizes on a Monday, the commission day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorneys on whom the notice to produce was served, & also the party who was their client, lived in the assize town:—*Held*: the service of the notice to produce was not too late, & the question in such case is, whether under all the circumstances reasonable notice has been given.—**FIRKIN v. EDWARDS** (1840), 9 C. & P. 478, N. P.

2238. ———.]—**R. v. BARKER**, No. 2261, *post*.

2239. ——— Reasonable time before trial.]

(1) If a forged deed be in the possession of prisoner, who is indicted for forging it, prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the assizes, given prisoner notice to produce it.

(2) A notice given to prisoner during the assizes is too late.

(3) If prisoner has said that he has destroyed the deed, no notice to produce it will be necessary.—**R. v. HAWORTH** (1830), 4 C. & P. 254.

Annotation:—Generally, **Mentd.** **R. v. Coote** (1873), L. R. 1.

2240. ———.]—**LLOYD v. MOSTYN**, No. 2258, *post*.

2241. Service during assizes—Insufficient.]—**R. v. HAWORTH**, No. 2239, *ante*.

2242. Service on Sunday bad.]—**HUGHES v. BUDD**, No. 2253, *post*.

2243. Whether time reasonable or not—Trial judge to decide.]—**LLOYD v. MOSTYN**, No. 2254, *post*.

2244. Must be in proper time.]—(1) In an action on a covenant by lessee against lessor, where the lease had been executed by deft.'s agent under a power of attorney, upon whom a *subpoena duces tecum* had been served, but not in proper time:—*Held*: secondary evidence of the contents of the power of attorney ought not to be admitted.

(2) An attorney cannot be compelled by the ct. to disclose the contents of a client's deed in his possession, but if he do so willingly the evidence may be received.—**HIBBERD v. KNIGHT** (1848), 2 Exch. 11; 3 New Pract. Cas. 75; 17 L. J. Ex. 119; 10 L. T. O. S. 395; 12 Jur. 162; 154 E. R. 384.

2245. Sessions previous to session of trial.]—

(1) A notice to produce, served on a prisoner in time for the Sept. sessions at the Central Criminal Ct., is sufficient for a trial at the following sessions without any fresh notice.

(2) Notice served on prisoner in prison is sufficient.—**R. v. ROBINSON** (1850), 14 J. P. 741; 5 Cox, C. C. 183.

2246. Day before trial.]—Prisoner was indicted for arson in setting fire to his own house, with intent to defraud an insurance office. Notice to produce the policy was given him in the middle of the day before the trial. The policy was not produced:—*Held*: secondary evidence of the policy was not admissible.—**R. v. KIRSON** (1853), Dears. C. C. 187; 22 L. J. M. C. 118; 17 J. P. 311; 17 Jur. 422; 6 Cox, C. C. 159, C. C. R.

Sect. 5.—Secondary evidence: Sub-sect. 6, D. (c) ii. & iii.]

ii. When Parties or Documents not at Place of Trial.

2247. Must be before commission day—Trial at assizes.]—Notice to produce must be served before the commission day on parties living away from the assize town.—*TRIST v. JOHNSON* (1833), 1 Mood. & R. 259, N. P.

Annotation:—Reid. R. v. Kitson (1853), 22 L. J. M. C. 118.

2248. When secondary evidence inadmissible—Service three days before trial—Party in Scotland.]

—Notice served on the attorney at 9 o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland, is too late.—*VICE v. ANSON* (1827), 3 C. & P. 19; Mood. & M. 96, N. P.

2249. ——— Second notice for further documents—First notice complied with.]—A notice to produce deeds was served on deft.'s attorney in Essex on Saturday, the commission day of the assizes being Monday; the attorney went to London & fetched them. A notice was served on the Monday evening to produce another deed. The attorney stated he had been to town to fetch the deeds, & if pltf. would pay the expense of sending for this from town where it was, it should be had. No offer to pay was made & the trial was on Thursday:—*Held*: pltf. was not entitled to give secondary evidence of the last mentioned deed.—*DOE d. CURTIS v. SPITTY* (1832), 3 B. & Ad. 182; 1 L. J. K. B. 88; 110 E. R. 68.

Annotation:—Consd. Byrne v. Harvey (1838), 2 Mood. & R. 89.

2250. ——— Service two days before trial—Documents nineteen miles away.]—A cause came on to be tried at the assizes on a Wednesday morning; on the previous Monday evening, deft.'s attorney being at the assize town, was served with a notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town:—*Held*: this service was too late.—*HARGEST v. FOTHERGILL* (1832), 5 C. & P. 303, N. P.

2251. ——— Documents ten miles away.]—A prisoner, tried at the assizes for arson on Wednesday, Mar. 20, was, on Monday, Mar. 18, served at the prison with a notice to produce a policy of insurance. The commission day was Friday, Mar. 15, & prisoner's home was ten miles from the assize town:—*Held*: the notice was served too late.—*R. v. ELLICOMBE* (1833), 5 C. & P. 522; 1 Mood. & R. 260, N. P.

Annotation:—Reid. R. v. Kitson (1853), 22 L. J. M. C. 118.

2252. ——— Service day before trial—Document eight miles away.]—*PHILLIPS v. MEREDITH* (1838), 2 Jur. 48.

2253. ———.]—(1) A service of a notice to produce an agreement at deft.'s house is a good service, after which secondary evidence may be given of the contents of the agreement.

(2) Such service on a Sunday is bad.

(3) The service of a notice on the attorney in the cause on the day before the trial, & at a distance from his place of business is bad.—*HUGHES v. BUDD* (1840), 8 Dowl. 315; 4 Jur. 150.

Annotation:—As to (2) Reid. Lancashire, Southern Division Case, Itavilins v. West Derby Overseers (1846), 2 C. B. 72.

2254. ——— Service on day of trial.]—(1) A notice to produce letters in the country served in London on the day of the trial in London:—*Held*: too late.

(2) A notice to produce letters from pltf. to A.:—*Held*: not sufficient to require letters from A. to pltf.—*COOMBS v. BRISTOL & EXETER RY. CO.* (1858), 1 F. & F. 206, N. P.

Annotation:—Mentd. Clay v. Oxford (1866), 15 L. T. 286.

2255. ——— Document in India—Service in January—To produce at Spring assizes.]—Plaintiff on Mar. 25, 1846, wrote & sent to deft.'s house at Bombay, a letter, which arrived in that country whilst deft. was there:—*Held*: a notice to produce that letter at the Spring assizes, 1848, served on Jan. 28, 1848, upon deft., who had come to this country in 1847, leaving his partners at Bombay, did not entitle pltf. to give secondary evidence of its contents.—*EHRENEFERGER v. ANDERSON* (1848), 3 Exch. 148; 18 L. J. Ex. 132; 154 E. R. 793.

Annotation:—Mentd. Corcoran v. Proser (1873), 22 W. R. 222.

2256. When secondary evidence admissible—Party a foreigner—Held to bail for the trial—On arrival seven months previously.]—A notice to produce letters written by pltf. to deft., who was a foreigner, & had been held to bail upon coming to this country seven months previous to the trial, was served on Apr. 10, the trial taking place on Apr. 14:—*Held*: sufficient to let in secondary evidence of the contents, although the letters were written eighteen years back, & addressed to deft. at his residence abroad.—*DRABBLE v. DONNER* (1824), 1 C. & P. 188; Ry. & M. 47, N. P.

Annotation:—Reid. Vice v. Anson (1827), Mood. & M. 96.

2257. ——— Service on day of trial—Admission that document not in existence—On notice to produce.]—Where none of the parties lived in the assize town pltf.'s attorney served deft.'s attorney in the assize town, on the commission day, with notice to produce a paper, & offered the expenses of going to fetch it. Deft.'s attorney said that that was of no use as the paper was not in existence:—*Held*: pltf. on the trial might give secondary evidence of the contents of the paper, as the statement of deft.'s attorney, that the paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce.—*FOSTER v. POINTER* (1841), 9 C. & P. 718, N. P.

2258. ——— Service day before trial—Document in court—In hands of third party.]—An action on a bond of indemnity stood for trial at the Flintshire assizes: the commission day was on July 27; the cause was tried on July 29. At 10 a.m. on July 28, a notice to produce the bond was served on deft.'s attorney in the action (who resided in London) in the deft.'s presence in the assize town. The bond was in the possession of W. who held it as the representative of a former attorney of the obligors, & was himself deft.'s general attorney, who had undertaken to produce it at the trial, if the judge should think he was bound to do so. Before the assizes the bond had been sent by W. to deft.'s attorney in the action, in London, for the purposes of inspection & admission under a judge's order: & pltf.'s attorney had there taken a correct copy of it. At the trial W. had the bond in ct. but objected to produce it on the ground of privilege, & the objection was allowed:—*Held*: (1) the notice to produce the deed was sufficient to let in secondary evidence of it; (2) the copy so taken by pltf.'s attorney was admissible as such evidence.

(3) Notice to produce must be given within reasonable time before the trial comes on, the judge at the trial being the proper person to consider whether that reasonable time has been given or not (*PARKE, B.*).—*LLOYD v. MOSTYN* (1842), 10 M. & W. 478; 2 Dowl. N. S. 476; 12 L. J. Ex. 1; 6 Jur. 974; 152 E. R. 558.

Annotations:—As to (2) Apd. Calcraft v. Guest, [1898] 1 Q. B. 759. Generally, *Mentd. Cleave v. Jones* (1852), 21 L. J. Ex. 105.

2259. ——— Notice that document was at

place of trial—In hands of third party.]—A., a plff. in a cause in the county ct., was indicted for perjury there, in respect of a paper which was produced on the trial there. A. & C. his attorney, both lived at a distance from H. the assize town. At noon, on the commission day, C. was served at H. with notice to produce this paper. The trial came on the next morning; but in the notice to produce, further notice was given, as the fact was, that the paper was then in H., in the possession of M. who was then at the G. Hotel in H.:—*Held*: sufficient notice to produce had been given, & secondary evidence of the paper should be received.—*R. v. HANKINS* (1849), 2 Car. & Kir. 823; 3 Cox, C. C. 434.

2260. — Service five days before trial.]—(1) Notice to produce a receipt was served on prisoner on Monday, the first day of the Jan. sessions, at the Central Criminal Ct. Prisoner lived in Ireland, & the trial commenced on Friday:—*Held*: the notice was sufficient.

(2) Prisoner brought an action on the bill alleged to be forged, & on the settlement of it gave up the bill, & received a receipt for it from deft. Prisoner afterwards became bkpt.:—*Semble*: notice to prisoner to produce such receipt is not sufficient to let in secondary evidence. It would pass to the assignees under the bkpey.—*R. v. JOEL* (1850), 14 J. P. 227.

2261. — Service two days before trial—Opportunity of obtaining document.]—Notice to produce policies of insurance served on prisoner's attorney on Tuesday evening, prisoner then being in M., the policies being twenty miles off & the trial taking place on Thursday:—*Held*: sufficient.

No general rule can be laid down; every case must be governed by particular circumstances, & as in this case there had been an opportunity of obtaining the policies, the notice is sufficient (*BRAMWELL, B.*).—*R. v. BARKER* (1858), 1 F. & F. 326.

iii. When Parties or Documents at Place of Trial.

2262. When secondary evidence admissible—Service on day before trial—On party's attorney—Having charge of cause.]—In a town cause, a notice to produce a paper that would be in the hands of opposite attorney, was served at 8 p.m. on the evening before the trial, at his office on one of his clerks, who had the management of the cause:—*Held*: the service was not too late, & the paper not being produced, secondary evidence could be given of its contents.—*GIBBONS v. POWELL* (1840), 9 C. & P. 634, N. P.

*Annotation:—**Reid. Lawrence v. Clark* (1845), 14 M. & W. 250.

2263. — — — — & on party.]—In a town cause for an assault in which deft. & his attorney both lived in town, a notice to produce a letter from plff.'s attorney to deft., asking compensation, was served at deft.'s house & at the office of deft.'s attorney, at about 6.30 p.m., on the evening of the day before that on which the cause was tried:—*Held*: it was not too late, & the letter not being produced, secondary evidence could be given of its contents.—*MEYRICK v. WOODS* (1812), Car. & M. 452, N. P.

2264. — — — —]—In a town cause for goods sold, in which deft. & his attorney both lived in town, a notice to produce a letter from plff. to deft., asking payment, was served at the office of deft.'s attorney, at 7 p.m., on the evening of the day before that on which the cause was tried:—*Held*: it was not too late, & the letter

not being produced, secondary evidence could be given of its contents.—*LEAF v. BUTT* (1812), Car. & M. 451, N. P.

2265. — — — —]—A cause at the sittings at *nisi prius* was called on upon Thursday, Feb. 4, & plff.'s case was closed on that day at 4 p.m.; the case was then adjourned to Friday, Feb. 5 at 10 a.m. All the parties lived in town, & in the evening of Feb. 4, before 9 p.m., a notice to produce a letter of deft. to plff. was served on plff.'s attorney:—*Held*: (1) this notice to produce was served in time; (2) if a party was served with notice to produce sufficiently early for him to be enabled to produce a document, if he thought proper to do so, it made no difference that, at the time of the service of the notice, the case was part heard.—*STURM v. JEFFERIE* (1847), 2 Car. & Kir. 442; 8 L. T. O. S. 415, N. P.

2266. — — — —]—Where H., having upon oath charged B. with fraud, & being bound over to prosecute, was subsequently induced to make an affidavit of B.'s innocence, & H. & his friends, in order to avoid the consequences of B.'s contradictory statement on oath, agreed, upon receiving a cheque from B.'s wife for a sum nearly equal to the amount of H.'s recognisances, to forfeit those recognisances by abstaining from prosecuting, & also to return the amount of the cheque if H. was not called upon his recognisances:—*Held*: (1) notice to produce the cheque served at the office of the London agents for the country attorney of defts. at 3 p.m. the day before the commencement of the trial was sufficient to let in secondary evidence of its contents; (2) such secondary evidence was admissible, although it appeared that the cheque had been seized by the sheriff under a levy upon the effects of H. for the amount of the estreated recognisance.—*IL v. HAMP* (1852), 6 Cox, C. C. 167, N. P.

2267. — Service two days before trial—On party's attorney.]—*FIRKIN v. EDWARDS*, No. 2237, ante.

2268. When secondary evidence inadmissible—Service on day before trial—On wife of party's attorney.]—*EXALL v. PARTRIDGE* (1799), cited in 1 Stark. at p. 283.

*Annotation:—**Consd. Dwyer v. Collins* (1852), 7 Exch. 639.

2269. — — — —]—Service of the wife of deft.'s attorney at produce a lease on the evening before the trial is insufficient.—*DOE d. WARTNEY v. GREY* (1816), 1 Stark. 283, N. P.

*Annotations:—**Distd. Lloyd v. Mostyn* (1842), 10 M. & W. 478. *Consd. Dwyer v. Collins* (1852), 7 Exch. 639. *Reid. Byrne v. Harvey* (1838), 2 Mood. & R. 89.

2270. — — — — On party.]—A notice to produce served on a deft. in London on a Saturday, the cause being tried on the following Monday, is too late. Notices to produce ought to be served on the attorney, if there be one.—*HOUSEMAN v. ROBERTS* (1832), 5 C. & P. 391, N. P.

2271. — — — — On attorney—Too late to communicate with client.]—A notice to produce in a town cause was served the evening before the trial at the residence of the attorney too late for the attorney to communicate with his client:—*Held*: it was not in time to let in secondary evidence.—*BYRNE v. HARVEY* (1838), 2 Mood. & R. 89, N. P.

2272. — — — — Notice left in letter-box late in evening.]—In action on a bill of exchange to which deft. pleaded fraud:—*Held*: notice to produce the bill left in the letter-box of the office of plff.'s attorney at 8.30 p.m. the day before the trial was too late.—*LAWRENCE v. CLARK* (1815), 14 M. & W. 250; 3 Dow. & L. 87; 15 L. J. Ex.

Sect. 5.—Secondary evidence: Sub-sect. 6, D. (c) iii. & iv. & (d), E. (a), (b) & (c).]

40; 153 E. R. 469; *sub nom.* LAURENCE v. CLARKE, 5 L. T. O. S. 243.

Annotations:—Consd. Dwyer v. Collins (1852), 7 Exch. 639. *Refd.* Ingram v. Webb (1847), 9 L. T. O. S. 147.

iv. Service during Trial.

2273. Whether in sufficient time.]—The attorney for the opposite party cannot be asked whether he has with him a rule of ct. relating to the cause, with a view to give secondary evidence of the rule, no notice to produce or *subpoena duces tecum* having been served. It is too late at the trial to serve such notice.—*COOK v. HEARN* (1832), 1 Mood. & R. 201.

Annotations:—Distd. Lloyd v. Mostyn (1842), 10 M. & W. 478. *Consd.* Dwyer v. Collins (1852), 7 Exch. 639. *Refd.* Bate v. Kinsey (1834), 1 Cr. M. & R. 38.

2274. ———.]—*STURM v. JEFFREE*, No. 2265, *ante*.

2275. ——— Document in court.]—*DWYER v. COLLINS*, No. 2160, *ante*.

2276. ——— Notice given on twelfth day of trial.]—Action to restrain alleged libel to the effect that pltf. was infringing the patent rights of deft., a rival tradesman. Deft., in cross-examination, stated that he had been in the habit of consulting A., an engineer (one of his witnesses), as to his patents, & had received from him a written report. Pltf. had not required from deft. an affidavit of documents, & on the twelfth day of the trial notice was given by leave to defts. to produce the report next day. The report not being produced next day pltf.'s counsel, after the evidence for deft. was closed, asked leave to recall deft. or A. to be examined as to the contents of the report, or that A. might produce a copy of it:—*Held*: parol evidence should not be given at that stage of the trial, with respect to a document as to which no proper notice to produce had been given.—*SUGG v. BRAY* (1884), 54 L. J. Ch. 132; 51 L. T. 194; *Griffin's Patent Cases*, 210.

Annotation:—Mentd. Sharp v. Brauer (1886), *Griffin's Patent Cases* 205.

(d) Place of Service and Person served.

2277. Place of service—Service at party's house—Valid.]—*HUGHES v. BUDD*, No. 2253, *ante*.

2278. ——— Prison—Where prisoner detained.]—*R. v. ROBINSON*, No. 2245, *ante*.

2279. Person served—Where party bankrupt—Service on assignees.]—*R. v. JOEL*, No. 2260, *ante*.

2280. ——— Party's attorney—Whether sufficient where party a prisoner.]—A notice to produce a document was delivered to an attorney suggested to be prisoner's attorney:—*Held*: in the absence of evidence that he was so it was not a valid notice, so as to enable secondary evidence to be given; & the attorney was not allowed to be asked whether he had shown the notice to his client.

It is not enough, in a case of felony, merely to prove service of a notice to produce a document upon an attorney, in order to let in secondary evidence of it (*POLLOCK, C.B.*).—*R. v. DOWNHAM* (1858), 1 F. & F. 386, N. P.

2281. ———.]—Service of notice to produce was served on an attorney who had served a notice on behalf of prisoner as to an application to bail him upon the charge:—*Held*: it was sufficient.—*R. v. BOUCHER* (1859), 1 F. & F. 486, N. P.

— — —.]—*See Nos.* 2149–2155, *ante*.

E. When Notice not Necessary.

(a) In General.

2282. Administering felonious oath—Paper from which oath read.]—*R. v. MOORS* (1801), 6 East, 419, n.; 102 E. R. 1347, n.

Annotation:—Mentd. R. v. Nield (1805), 6 East, 417.

2283. Ship's articles—Action for seaman's wages.]—In an action for seaman's wages pltf. may, under 2 Geo. 2, c. 36, give evidence of the contents of the ship's articles, without having served a notice to produce them.—*BOWMAN v. MANZELMAN* (1809), 2 Camp. 315, N. P.

2284. Knowledge of possessor—As to materiality of documents to the action.]—*WOOD v. STRICKLAND*, No. 2228, *ante*.

2285. Driving licence—On prosecution for exceeding speed limit.]—On the prosecution of the driver of a motor car for exceeding the speed limit fixed by Motor Car Act, 1903 (c. 36), s. 9 (1) it is not necessary to give deft. notice to produce his licence, in order to let in evidence as to its contents by the police constable who stopped the car, & to whom the licence was produced by the driver at the time.—*MARSHALL v. FORD* (1908), 99 L. T. 796; 72 J. P. 480; 6 L. G. R. 1126; 21 Cox, C. C. 731, D. C.

Annotation:—Consd. Martin v. White, [1910] 1 K. B. 665.

2286. Fixed notice—Warning to trespassers.]—*BARTHOLOMEW v. STEPHENS*, No. 1879, *ante*.

2287. ——— Statutory factory notice.]—*OWNER v. BEE HIVE SPINNING CO., LTD.*, No. 1881, *ante*.

2288. Notice to offender & proper officer—Trial of indictment as habitual criminal.]—(1) In order to prove that seven days' notice, required by Prevention of Crime Act, 1908 (c. 59), s. 10 (4) (b) of the intention to insert in the indictment a charge of being a habitual criminal, has been given to the proper officer of the ct. it is not necessary that the officer himself, *e.g.*, the clerk of the peace, should be called, but there must be some proof of the receipt by him of the notice, *e.g.*, by calling his clerk.

(2) Notice to produce the notice, required by the above sub-sect., to the offender that it is intended to insert the charge of being a habitual criminal in the indictment is not required in order to render secondary evidence of the contents of the notice to the offender admissible.—*R. v. TURNER*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 26 T. L. R. 112; 22 Cox, C. C. 310; 3 Cr. App. Rep. 103; *sub nom.* R. v. TURNER, R. v. WALLER, 74 J. P. 81; 54 Sol. Jo. 164, C. C. A.

Annotations:—Generally. Mentd. R. v. Johnson (1909), 3 Cr. App. Rep. 168; R. v. Condon (1910), 4 Cr. App. Rep. 109; R. v. Fawcett (1910), 74 J. P. 444; R. v. Marshall (1910), 74 J. P. 381; R. v. Moran (1910), 5 Cr. App. Rep. 219; R. v. Walker (1910), 27 T. L. R. 51; Browne v. Black, [1911] 1 K. B. 975; R. v. Summers (1914), 10 Cr. App. Rep. 11; R. v. Harris, [1922] 2 K. B. 543; R. v. Coney (1923), 92 J. K. B. 915; R. v. Dean (1924), 18 Cr. App. Rep. 21.

(b) Documents themselves Notices or in nature of Notices.

2289. Notice of demand—Prior to action of trover.]—Notice to produce a written demand of a thing, for which an action of trover is brought:—*Held*: unnecessary.—*HAMMOND v. PLANK* (1796), Peake, Add. Cas. 90, N. P.

2290. Notice of assignment of debt—Action by assignees.]—Where an assignment has been executed of property due by a third person, & the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at same time, which he signs,

& serves one of them on such person, if an action is afterwards brought by the assignees, he can give that notice in evidence which he retained, without giving a notice to produce that served on the other person.—*SURTEES v. HUBBARD* (1802), 4 Esp. 203, N. P.

Annotation.—*Refd.* *Robinson v. Brown* (1846), 1 New Pract. Cas. 538.

2291. Notice of dishonour—Note of hand—Parol evidence inadmissible.—*SHAW v. MARKHAM*, No. 2209, *ante*.

2292. — Of bill of exchange.—*LANGDON v. HULLS*, No. 2198, *ante*.

2293. — ——A copy of a letter containing notice of the dishonour of a bill is admissible without notice to produce the original.—*ROBERTS v. BRADSHAW* (1815), 1 Stark. 28, N. P.

Annotations.—*Consd.* *Kine v. Beaumont* (1822), 3 Brod. & Bing. 288. *Refd.* *Curlew v. Corfield* (1841), 1 Q. B. 814.

2294. — ——(1) The copy of an original letter, giving notice of the dishonour of a bill of exchange, is admissible in evidence, without notice to produce such original letter.

(2) *Semble*: there is no substantial distinction between a duplicate original & a copy made at the time, & authenticated on oath.—*KINE v. BEAUMONT* (1822), 3 Brod. & Bing. 288; 7 Moore, C. P. 112; 129 E. R. 1295.

Annotations.—*As to* (1) *Consd.* *Colling v. Treweek* (1827), 6 B. & C. 394. *Fold.* *Swain v. Lewis* (1835), 2 Cr. M. & R. 261. *Consd.* *R. v. Whitley* (1908), 72 J. P. 272. *Distd.* *Andrews v. Wirral R. C.*, [1916] 1 K. B. 863. *Refd.* *Doe d. Fleming v. Somerton* (1845), 7 Q. B. 58; *Toms v. Cumming* (1845), 1 Lut. Reg. Cas. 200; *Robinson v. Brown* (1846), 16 L. J. C. P. 46. *As to* (2) *Refd.* *Colling v. Treweek* (1827), 6 B. & C. 394.

2295. — Not subject-matter of action.—*LANAUZE v. PALMER*, No. 2199, *ante*.

2296. — ——Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it.—*SWAIN v. LEWIS* (1835), 2 Cr. M. & R. 261; 4 Dowl. 261; 1 Gale, 182; 5 Tyr. 998; 4 L. J. Ex. 249; 150 E. R. 114.

Annotations.—*Refd.* *Doe d. Fleming v. Somerton* (1845), 7 Q. B. 58; *Robinson v. Brown* (1846), 16 L. J. C. P. 46.

2297. Notice to pay—Action against surety—Not if notice also contains statement of account.—A., as surety for B., binds himself to pay to C. the balance of account between B. & C. within the space of six months after notice. In an action by C. against A.:—*Held*: parol evidence of such notice could not be given without proof of the usual notice to produce it.—*GROVE v. WARE* (1817), 2 Stark. 174, N. P.

2298. Notice to quit.—A written notice to quit may be proved by production of a copy, though no notice has been given to produce the original.—*DOE d. FLEMING v. SOMERTON* (1845), 7 Q. B. 58; 14 L. J. Q. B. 210; 9 Jur. 775; 115 E. R. 410; *sub nom.* *DOE d. BENHAM v. SOMERTON*, 5 L. T. O. S. 50.

Annotation.—*Refd.* *Andrews v. Wirral R. D. C.* (1915), 80 J. P. 29.

2299. Attorney's bill of costs.—A copy of an attorney's bill, the original of which has been delivered to deft., may be admitted in evidence without proof of notice to produce the original.—*ANDERSON v. MAY* (1800), 2 Bos. & P. 237; 126 E. R. 1256; *previous proceedings*, 3 Esp. 167, N. P.

Annotations.—*Consd.* *Phillipson v. Chase* (1809), 2 Camp. 110. *Appl.* *Colling v. Treweek* (1827), 6 B. & C. 394. *Mentd.* *Re Park, Cole v. Park* (1889), 41 Ch. D. 326; *Lumsden v. Shipcoats Land Co.* (1906), 75 L. J. K. B. 663.

PART IV. SECT. 5, SUB-SECT. 6.—E. (c).

s. Ejectment—Letters referring to deed.—In ejectment, the point in dispute was whether T., one of the

plffs., had ever conveyed the land to one J., deceased, under whom deft. derived title. Evidence was given of conversations in which T. had stated either that he had given a deed to J., or that the title was vested in J., &

2300. — Parol evidence only inadmissible.—

(1) In an action on an attorney's bill, pltf. cannot give parol evidence of the contents of the bill delivered, without a notice to produce it.

(2) A copy made at the same time with the bill delivered, is good evidence without such notice.

(3) If there are two co-temporary writings, the counterparts of each other, one of which is delivered to the opposite party, & the other preserved, as they may both be considered as originals, & they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered (*LORD ELLENBOROUGH, C.J.*).—*PHILLIPSON v. CHASE* (1809), 2 Camp. 110, N. P.

Annotations.—*As to* (3) *Distd.* *Andrews v. Wirral R. C.*, [1916] 1 K. B. 863. *Refd.* *Colling v. Treweek* (1827), 6 B. & C. 394.

2301. — ——On the trial of an action for an attorney's bill, it is not necessary to prove notice to produce the bill delivered before action brought; it is sufficient to give an examined copy in evidence.—*COLLING v. TREWEEK* (1827), 6 B. & C. 394; 9 Dow. & Ry. K. B. 456; 5 L. J. O. S. K. B. 132; 108 E. R. 497.

Annotations.—*Consd.* *R. v. Whitley* (1908), 72 J. P. 272. *Mentd.* *Smith v. Brown* (1831), 1 Cr. & J. 542.

2302. — ——In an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient.—*FYSON v. KEMP* (1833), 6 C. & P. 71.

2303. When notice to produce necessary—Notice required served on third person—Action against co-sureties.—*ROBINSON v. BROWN*, No. 1862, *ante*.

2304. — — — Notice by local authority.—The general principle that no notice to produce a notice is usually required does not apply to a case in which the notice required to be produced has been served on a third person.

A local authority had power, under bye-laws made under the Public Health Act, 1875 (c. 55), if any work should be "begun or done" in contravention of the bye-laws, to pull down the work after notice to the person by whom the work had been begun or done. A building was constructed in contravention of the bye-laws by W., & after being set upon wheels, was sold to pltf. The local authority gave notice to pltf. to show cause why it should not be pulled down, & his reply being unsatisfactory, pulled it down. Pltf., sued for damages. At the trial the local authority sought to prove notice to W. by secondary evidence, viz. a duplicate notice only:—*Held*: the duplicate notice was inadmissible.—*ANDREWS v. WIRRAL RURAL COUNCIL*, [1916] 1 K. B. 863; 85 L. J. K. B. 853; 114 L. T. 1006; 80 J. P. 257; 14 L. G. R. 521, C. A.

(c) Documents Basis of Action.

2305. Action of trover—Certificate of ship's registry.—In trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice has been given to produce the certificate itself.—*BUCHER v. JARRATT* (1802), 3 Bos. & P. 143; 127 E. R. 78.

Annotation.—*Consd.* *Strother v. Barr* (1828), 5 Bing. 136.

2306. — Bond.—In trover for a bond pltf. may give parol evidence of it to support the

a letter from T. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—*Held*: such evidence, under the circumstances, was admissible on the part of defts.

Sect. 5.—Secondary evidence: Sub-sect. 6, E. (c) (d); sub-sects. 7 & 8. Sects. 6, 7, 8 & 9: St sect. 1.]

general description of the instrument in the declaration without having given deft. previous notice to produce it, as the nature of the action gives sufficient notice to deft. of the subject of inquiry, to prepare himself to produce it, if necessary, for his defence.—*How v. HALL* (1811), 14 East, 274; 104 E. R. 606.

Annotation:—Consd. Strother v. Barr (1828), 5 Bing. 136.

2307. ——— Written instrument.]—Semble: in trover for a written instrument it is not necessary to give defts. notice to produce it, but it may be proved by description.—*SCOTT v. JONES* (1813), 4 Taunt. 865; 128 E. R. 572.

Annotation:—Mentd. Hulgh v. Brooks (1839), 10 Ad. & El. 309.

2308. ———.]—In trover for a written document, pltf. may prove the nature & description of the document by secondary evidence, though deft. offers to produce it.—WHITEHEAD v. SCOTT (1830), 1 Mood. & R. 2, N. P.

Annotation:—Consd. Boyle v. Wiseman (1855), 11 Exch. 360.

2309. ———.]—R. v. ELWORTHY, No. 2129, ante.

2310. Action for non-delivery of document.]—In *assumpsit* against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to deft. to produce them, before giving parol evidence of their contents.—JOLLEY v. TAYLOR (1807), 1 Camp. 143, N. P.

Annotation:—Consd. Strother v. Barr (1828), 5 Bing. 136.

2311. Prosecution for stealing document.]—R. v. ELWORTHY, No. 2129, ante.

(d) *Counterpart or Copy tendered in Evidence.*

2312. Counterpart original.]—PHILIPSON v. CHASE, No. 2300, ante.

2313. ———.]—KINE v. BEAUMONT, No. 2291, ante.

2314. Copy—Made at same time.]—Where a notice has been given to a party to produce an instrument, of which at the same time another copy was made, it may be given in evidence without notice to produce that in the other party's possession.—*GOTTLIEB v. DANVERS* (1796), 1 Esp. 455, N. P.

2315. ———.]—SURTEES v. HUBBARD, No. 2290, ante.

2316. ———.]—PHILIPSON v. CHASE, No. 2300, ante.

2317. ——— & authenticated on oath.]—KINE v. BEAUMONT, No. 2291, ante.

2318. ——— Attorney's bill of costs.]—ANDERSON v. MAY, No. 2299, ante.

2319. ——— Examined copy.]—COLLING v. TREWEEK, No. 2301, ante.

2320. ———.]—FYSON v. KEMP, No. 2302, ante.

2321. ——— Notes of dishonour—Bill of exchange.]—ROBERTS v. BRADSHAW, No. 2293, ante.

2322. ——— Bill not subject-matter of action.]—LANAUZE v. PALMER, No. 2199, ante.

2323. ——— Notice to quit.]—DOE d. FLEMING v. SOMERTON, No. 2298, ante.

2324. ——— Document itself a notice—Notice required served on third person.]—ROBINSON v. BROWN, No. 1862, ante.

as primary evidence, & notice to pltf's. to produce such deed was unnecessary.—*ROGERS v. CARD* (1858), 7 C. P. 89.—**CAN.**

PART IV. SECT. 9, SUB-SECT. 6.—E. (d).

t. *Copy—Of affidavit made in*

cause.]—In assumpsit for not delivering goods after pltf. had proved a verbal agreement, deft. gave in evidence a copy of the affidavit of debt made in the cause, & of an agreement in writing incorporated therein, sworn to by one of pltf's., & then called upon pltf's. to produce the original agreement not

2325. ———.]—ANDREWS v. WIRRAL RURAL COUNCIL, No. 2304, ante.

SUB-SECT. 7.—DOCUMENTS STOLEN OR OBTAINED BY FRAUD.

2326. Warranty—Action for breach of—Fraudulent acquisition not traced to defendant.]—A horse was sold under a written warranty, contained in a receipt for the purchase-money, which was given to the buyer's servant. The son of the seller, who was proved to have been present when the bargain was made, & to have acted at other times in his father's business, but never to have sold a horse by himself, got the receipt back from the servant by a fraudulent representation. In an action on the warranty against the father:—*Held:* parol evidence of the contents could not be given, but the son must be called as a witness.

The son being called, proved that he went for the receipt by desire of a person named T., the owner of the horse, for whom his father sold on commission, & did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to T.:—*Held:* this fact did not vary the case, so as to let in the parol testimony.—*BEST v. OSBORN* (1825), 1 C. & P. 632, N. P.

2327. Bill of costs—Admissibility of copy.]—Pltf., who had delivered to N., as A.'s attorney a bill in which he made A. his debtor, afterwards obtained the bill surreptitiously from N., & delivering a new bill for the same charges, in which he made N. his debtor, sued N. for the amount:—*Held:* the proceedings should be stayed till pltf. should deliver to N. a copy of the paper surreptitiously obtained from him, the copy to be evidence in the cause.—EDGINGTON v. NIXON (1835), 2 Bing. N. C. 316; 2 Scott, 507; 132 E. R. 124.

2328. Documents relating to contract—Minute book containing particulars thereof.]—CARLTON v. KING (1848), 11 L. T. O. S. 291.

2329. Letter—Parol evidence—No notice to produce.]—An indictment alleged that prisoner, being in the employ of the Post Office, stole a post-letter, directed & addressed, which contained certain property, etc. At the trial, a witness having deposed that he employed a man to post a letter containing the property in question:—*Held:* he might be asked how that letter was addressed, although no notice to produce the letter had been given.—*R. v. CLUBE* (1857), 3 Jur. N. S. 698.

SUB-SECT. 8.—UNSTAMPED DOCUMENTS.

See Sect. 10, sub-sect. 11, post.

SECT. 6.—ADMISSION OF EXTRINSIC EVIDENCE.

To show intention of parties.]—See DEEDS, Vol. XVII., pp. 302–305.

To vary or contradict terms.]—See DEEDS, Vol. XVII., pp. 305–312.

having served any notice to produce:—*Held:* no notice to produce was necessary, pltf's. having shown themselves in possession of the agreement by their affidavit of debt; & as the writing was the best evidence, it should have been produced.—*GILBERT v. SLEEPER* (1833), 3 O. S. 135.—**CAN.**

To add terms.]—*See* DEEDS, Vol. XVII., pp. 312–314.

To explain ambiguities.]—*See* DEEDS, Vol. XVII., pp. 314–317.

To identify parties & subject-matter.]—*See* DEEDS, Vol. XVII., pp. 321–325.

To show mistake, misrepresentation or fraud.]—*See* MISTAKE; MISREPRESENTATION & FRAUD.

2330. To vitiate record.]—A record found in the proper office must be intended to have been always in the plight in which it is found, & parol evidence shall not be admitted to prove it wrong.—*DICKSON v. FISHER* (1768), 1 Wm. Bl. 664; 4 Burr. 2267; 96 E. R. 386.

2331. To prove consideration.]—A female pauper having proved that she was hired for a year by contract in writing, which was lost; appts. proposed to show by her cross-examination that she had agreed not only to serve but to cohabit with her master; it being already in evidence that she had in fact cohabited with him during her residence in his family under the hiring; the sessions refused the evidence, on the ground that no proof of a consideration which did not appear on the written agreement, was admissible:—*Held*: the evidence ought to have been received for the purpose of ascertaining whether the consideration for the hiring was wholly or in part cohabitation.—*R. v. NORTHWINGFIELD (INHABITANTS)* (1831), 1 B. & Ad. 912; 9 L. J. O. S. M. C. 57; 109 E. R. 1025.

*Annotation:—**Refd.* *R. v. Billingham* (1836), 5 Ad. & El. 676.
—.]—*See, generally*, DEEDS, Vol. XVII., pp. 335–337.

In matters particularly relating to contract, *see, generally*, DEEDS, Vol. XVII., pp. 331–348.

Negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 181–183.

2332. To explain surrounding circumstances.]—*R. v. PEMBRIDGE (INHABITANTS)*, No. 1804, *ante*.

—.]—*See, generally*, DEEDS, Vol. XVII., pp. 317–321.

2333. To supplement consignment note.]—A., by parol, made arrangements with defts., a railway co., to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to B., an intermediate station on the line to K.:—*Held*: parol evidence was admissible to show that defts. had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract.—*MALPAS v. LONDON & SOUTH WESTERN RY. CO.* (1866), L. R. 1 C. P. 336; Har. & Ruth. 227; 35 L. J. C. P. 166; 13 L. T. 710; 12 Jur. N. S. 271; 14 W. R. 391.

*Annotations:—**Refd.* *Lord v. Midland Ry.* (1867), L. R. 2 C. P. 339; *Johnson v. Appleby* (1874), 43 L. J. C. P. 146.

2334. To explain words of art.]—*MERSEY MUTUAL UNDERWRITING ASSOCN., LTD. v. POLAND* (1910), 26 T. L. R. 386; 15 Com. Cas. 205.

—.]—*See, generally*, DEEDS, Vol. XVII., pp. 325–327.

In particular documents.]—*See* Specific Titles *passim*.

To explain award.]—*See* ARBITRATION, Vol. II., pp. 533, 534, Nos. 1698–1702; COMMONS, Vol. XI., p. 75, No. 970.

PART IV. SECT. 6.

2330 i. To vitiate record.]—Parol testimony cannot be received to contradict a continuance roll.—*PRENTICE v. HAMILTON* (1831), Dra. 410.—CAN.

PART IV. SECT. 9, SUB-SECT. 1.

2335 i. Admissibility—If original admissible.]—The voters' list is a public

document, & as the original can be received in evidence a copy certified by the Clerk of the Crown in Chancery is also evidence under Canada Evidence Act.—*Re ALBERTA DOMINION ELECTION* (1905), 1 W. L. R. 486; 6 Terr. L. R. 329.—CAN.

2341 i. —Necessity for examination with original.]—In an action by the

Evidence of acts & conduct under instrument.]—*See* DEEDS, Vol. XVII., pp. 327–331.

Evidence of custom & usage.]—*See* CUSTOM & USAGES, Vol. XVII., pp. 19 *et seq.*

Of date.]—*See* DEEDS, Vol. XVII., pp. 358, 359.

As regards negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 181–183, 484–486.

In reference to statutes.]—*See* STATUTES.

As regards wills.]—*See* EXECUTORS; WILLS.

SECT. 7.—EXAMINATION OF WITNESS AS TO DOCUMENTS.

In general.]—*See* Part V., Sect. 6, sub-sect. 6, *post*.

Refreshing memory of witness by reference to documents.]—*See* Part V., Sect. 6, sub-sect. 7, *post*.

Impeaching credit of witness by reference to documents.]—*See* Part V., Sect. 8, sub-sect. 1, C., & sub-sect. 2, C., *post*.

SECT. 8.—IN PEERAGE CASES BEFORE COMMITTEE OF PRIVILEGES.

See PEERAGES AND DIGNITIES.

SECT. 9.—COPIES OF DOCUMENTS.

SUB-SECT. 1.—IN GENERAL.

2335. Admissibility—If original admissible.]—Where original is evidence, copy of it is so.—*BRAY MANOR CUSTOM TRIAL* (1692), 12 Mod. Rep. 24; 88 E. R. 1140.

2336. ———.]—In all cases where the original is evidence, the copy is evidence; but if the original be but a copy, there a copy of such original may not be read, as a book for probate of a will of land; this is but a copy, & therefore it ought to be produced, & a copy out of the book will not suffice; but a copy of a probate of a will, where the ct. has jurisdiction, is good, because the probate itself in such case is an original act of the ct. (*HOLT, C.J.*).—*R. v. HAINES* (1695), Skin. 584; Comb. 337; 90 E. R. 262.

*Annotations:—**Apd.* *Cox v. Allingham* (1822), Jac. 514. *Refd.* *R. v. Smith* (1828), 8 B. & C. 341; *Police Comr. for Metropolis v. Donovan* (1903), 88 L. T. 555.

2337. ———.]—*LYNCH v. CLERKE*, No. 3549, *post*.

2338. ———.]—Where original is evidence, copy is.—*WEST v. CHAMBERLAIN* (1701), 12 Mod. Rep. 494; 88 E. R. 1470.

2339. ———.]—*BULLEN v. MICHEL*, No. 3606, *post*.

2340. ———.]—A copy of a document sent by pltf. to deft. with a letter stating it to be a copy, is receivable in evidence for deft. where the document itself would be so, without production of or accounting for the original.—*ANSELL v. BAKER* (1850), 3 Car. & Kir. 145.

2341. —Necessity for examination with original—Where original in existence.]—The copy of a deed cannot be given in evidence unless proved to have been compared with the original although

assignee of an insolvent estate to set aside a mtge. given by the insolvent within three months before the sequestration of his estate as being a fraudulent preference, or given with intent to defeat or delay creditors, letters written before & at the date of the mtge. by the insolvent are not to show that he was then being pressed by his creditors, & was striving to gale

2360. Of rules of court—Only if authorised by court.]—Where a ct. prints & circulates copies of its rules for the guidance of its officers, the production of one of these printed copies is good evidence of the rule which the officers are to act on, though the original rules are kept under the seal of the ct., & the copy is not shown to have been examined with the original.—*DANCE v. ROBSON* (1829), *Mood. & M.* 294.

2361. Close copy—Of proceedings in one court—Whether admissible—In proceedings in another court.]—Close copies of proceedings in any ct. may be given in evidence in another ct. without any but the common stamps.—*DENN d. LUCAS v. FULFORD* (1761), 2 Burr. 1177; 97 E. R. 775; *sub nom. LUCAS v. FULFORD*, 1 Wm. Bl. 288.

Annotations:—Apld. Highfield v. Peake (1827), *Mood. & M.* 109. **Mentd.** *Robinson v. Dryborough* (1795), 6 Term Rep. 317.

2362. ——— Proof of authority.]—Perjury cannot be assigned upon an affidavit sworn in the Insolvent Debtors' Ct., by an insolvent, respecting the state of his property & his expenditure, for the purpose of obtaining an extended time to petition under 7 Geo. 4, c. 57, s. 10, without proving that the ct., by its practice, requires such an affidavit. Such proof is not given by an officer of the ct. producing printed rules purporting to be rules of the ct., which he has obtained from the clerk of the rules, & is in the habit of delivering out as rules of the ct., but which are not otherwise shown to be sanctioned by the ct.; the officer professing to have no knowledge of the practice except from such printed rules.—*R. v. KOOPS* (1837), 6 Ad. & El. 198; 1 Nev. & P. K. B. 828; *Will. Woll. & Dav.* 148; 6 L. J. K. B. 114; 1 J. P. 262; 112 E. R. 75.

Lost or destroyed documents.]—*See* Sect. 5, sub-sect. 5, E. (b), *ante*.

Documents not produced after notice.]—*See* Sect. 5, sub-sect. 6, C., *ante*.

SUB-SECT. 2.—EXEMPLIFICATIONS.

2363. Whether admissible—Exemplification of patent—Other party unable to consult patent roll.]—Exemplification of part of a patent not suffered to be read in evidence, notwithstanding 3 & 4 Edw. 6, c. 4, & 13 Eliz. c. 6, where the other side have no time to consult the patent roll, & so may be surprised by an imperfect exemplification.—*A.-G. v. TAYLOR* (1695), *Pres. Ch.* 59; 24 E. R. 29.

2364. How proved—Production from proper custody—Although Great Seal not affixed.]—When an ancient document, purporting to be an exemplification, is produced from the proper place of the deposit, but has not, at the time of its

production, the Great Seal affixed, it is still to be presumed that it is an exemplification, & may be read in evidence as such.—*BEVERLEY CORPN. v. CRAVEN* (1838), 2 Mood. & R. 140.

2365. Whether proof of record—Produced under seal of court—Other than court hearing original cause.]—Outlawry of pltf. in Common Bench pleaded to an action there, if on the issue of *nulli record* an exemplification of it under the seal of King's Bench, into which it has been removed on error, alone be produced, it is a failure of record: so if the outlawry be reversed, for it is no record *ab initio*, yet a *respondens ouster* shall be awarded.—*PALMER v. FRANKLIN* (1561), 2 Dyer, 227 b; 73 E. R. 503.

Mentd. *Drury's Case* (1610), 8 Co. Rep. 141 b; *Moor v. Garrett* (1698), 2 Salk. 566; *Creamer v. Wickett* (1699), *Carth.* 517; *South Staffordshire Ry. v. Smith* (1850), 5 Exch. 472.

Of lost or destroyed documents.]—*See* Sect. 5, sub-sect. 5, E. (b), *ante*.

SUB-SECT. 3.—OFFICE COPIES.

A. In General.

See R. S. C. Ord. 37, r. 4; Ord. 61, r. 7; Bills of Sale Act, 1878 (c. 31), s. 16; Conveyancing Act, 1882 (c. 39), ss. 2 (2), 7 (8).

2366. Admissibility—Copy of office copy—Examination of office copy with original—Necessity for.]—Verification of the copy of the bill served under Ord. 24 of Aug. 1811. It is not sufficient that the copy of the bill under the order has been examined with the office copy, unless the office copy be proved to have been examined with the engrossment.—*COLEMAN v. RACKHAM* (1844), 3 Hare. 184; 67 E. R. 317.

2367. ——— Prima facie admissible.]—Before ordering the production of original records, the ct. requires it to be shown that the office copies will not be sufficient.—*ANON.* (1850), 13 Beav. 420; 51 E. R. 162.

2368. Is proof of original.]—An office copy of an order is for all practical purposes the same as the original order.—*DAVENPORT v. TOWNSEND* (1867), 15 L. T. 528; 15 W. R. 378.

2369. Of will—Proof of original.]—An office copy of a will, relating to real estate only, will be admitted by the ct. as sufficient proof of the will itself.—*DANBY v. POOLE* (1862), 7 L. T. 240; 10 W. R. 515.

2370. Of bill of sale—Proof of registration of original.]—It is incumbent on a claimant, under a bill of sale, to show that the document filed is a true copy of the original instrument. A certificate of the registration of a bill of sale, without production of an authenticated or office copy of the

HOBHOUSE v. HAMILTON (1803), 1 Sch. & Lef. 207.—**IR.**

d. Of enrolment of deed—As secondary evidence of deed.]—A copy of the enrolment of a deed of bargain & sale requiring enrolment is secondary evidence of the deed.—*DEVONSHIRE (DUKE) v. NEILL* (1877), 2 L. R. Ir. 132.—**IR.**

e. Of memorial of Landed Estates Court conveyance—Lodged in Registry of Deeds.]—*Scmble:* a memorial of a Landed Estates Ct. conveyance lodged in the Registry of Deeds, being a duplicate of the original conveyance, may be received in evidence without proof of the loss of the original.—*STAPLES v. YOUNG*, [1908] 1 L. R. 135, 139.—**IR.**

PART IV. SECT. 9. SUB-SECT. 2.

1. Whether admissible—Exemplifica-

tion of patent.]—At the trial pltf. put in an exemplification of a patent dated Mar. 10, 1797, granting certain letters in fee to A.—*DOE d. ARNOLD v. AULDJO* (1848), 5 U. C. R. 171.—**CAN.**

g. ———.]—A person who has lost his patent for land must produce an exemplification of the patent.—*MCCOLLUM v. DAVIS* (1850), 8 U. C. R. 150.—**CAN.**

h. Affidavit on which capias issued.]—In an action for a malicious arrest upon a bailable capias issued out of this ct., the affidavit upon which the writ issued having been filed may be proved by an exemplification under the seal of the ct.—*WENTWORTH v. HALLETT* (1844), 2 Kerr, 560.—**CAN.**

k. Foreign judgment—Under seal of court.]—The mere exemplification of a foreign judgment, if properly proved to be under the seal of the et.,

is sufficient proof.—*WARENER v. KINGSMILL* (1850), 7 U. C. R. 409.—**CAN.**

——— an action for judgment conform to "extract .. exemplification" of a judgment obtained in the Ct. of Queen's Bench against defender, the "exemplification" produced bore to be attested by one of the masters of the ct. as a true copy; & the seal of the ct. was appended to it, & there was prefixed a notarial instrument, certifying that it was an office copy, & that it agreed with the original, & that the subscription to it was genuine:—*Held:* the validity & regularity of the document not being formerly challenged, it was good evidence for this ct. to receive & to act upon.—*WHITEHEAD v. THOMPSON* (1861), 23 Dunal. (Ct. of Sess.) 772; 33 Sc. Jur. 401.—SCOT.****

Sect. 9.—Copies of documents: Sub-sect. 3, A., B. & C.; sub-sect. 4, A.]

bill of sale certified to have been registered, is not sufficient.—*EMMOTT v. MARCHANT* (1878), 3 Q. B. D. 555; 38 L. T. 508; *sub nom.* *HALKETT v. EMMOTT*, 47 L. J. Q. B. 436; 26 W. R. 632.
Annotation:—Mentd. Re Wood, Ex p. Hattie (1878), 39 L. T. 373.

2371. Of deed of assignment—Proof of act of bankruptcy.]—Upon the hearing of a bkpcy. petition, the only evidence adduced to prove the act of bkpcy. alleged, that the debtor had executed an assignment of all his property for the benefit of his creditors, was an office copy of a deed, registered under Deeds of Arrangement Act, 1887 (c. 57), purporting to be executed by the debtor:—*Held*: the office copy was, by reason of the provisions of sect. 11 of the Act, sufficient *prima facie* evidence of the execution of the registered deed by the debtor, & of its execution on the date appearing in the office copy.—*Re SLATER, Ex p. SLATER* (1897), 76 L. T. 704; 4 Mans. 118, C. A.

Lost or destroyed documents.]—See Sect. 5, sub-sect. 5, E. (b), *ante*.

Documents not produced after notice.]—See Sect. 5, sub-sect. 6, C., *ante*.

B. Of Judicial Proceedings.

2372. Of proceedings in Chancery—Whether admissible—Bill taken from file.]—*ANON.* (1701), 12 Mod. Rep. 505; 88 E. R. 1523.

2373. ——— Answer—Though containing an error.]—To support an allegation that to an information in Chancery against T. Eamy, "the answer of the said T. Eamy was filed," it is enough to put in an office copy of an answer to the information entitled "the answer of T. Eamy" although this be signed T. Amey.—*SALTER v. TURNER* (1809), 2 Camp. 87.

2374. ——— ——— ———.]—(1) In an action against three defts., as partners, the office copy of an answer to a bill in Chancery, filed by one against the others, is admissible evidence, without producing the original, in order to establish the partnership; (2) & to prove the identity of defts., the clerk of their solr. is a competent witness to that fact, though he knows nothing of defts. but from his intercourse with them professionally in the conduct of the suit in Chancery.—*STUDDY v. SANDERS* (1823), 2 Dow. & Ry. K. B. 347; *sub nom.* *STADY v. SANDERS*, 1 L. J. O. S. K. B. 96.
Annotation:—As to (2) Rejd. Greenough v. Gaskell (1833), 1 My. & K. 98.

2375. ——— ——— ——— Though abbreviations used.]—Office copy of an answer in Chancery offered in evidence. It appeared from the examination of the witness who had compared the office copy with the original, that the original contained words at length, such as "complainant," "orator," etc., which in the office copy were written "complt" "oror," etc.:—*Held*: this was no objection.—*ANDERDON v. FOLEY* (LORD) (1833), 2 L. J. K. B. 214.

Compare No. 2401, post.

2376. Of proceedings in one court—Whether admissible—In proceedings in another court—Other proceedings criminal.]—Where an answer is required as evidence upon a trial, the ct.,

except in a criminal case, does not permit the record itself to go, but an office copy; unless proof of the signature is necessary. Not granted, where the action is by a stranger unconnected with the suit in equity.—*JERVIS v. WHITE* (1803), 8 Ves. 313; 32 E. R. 374.

2377. ——— ——— ——— Not if proof of signature required.]—*JERVIS v. WHITE*, No. 2376, *ante*.

2378. ——— ——— ——— Other proceedings instituted by stranger.]—*JERVIS v. WHITE*, No. 2376, *ante*.

2379. ——— ——— ———.]—Office copies are not evidence on the trial of an issue out of the Ct. of Ch., though they were used in the Ct. of Equity.—*BURNARD v. NEROT* (1824), 1 C. & P. 578.

2380. ——— ——— ———.]—In a civil proceeding at law, the office copies of the depositions in Chancery being good evidence, the originals will not be ordered to be produced.—*A.-G. v. RAY* (1843), 6 Beav. 335; 3 Hare, 335; 49 E. R. 855.
Annotation:—Mentd. Biddulph v. Camoys (1854), 19 Beav. 407.

2381. ——— ——— ——— Same matters in litigation.]

—Office copies of former proceedings in other cts. in old suits, relating to the matters in litigation in this ct., may be read & entered in the decree as evidence, without any previous order of the ct. for that purpose.—*MANBY v. BEWICKE* (1857), 3 Jur. N. S. 685; 5 W. R. 867.

2382. Of writ & return thereto—Admissibility—Proceedings for false returns.]—A copy from the Crown Office of the writ & return to a *mandamus* is sufficient evidence against the party on an information for a false return.—*R. v. CHAPMAN* (1704), 6 Mod. Rep. 152; Holt, K. B. 442; cited 15 Vin. Abr. 214; 87 E. R. 910.

Annotation:—Mentd. Anon. (1730), 1 Barn. K. B. 327.

2383. ——— ——— ——— Examined office copies.]—In an action against a sheriff for a false return to a *fi. fa.*, office copies of the *fi. fa.* & return, which are not proved to have been examined copies, are not receivable in evidence, even where the original cause was in the same ct. as the action against the sheriff.—*PITCHER v. KING* (1844), 1 Car. & Kir. 655, N. P.

2384. ——— Evidence for what purpose—Receipt of money by bailiff—Whether sufficient.]—In an action against the sheriff for money had & received to prove that a certain person as bailiff received the money on an arrest:—*Held*: an office copy of the writ & return, & which contained the name of such person, coupled with evidence that it was usual to indorse the bailiff's name on the writ, & that the person whose name so appeared was a bailiff, & made the arrest, was evidence to charge the sheriffs.—*M'NEIL v. PERCHARD* (1795), 1 Esp. 263.

Annotation:—Rejd. Hill v. Middlesex (1816), 7 Taunt. 8.

2385. Of libel in Ecclesiastical Court—How proved—Necessity for affirming affidavit.]—*ANON.* (1733), 2 Barn. K. B. 285; 94 E. R. 503.

2386. Of rule of court—Evidence for what purpose—Judge's order.]—In an action on an award made under a judge's order, to prove the order, it is enough to put in an office-copy of the rule, making it a rule of ct.—*STILL v. HALFORD* (1814), 4 Camp. 17.

Annotations:—Mentd. Manning v. Eastern Counties Ry. (1843), 12 M. & W. 237; *Borney v. Road* (1845), 7 Q. B. 79; *Livesley v. Gilmore* (1866), Har. & Ruth. 849.

PART IV. SECT. 9, SUB-SECT. 3.—B.

m. Award of statutory public officer—Acting in judicial capacity.]—In trespass to land, deft. justified under an award of fence-viewers. The township clerk produced a copy, which he

swore was a true copy of the award, the original being in his custody:—*Held*: such copy was admissible in evidence under C. S. U. C. 32, s. 6, these awards being made by a statutory public officer acting in a judicial capacity.—*WARREN v. DES-*

LIPES (1872), 33 U. C. R. 59.—*CAN. n. Of judgment.]*—*Held*: a document bearing to be an office copy of a judgment pronounced against an English debtor by one of the superior cts. in England & appearing to be stamped on each page with the seal

2387. Of insolvent petition—Evidence for what purpose—Due filing of petition.]—The office copy of an insolvent's petition, attested by the officer of the Insolvent Debtors Ct., is sufficient evidence to prove an allegation, that the petition subscribed by the insolvent was duly filed.—*GOULD v. HULME* (1829), 3 C. & P. 625.

2388. Of judgment—Proof of judgment.]—*BUCHANAN v. SMITH* (1845), 5 L. T. O. S. 431.

2389. ———.]—*JEFFS v. DAY*, No. 2407, *post*.

C. Of Affidavits.

2390. Whether admissible—To support allegation.]—In an action for maliciously holding *pltf.* to bail, the declaration stated, that *deft.* had sued out the writ which he had caused to be indorsed for bail, by virtue of an affidavit for that purpose filed:—*Held*: a copy of the affidavit was admissible in support of this allegation.—*CROOK v. DOWLING* (1782), 3 Doug. K. B. 75; Bull. N. P. 7th ed. 14; 99 E. R. 546.

Annotations:—*Folld. Casburn v. Reid* (1818), 2 Moore, C. P. 60. *Refd. Webb v. Horne* (1798), 1 Bos. & P. 281; *Nightingale v. Wilcoxon* (1829), 10 B. & C. 202.

2391. ———.]—In an action against a sheriff for an escape, *pltf.* averred in his declaration that a writ was indorsed for bail, by virtue of an affidavit of *pltf.*'s cause of action before then made & duly filed of record:—*Held*: the production of an office copy of the affidavit was sufficient to prove such averment.—*CASBURN v. REID* (1818), 2 Moore, C. P. 60.

Annotation:—*Refd. Wilcoxon v. Nightingale* (1828), 4 Bing. 501.

2392. ——— In other & separate proceedings—*Indictment for perjury.]*—*R. v. DIXON* (1848), 10 L. T. O. S. 325; 12 J. P. Jo. 54; *previous proceedings*, 9 L. T. O. S. 148.

2393. ——— Without proof of identity—& use in previous proceedings.]—(1) In ejectment, examined office copies of a bill in Chancery filed by *deft.* for an injunction, of an affidavit purporting to have been made, in the equity suit by a person of the same name & description, to support a motion for an injunction, & alleging title to the premises in one of the lessors of *pltf.*s, were produced to prove that title:—*Held*: the copy of the affidavit was not admissible without proof of identity, or that it had been used.

(2) *Seemle*: if the copy were admissible, it would not be sufficient evidence of title.—*REES d. HOWELL v. BOWEN* (1825), *M'Cle. & Yo.* 383; 148 E. R. 461.

Annotation:—*As to* (1) *Refd. Highfield v. Peake* (1827), *Mood. & M.* 109.

2394. ——— On appeal.]—Where an appeal is brought, office copies of affidavits are *prima facie* sufficient, & if on any appeal further copies are made for the use of the judges of the Ct. of Appeal, that *ct.* should be asked at the time to allow them.—*Re ROLLASON'S REGISTERED DESIGN* (No. 2) (1898), 78 L. T. 511.

Annotation:—*Refd. Stephens v. Lydall* (No. 2) (1898), 43 Sol. Jo. 27.

2395. ——— As evidence of title—Whether sufficient.]—*REES d. HOWELL v. BOWEN*, No. 2393, *ante*.

2396. ——— Evidence of death.]—It being necessary to prove the death of L., office copies of affidavits, which had proved that death to the satisfaction of the Cts. of Ch. & of Probate in other

matters, were allowed to be taken as sufficient evidence of the same death in the present case *Re WOOLLEY'S TRUSTS* (1876), 24 W. R. 783

SUB-SECT. 4.—EXAMINED COPIES.

A. Of Judicial Proceedings.

See Evidence Act, 1851 (c. 99), s. 14.

2397. Admissibility—Copy of proceedings in Chancery—In proceedings at law.]—On a trial at law, an examined copy of *pltf.*'s answer to a bill in equity may be read in evidence against him, without producing the original.—*HODGKINSON v. WILLIS* (1813), 3 Camp. 401, N. P.

2398. ———.]—Where a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery:—*Held*: an examined copy of that answer was admissible to contradict him, & it was not necessary to produce the original answer.—*EWER v. AMBROSE* (1825), 4 B. & C. 25; 6 Dow. & Ry. K. B. 127; 3 L. J. O. S. K. B. 128; 107 E. R. 969; *previous proceedings*, 3 B. & C. 746.

Annotations:—*Consd. Wright v. Beckett* (1834), 1 Mood. & R. 414. *Refd. Bradley v. Ricardo* (1831), 8 Bing. 57.

2399. ——— Different parties.]—An examined copy of an answer in Chancery, by a person not party to the action, is evidence; & it is not necessary to produce the original, or prove the handwriting of the party.—*TOOTH, DEMANDANT, BAGWELL, TENANT* (1826), 2 C. & P. 271, N. P.; *subsequent proceedings*, 3 Bing. 373, 446.

Annotations:—*Mentd. Jones v. Brearly* (1832), 5 C. & P. 319; *Spiers v. Morris* (1833), 9 Bing. 687; *Carme v. Nicoll* (1834), 1 Scott, 68.

2400. ———.]—An examined copy of a deposition in Chancery is admissible in evidence, for the purpose of contradicting the testimony of the same person when produced afterwards as witness.—*HIGHFIELD v. PEAKE* (1827), *Mood. & M.* 109, N. P.; *previous proceedings, sub nom. PEAKE v. HIGHFIELD* (1826), 1 Russ. 559.

2401. ——— In criminal proceedings—Copy containing abbreviations.]—An office copy of a bill in Chancery, which a witness examined with the original, but which office copy contained abbreviations, such as "pnl. este." for the words "personal estate," in the original bill, is not such an examined copy as will be evidence to support an allegation of a bill in Chancery on an indictment for perjury committed in an affidavit in that suit in Chancery.—*R. v. CHRISTIAN* (1842), *Car. & M.* 388, N. P.

Compare No. 2375, *ante*.

2402. ——— Copy of proceedings at law—In proceedings in Chancery.]—*Deft.* in equity had brought an action against *pltf.* in equity on a promissory note, & delivered declaration thereon prior to the filing of the bill. Subsequently to the filing of the bill, which put in issue the declaration, the action proceeded to trial, & a verdict was found for *deft.*, *pltf.* in equity, who proved in this cause an examined copy of the judgment roll:—*Held*: the judgment was admissible in evidence; but as it was obtained after the bill was filed, *deft.* in equity was entitled to have an inquiry before the master, whether it was fairly & under what circumstances obtained.—*PEARCE v. GRAY* (1843), 2 Y. & C. Ch. Cas. 322; 7 Jur. 250; 63 E. R. 142.

2403. ——— Copy of judgment—To prove title.]—

for malicious arrest on a *ca. sa.*, the affidavit is sufficiently proved by a copy of the original filed in the Crown office.—*WILSON v. THORPE* (1859), 18 U. C. R. 443.—*CAN.*

thereof, was, if authentic, *prima facie* evidence of the constitution of the debt.—*STEVEN v. MYER* (1868), 6 Macph. (Ch. of Sess.) 370; 40 Sc. Jur. 504.—*SCOT.*

PART IV. SECT. 9, SUB-SECT. 3.—C.

o. Whether admissible—In other & separate proceedings—Action for malicious arrest.]—*Held*: in an action

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In an action by pltf. claiming under an *elegit* for use & occupation, an examined copy of the judgment roll, containing the award of *elegit* & return of the inquisition, is evidence of pltf.'s title, without proving a copy of the *elegit* & of the inquisition.—*RAMSBOTTOM v. BUCKHURST* (1814), 2 M. & S. 565; 105 E. R. 492.

Annotations:—*Refd.* Magrath v. Hardy (1838), 4 Bing. N. C. 782; *Park v. Turpley* (1839), 9 Ad. & El. 468.

2404. ———— **To prove writ of execution.]—***Semble:* where, in an action of trover, pltf. claimed under an assignment by bill of sale from the sheriff, on an execution issued by him against S. who afterwards became bkpt., & defts., as his assignees, seized the goods by virtue of the commission, but did not defend the action as such, or were proved to have acted in that character at the trial, they must be considered as strangers; & consequently it was incumbent on pltf. to produce an examined copy of the judgment on which the writ of *fi. fu.* was grounded, as well as the writ itself, & the assignment to him from the sheriff.—*GLASIER v. EVE* (1823), 1 Bing. 209; 8 Moore, C. P. 40; 1 L. J. O. S. C. P. 67; 130 E. R. 85.

2405. ———— **Copy of record.—To prove judgment.]—**In an action against attorneys for negligence in not making a motion to set aside proceedings for irregularity, if the declaration aver, as the consequence of the neglect, a judgment by default & further proceedings & final judgment & execution, an examined copy of the record must be given in evidence to prove both the judgments; & it is not enough to produce entries in the prothonotary's book, & the inquisition, with the prothonotary's *allocatur*.—*GODEFROY v. JAY* (1827), 3 C. & P. 192, N. P.; *subsequent proceedings* (1828), 1 Moo. & P. 236.

Annotations:—*Refd.* Godefroy v. Dalton (1830), 6 Bing. 460; *Deacon v. Allison* (1848), 6 C. B. 434; *Tapp v. Jones* (1874), L. R. 9 C. P. 418.

2406. ———— **Action in county court on judgment in superior court.]—**In support of a defence of *nul tiel* record to an action in a county ct. on a judgment of a superior ct. proof of the judgment must be made by *certiorari* & *mittimus* from the Ct. of Ch., as in the case of *nul tiel* record pleaded in the superior cts., & not by producing an examined copy of the record in the superior ct. The ct. will not in support of a motion for a prohibition, entertain an objection that was not taken, or not properly taken in the ct. below.—*WINSON v. DUNFORD* (1848), 12 Q. B. 603; *Cox, M. & H.* 132; 18 L. J. Q. B. 14; 11 L. T. O. S. 472; 12 Jur. 629; 12 J. P. Jo. 403; 116 E. R. 996.

2407. ———— **Of superior court.]—**A judgment in the superior cts. cannot be proved by a judgment paper from the office of the master, but only by an examined or office copy of the record.—*JEFFS v. DAY* (1865), 12 L. T. 852, N. P.

2408. ———— **Copy of conviction by magistrate—**

To prove an information.]—If a plea, justifying a libel, state that an information was laid before a magistrate, an examined copy of the magistrate's conviction, reciting the information, is sufficient proof of the information.—*SCARTH v. GARDENER* (1831), 5 C. & P. 38, N. P.

Annotation:—*Mentd.* *Cox v. Reid* (1849), 18 L. J. Q. B. 216.

2409. ———— **To prove commission of the offence.]—**Metropolitan Police Act, 1839 (c. 47), s. 54, imposes a penalty not exceeding 40s. for "furious driving" in a thoroughfare; & sect. 63 empowers any constable of the metropolitan police district to take into custody, without warrant, any person who, within view of such constable, shall offend in any manner against the act. In an action in a county ct. against constables for a tort in taking pltf. into custody on a false & unfounded charge of furiously driving a horse & gig, to the danger of the passengers in a public highway, pltf., in stating his case, admitted that he had been taken before two justices, convicted, & fined 20s. & that he had paid the penalty, & had not taken any steps to impeach the validity of the conviction. The judge thereupon asked defts. if they could prove the conviction; & they accordingly put in an examined copy, which stated the offence, but did not allege that it was committed "within view of the constables." The judge, being of opinion, that, "under the circumstances, the conviction was an answer to pltf.'s claim for damages," directed the jury to find for defts.:—*Held:* a misdirection.—*JUSTICE v. GOSLING* (1852), 12 C. B. 39; *Cox, M. & H.* 609; 21 L. J. C. P. 94; 19 L. T. O. S. 91; 16 J. P. 104; 16 Jur. 429; 138 E. R. 815.

Annotations:—*Refd.* *In the Estate of Crippen*, [1911] P. 108. *Mentd.* *Caine v. Palace Steam Shipping Co.*, [1907] 1 K. B. 670.

2410. ———— **—.]—**A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it.

Where a police magistrate, after hearing a case of common assault, ordered accused to enter into recognisance & pay the recognisance fee, but did not order him to be imprisoned or to pay any fine, & an action having been subsequently brought for the same assault, the magistrate's clerk stated in evidence the above facts, but no record of the proceedings was put in:—*Held:* the above was not a conviction within Offences against the Person Act, 1861 (c. 100), s. 45, & was not a bar to the action; & the conviction, if any, was not proved.—*HARTLEY v. HINDMARSH* (1866), L. R. 1 C. P. 553; *Har. & Ruth.* 607; 35 L. J. M. C. 255; 14 L. T. 795; 12 Jur. N. S. 502; 14 W. R. 862.

Annotations:—*Refd.* *Police Comr. for Metropolis v. Donovan* (1903), 52 W. R. 14. *Mentd.* *R. v. Miles* (1890), 24 Q. B. D. 423.

2411. ———— **Copy of writ of execution—Endorsed with name of bailiff.—To prove identity of bailiff.]—**An examined copy of a writ returned & filed, & of the indorsement thereon, on which writ is indorsed, apparently by the sheriff's authority, the name of

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2405 I. Admissibility.—Copy of record —To prove judgment.]—Action for malicious prosecution & slander. In proof of the termination of the criminal proceedings, pltf. produced the original indictment, indorsed "no bill":—*Held:* this was not sufficient, but that a record should have been regularly drawn up & an examined copy produced.—*MCCANN v. PRENEVEAU* (1855), 10 O. R. 573.—*CAN.*

p. ———— **To prove trial of appeal.]—**Perjury assigned upon evidence given at the trial of an appeal

before quarter sessions. The appeal was from a conviction before a magistrate:—*Held:* the proper evidence of the trial of the appeal was the record of the trial regularly made up, or an examined copy thereof.—*R. v. HORGAN* (1840), 2 *Craw. & D.*—*IR.*

q. ———— **Action for malicious arrest —Copy of defendant's affidavit on which arrest made.]—**In an action for a malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer & shown to have been used in the cause, is sufficient to prove

that it was made by doft.—*SPAFFORD v. BUCHANAN* (1834), 3 O. S. 391.—*CAN.*

r. ———— **—.]—***FITZGERALD v. WEBSTER* (1839), 2 Ont. Dig. 2562.—*CAN.*

s. ———— **Copy of foreign judgment—Verified by affidavit.]—**A judgment of the Ct. of King's Bench in England may be proved in this province by an examined copy verified by an affidavit sworn before the Lord Mayor of London, under 5 Geo. II, c. 7.—*CHAMPION v. LONG* (1834), N. B. Dig. 332.—*CAN.*

t. ———— **Proceedings before justice**

the bailiff employed to make the levy, is no evidence to prove who was the bailiff so employed by the sheriff, evidence not being added that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority.—*HILL v. MIDDLESEX, SHERIFF* (1816), 7 Taunt. 8; 129 E. R. 3.

Annotations.—*Apld.* Morgan v. Brydges (1818), 2 Stark. 314. *Expld.* Francis v. Neave (1821), 6 Moore, C. P. 120.

2412. — Copy of *cognovit*—To prove original.]—A *cognovit* which is filed may be proved by putting in an examined copy without producing the original, & the subscribing witness may prove that he saw the party sign a *cognovit*, of which the paper produced is a copy.—*SCOTT v. LEWIS* (1836), 7 C. & P. 347, N. P.

2413. How proved—Examination by one person—Original read by another.]—To prove an examined copy of a record, it is sufficient for a witness to swear that he examined the copy while another person read the original.—*REID v. MARGISON* (1808), 1 Camp. 469.

2414. — — — — — Unnecessary to exchange papers.]—*GYLES v. HILL* (1809), 1 Camp. 471, n., N. P.

2415. — — — — —.]—To prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the ct. read as the contents of the record: it is not necessary for the persons examining to exchange papers & read them alternately, as in another case.—*ROLF v. DART* (1809), 2 Taunt. 52; 127 E. R. 994.

2416. — Production of original from proper custody—Irish judgment.]—To prove an examined copy of an Irish judgment, it is not enough for the witness to say that he examined the copy with a record produced to him in the room over the Four Courts at Dublin where the records of the superior Irish cts. are kept, without seeing whence the record in question was taken, or knowing the person who produced it to be an officer of the ct.—*ADAMTHWAITE v. SYNGE* (1816), 4 Camp. 372; 1 Stark. 183, N. P.

2417. — — — — —.]—Where the examined copy of a judgment was proved by a witness to have been examined at the house of a person having the custody of the records of the ct., the witness knowing that that person had the custody of the records:—*Held*: sufficient.—*BANNISTER v. LAMBERT* (1832), 1 L. J. K. B. 179.

B. Other Documents.

See Evidence Act, 1851 (c. 99), s. 14.

2418. Admissibility of examined copy—Bond to the Crown.]—On *riens per discent* pleaded in debt against an heir he cannot give in evidence an extent upon a bond to the King without giving in

evidence either the bond itself or an attested copy of it.—*SHERWOOD v. ADDERLEY* (1699), 1 Ld. Raym. 734; 91 E. R. 1391, N. P.

2419. — Election poll.]—(1) A copy of the poll taken at a borough election examined with the original & signed by the returning officer, is admissible evidence in an action for bribery.

(2) The original precept from the sheriff to the returning officer of a borough to proceed to an election is admissible in evidence to prove the allegation in a declaration that such a precept issued, etc.—*MEAD v. ROBINSON* (1743), Willes, 422; 125 E. R. 1247.

Annotations.—*As to* (2) *Refd.* Webb v. Smith (1838), 4 Bing. N. C. 373. *Generally*, *Mentd.* Howard v. Shipley (1803), 4 East, 180.

2420. — Deed registered in Middlesex.]—An examined copy of the registry of a deed in the registry of the county of Middlesex, is admissible as secondary evidence of its contents.—*DOE d. UBELE v. KILNER* (1826), 2 C. & P. 289, N. P.

2421. — — — — —.]—*COLLINS v. MAULE*, No. 3712, post.

2422. — Court rolls—To prove a surrender.]—48 Geo. 3, c. 149, s. 32, which requires that every surrender of copyhold, & admittance, etc., made out of ct. or a memorandum thereof, shall be stamped; & sect. 33, which enacts that in cases of surrender, etc., in ct., the steward shall make & deliver to the tenant a stamped copy of the ct. roll are merely revenue regulations, & not intended to vary the rules of evidence; & therefore a surrender & admittance out of ct., presented & enrolled afterwards, may be proved by an examined copy of the ct. roll, without producing the original surrender, etc., or memorandum thereof.—*DOE d. CAWTHORN v. MEE* (1833), 4 B. & Ad. 617; 110 E. R. 588; *sub nom.* *DOE d. HAWTHORN v. MEE*, 1 Nev. & M. K. B. 424; 2 L. J. K. B. 104.

Annotation.—*Refd.* Doe d. Garrod v. Olley (1840), 12 Ad. & El. 481.

2423. — Precept to returning officer—In action for bribery at an election.]—In debt on 2 Geo. 2, c. 24, s. 7, for bribery at a borough election:—*Held*: the precept to the returning officer was sufficiently proved by an examined copy obtained from the Crown office, whither it appeared to have been returned together with the writ & indenture.—*WEBB v. SMITH* (1838), 4 Bing. N. C. 373; 1 Arn. 145; 6 Scott, 147; 7 L. J. C. P. 191; 2 J. P. 300; 2 Jur. 304; 132 E. R. 830.

2424. — Record of fine.]—*DOE d. GILBERT v. ROSS*, No. 1846, ante.

2425. — Letter of attorney — Enrolled in Jamaica.]—*Semble*: (1) an examined copy of a letter of attorney, enrolled in the office of record

of peace—Returned to Supreme Court.]—An information & other proceedings before a justice of the peace, returned to the Supreme Ct. with a *certiorari* & filed with the clerk of the Crown, becomes a record, & may be proved by an examined copy, taken before the original was filed.—*SEWELL v. OLIVE* (1839), 4 All. 394.—*CAN.*

2413 i. How proved—Examination by one person—Original read by another.]—To prove a compared copy of a record of conviction a witness stated that the record was read aloud in his presence by the proper officer, while he perused the copy, & saw that it corresponded with the original record:—*Held*: a sufficient comparison of the copy with the original record.—*R. v. HUGHES* (1839), 1 Craw. & D. 13.—*IR.*

2413 ii. — — — — —.]—*R. v. McDONALD* (1841), Arn. M. & O. 112.—*IR.*

PART IV. SECT. 9, SUB-SECT. 4.—B.

a. Admissibility of examined copy—Inventory filed by administrator.]

An examined copy of an inventory, filed by the administrator in the registry of the Ct. of Probates, pursuant to 3 Vict. c. 61, is admissible in evidence, & the original need not be produced.—*CUNLIFFE v. MOREHOUSE* (1843), 2 Kerr, 311.—*CAN.*

b. — Registrar's book—In which memorial recorded.]—The production of the registrar's book in which a memorial is recorded, is good evidence of the title being a registered title. *Semble*: the registrar producing an examined copy from his book, without either his book or the memorial, would be good evidence.—*DOE d. PRINCE v. GRTY* (1851), 9 U. C. R. 41.—*CAN.*

c. — — Assignment in insolvency.]

—*Held*: a notarial copy of an assignment in insolvency may be received as evidence of such assignment under C. S. C. c. 80, s. 2.—*PRESOTT ELECTION CASE, MCKENZIE v. HAMILTON* (1871), H. E. C. 1.—*CAN.*

d. — Public document.]—Any public document filed in a public office of the govt., may be proved by an examined copy.—*MCLEAN v. McDONELL* (1844), 1 U. C. R. 13.—*CAN.*

e. — — — — — Undesirable to move from place of deposit.]—The contents of public documents which it is desirable not to remove from their place of deposit, as for instance, those having reference to shipping, navigation or trade, may be proved by examined copies.—*BURVEE v. CARVILL* (1875), 3 Pug. 141.—*CAN.*

f. — — — — — Statutory requirements.] By Imperial statute 14 &

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in Jamaica, is not admissible in evidence, without more; (2) although an examined copy of a deed so inrolled is, by force of Acts of the local legislature, admissible.—**FAULKNER v. DANIEL** (1843), as reported in 3 Hare, 199; 67 E. R. 355.

Annotations:—Generally, Mentd. *Davis v. Chanter* (1848), 2 Ph. 545; *Ryam v. Sutton* (1854), 19 Beav. 556; *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

2426. — Deed—Enrolled in Jamaica—Effect of local statutes.]—FAULKNER v. DANIEL, No. 2425, ante.

2427. — Marriage entry—Copy of examined copy.]—A copy of the entry of a marriage, not collated with the original, but with another copy which had been so collated, received.—WEBB v. WEBB (1844), 3 Notes of Cases, 438.

2428. — Assignment of judgment—Recovered in Ireland—Admissible by statute.]—Marriage does not enure as an assignment to the husband of a judgment recovered by the wife, in Ireland, before the marriage, under 9 Geo. 2, c. 5 (Ir.), amended by 25 Geo. 2, c. 14 (Ir.), & made perpetual by 12 Geo. 3, c. 19, s. 2. Under these statutes, an examined copy of the inrolment of the memorial of an assignment of such judgment is good evidence of that assignment.—FITZGERALD v. FITZGERALD (1840), 8 C. B. 502; 19 L. J. C. P. 126; 15 L. T. O. S. 47; 14 Jur. 485; 137 E. R. 639.

2429. — Registration of chapel—To prove fact of registration.]—Prisoner was convicted on an indictment for bigamy. It was alleged that the first marriage took place in a dissenting chapel duly licensed for marriages. A witness produced a certificate, under the hand of the superintendent registrar, of the fact that the chapel had been duly registered. It did not purport to be a copy or extract, but the witness proved that he had examined it with the register book at the office of the superintendent registrar, & that it was correct:—Held:** the document was admissible as an examined copy or extract from the superintendent registrar's book, under Evidence Act, 1851 (c. 99), s. 14, & was good evidence of the due registration of the chapel.—*R. v. MANWARING* (1856), Dears. & R. 132; 26 L. J. M. C. 10; 28 L. T. O. S. 189; 20 J. P. 804; 2 Jur. N. S. 1236; 5 W. R. 119; 7 Cox, C. C. 192, C. C. R.**

Annotations:—Refd. *Sichel v. Lambert* (1864), 15 C. B. N. S. 781. **Mentd.** *R. v. Craddock* (1863), 3 F. & F. 837.

2430. — Rate book.]—JUSTICE v. ELSTON, No. 3283, post.

2431. How proved—Sufficiency of examination—Copy of rules of benefit society—Examination of all the rules.]—To give evidence of the transcript of the rules of a benefit society inrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the

copy of all the rules with the transcript.—*R. v. BOYNES* (1843), 1 Car. & Kir. 65.

2432. — Production of original from proper custody—Parish register.]—DOE d. ARUNDEL (LORD) v. FOWLER, No. 3343, post.

Lost or destroyed documents.]—See Sect. 5, sub-sect. 5, E. (b), ante.

Documents not produced after notice.]—See Sect. 5, sub-sect. 6, C., ante.

SUB-SECT. 5.—CERTIFIED COPIES.

A. Admissibility generally.

See Evidence Act, 1845 (c. 113), s. 1; Evidence Act, 1851 (c. 99), s. 14; Public Record Office Act, 1838 (c. 94), ss. 12, 13.

2433. General rule.]—ANON. (1712), Cooke, Pr. Cas. 6; 125 E. R. 922.

2434. Admissibility.—In proceedings in House of Lords & courts of law—Contrasted.]—NETTERVILLE PEERAGE CASE (1831), 2 Dow. & Cl. 342; 6 E. R. 755, H. L.

Annotation:—Refd. *Donoughmore Peerage* (1853), 3 H. L. Cas. 822.

2435. Admission as freeman of London—That proof of such fact—After death of person admitted—With evidence of identity.]—An attested copy of an entry in the book of the Chamberlain of London, that A. was admitted to the freedom of the city, is not sufficient after his death, to prove him to have been a freeman, without proving the identity of his person.—*YOUNG v. BURDETT* (1724), 5 Bro. Parl. Cas. 54; 2 E. R. 529.

2436. Land tax assessment—Information against commissioners.]—The ct. will not grant a *certiorari* to remove the assessment of the land tax, if an information be moved for against the comrs. of the land tax, the ct. will admit an attested copy of the assessment as evidence, instead of the original.—*R. v. KING* (1788), 2 Term Rep. 234; 100 E. R. 127.

Annotations:—Refd. *Mortimer v. McCallan* (1840), 6 M. & W. 58. **Mentd.** *R. v. Woodhouse*, [1908] 2 K. B. 501.

2437. Legal proceedings—Record of trial & acquittal—Plea of *nul tiel* record.]—(1) An action brought in a superior ct., under Libel Act, 1843 (c. 96), s. 8, to recover the costs sustained by plff. upon the trial of an indictment for libel preferred against him at the assizes by deft., upon which trial a verdict of not guilty was returned, & judgment was given for plff., who was duly discharged, is a "proceeding" in which, under Evidence Act, 1851 (c. 99), s. 13, a certified copy of the record of such trial & acquittal, under the hand of the proper officer of the ct. of assize, is admissible in evidence in proof of such trial & acquittal, in answer to a plea of *nul tiel* record.

(2) Evidence Act, 1851 (c. 99), s. 13, which allows a criminal record to be proved by a certificate of the officer having custody of the record,

15 Viet. c. 99, s. 14, certain provision is made for the proof of books & documents of a public nature by the production of an examined copy, "provided it purport to be signed & certified as a true copy . . . by the officer to whose custody the original is entrusted." A copy of a book, within this statute, certified by "A. R., Acting Surveyor-General," the original of which was proved to be in the Department of the Interior, in the Dominion Lands office, at O.:—**Held:** not sufficient evidence without proof that A. R. was the officer to whose custody the original had been entrusted.—*McKILLIGAN v. MACHAR* (1886), 3 Man. L. R. 418.—**CAN.**

G. Census returns.]—Plffs., to prove the population of B., in 1880, called one of the census comrs., who produced the original draft general report signed by the census comrs. of that year & a Blue Book of the "abstract" laid by them before Parliament:—Held:** either as originals or as examined copies of public documents these were properly admitted as evidence.—*DUBLIN CORPN. v. BRAY TOWNSHIP COMRS.*, [1900] 2 I. R. 88.—**IR.****

PART IV. SECT. 9, SUB-SECT. 5.—A.

b. Legal proceedings—Record of trial & acquittal.]—In an action for

malicious prosecution, plff. sought but was not permitted to prove his acquittal before the county judge's criminal ct. on a charge of misdemeanour, by means of the production of the original record signed by the county judge & produced & verified by the clerk of the peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer:—**Held:** the evidence should have been admitted in either of the above two forms.—*O'HARA v. DOUGHERTY* (1894), 25 O. R. 347.—**CAN.**

k. — Proceedings in bankruptcy—To contradict witness—Whether admissible.]—It is not competent to

omitting the formal parts, applies to proof in civil as well as in criminal proceedings.—**RICHARDSON v. WILLIS** (1872), L. R. 8 Exch. 69; 42 L. J. Ex. 15; 27 L. T. 828; 12 Cox, C. C. 298.

2438. — Depositions embodied in decree.—Where there had been a decree of one of the extinct cts., & depositions taken in the cause in which such decree was made:—*Held*: those depositions could not be used in evidence in a cause before this ct., except so far as they were embodied in the decree, & therefore part of the proceedings of a ct., & documents of a public nature of which this ct. would receive in evidence a certified copy.—**LINZEE v. LINZEE** (1860), 29 L. J. P. M. & A. 128.

2439. Acknowledgment by married woman—Taken on oath abroad—On proof of foreign law.—Where an acknowledgment of a married woman under Fines & Recoveries Act, 1833 (c. 74), was taken at Milan, the ct. allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received & filed in lieu of the affidavit verifying the certificate of the comrs. upon the production of an affidavit from a competent party, showing that by the law of that country, depositions on oath are always deposited amongst the records of the ct. & office or certified copies only delivered out to the parties.—**Re CLERICETTI** (1855), 15 C. B. 762; 139 E. R. 626.

2440. Election writ.—**R. v. CLARKE** (1859), 1 F. & F. 654.

2441. Election register.—**KING'S COUNTY CASE** (1866), 14 L. T. 425.

2442. Bill of sale—Evidence of filing of bill & time of filing.—17 & 18 Vict. c. 36, s. 1, enacts, that every bill of sale of personal chattels, or a true copy thereof, together with an affidavit of the time of such bill of sale being made, etc., shall be filed with the

officer acting as clerk of the docquets & judgments in the Ct. of Q. B., within twenty-one days after the making of such bill of sale. By sect. 3 the officer is required to keep a book containing particulars of every bill of sale so filed, together with the dates of the execution & filing of the same, etc.:—*Held*: the book kept by the officer is a "public document," & a certified copy or extract is, by Evidence Act, 1851 (c. 99), s. 14, evidence of the filing of the bill of sale & affidavit, & of the time of their being filed.—**GRINDELL v. BRENDON** (1859), 6 C. B. N. S. 698; 28 L. J. C. P. 333; 33 L. T. O. S. 224; 5 Jur. N. S. 1420; 7 W. R. 579; 141 E. R. 625.

Annotations:—**Apld.** **Waddington v. Roberts** (1868), L. R. 3 Q. B. 579. **Refd.** **Mason v. Wood** (1875), 1 C. P. D. 63; **Emmott v. Marchant** (1878), 3 Q. B. D. 555.

2443. Depositions before receiver of wreck.—In a cause of damage, though it may be intended to contradict a witness as to statements made by him before a receiver of wreck, it is not necessary to *subpoena* the receiver of wreck to produce the original deposition, as a certified copy will be sufficient for the purpose.—**THE OSCAR** (1861), 10 L. T. 789; 12 W. R. 872; 2 Mar. L. C. 42.

Annotation:—**Consd.** **The Emperor, The Zephyr** (1861), 12 W. R. 890.

2444. ——Certified copy of examination taken before a receiver of wreck under M. S. Act, 1854 (c. 120), ss. 448, 449, cannot be used to discredit the captain in the witness box—the original only can be admitted.—**THE EMPEROR v. THE ZEPHYR** (1864), 12 W. R. 890.

2445. Registry of copyright—Evidence of proprietorship of copyright.—Certified copies of the book of registry of the proprietorship of copyright are admissible in a criminal prosecution as *prima facie* proof of the proprietorship of copyright, &

notaries of Montreal, is admissible.—**GRAY v. McMILLAN** (1850), 5 C. P. 400.—**CAN.**

t. Patent.—*From books in provincial registrar's office*—[Certified by deputy registrar.]—A certified copy of a patent taken from the books in the provincial registrar's office, & signed by the deputy registrar, is not sufficient as primary evidence. Instead of an exemplification.—**PAUNCE v. McLEAN** (1859), 17 U. C. R. 463.—**CAN.**

b. Licence to administrator to sell land.—A licence by the Governor in Council to an administrator to sell land, granted under 26 Geo. III c. 11, may be proved by a copy from the records of the Council, certified by the clerk of the Executive Council, under 21 Vict. c. 3, s. 7.—**CAUGHEY v. INMAN** (1862), 5 Alt. 399.—**CAN.**

b. Conviction returned to quarter sessions.—*Seable*: a conviction returned to quarter sessions, & filed by the clerk of the peace, becomes a record of the ct., & may be proved by a certified copy.—**GRAHAM v. MCARTHUR** (1866), 25 U. C. R. 478.—**CAN.**

c. Field notes of original survey.—A certified copy of part of the field notes of the original survey is admissible in evidence.—**CARRICK v. JOHNSTON** (1866), 26 U. C. R. 69.—**CAN.**

d. Register of mortgage.—**Merchant Shipping Act, 1851**, pt. 11, s. 107, makes a certified copy of the register of a mortgage *prima facie* proof of all the matters contained or recited in such register.—**OXLEY v. SKEARWATER** (1867), 7 N. S. R. 144.—**CAN.**

e. Petition to administrator of government.—A copy of a petition to the administrator of the govt. certified by the clerk of the executive council, purporting to be signed by petrs., one being a marksman, was held admissible as evidence, without proof of the

prove on the cross-examination of a witness, that he has made a different statement relative to the subject matter of the suit in his examination in bankruptcy in England, without producing the original proceedings in bankruptcy. A certified copy of the proceedings is not sufficient.—**CAMBELL v. GILBERT** (1862), 5 Alt. 420.—**CAN.**

i. ——On a petition of one of the parties to a cause the ct. authorised & required the principal clerk of the division to certify a copy of the proceedings for production in the Irish cts. in a similar action there between the same parties.—**WALTER** (1839), 16 R. (Ct. of Sess.) 926; 26 Sc. L. R. 369.—**SCOT.**

2441 i. Election register.—A copy of a list of electors bearing upon its face a statement that it is issued by the Queen's Printer makes proof of its contents without further verification.—**TWO MOUNTAINS ELECTION CASE**, **ETHIER v. LEGAULT** (1901), 31 S. C. R. 437.—**CAN.**

2441 ii. ——*Re ALBERTA DOMINION ELECTION* (1905), 1 W. L. R. 486; 6 Terr. L. R. 329.—**CAN.**

2445 i. Registry of copyright—Evidence of proprietorship of copyright.—A certified copy of the register of copyrights is evidence, not merely of registration, but of ownership in the copyright.—**ALLAN & CO. PROPRIETARY LTD. v. REED**, [1913] V. L. R. 422.—**AUS.**

m. Certificate of registration of birth—Is evidence of date of birth.—A certified copy of a certificate of registration of birth is admissible in evidence, & is *prima facie* evidence of all the contents which are required by law to be stated in such certificate, & therefore of the date of the birth.—**R. v. COLEMAN** (No. 2) (1901), 27 V. L. R. 294.—**AUS.**

n. Entry in marriage register—As evidence of marriage.—The ct.

accepted as sufficient evidence of a marriage the testimony of the wife coupled with a certificate of the superintendent registrar for the district in which the alleged marriage took place, certifying to the correctness of a copy of an entry in a register book of marriages in his custody.—**ROBINSON v. THORP**, [1920] 3 W. W. R. 828.—**CAN.**

o. Affidavit—Filed in office of clerk of the Crown.—A certified copy of an affidavit filed in the office of the clerk of the Crown:—*Held*: sufficient to move upon.—**MCKENZIE v. BUSSELL** (1831), 3 O. S. 343.—**CAN.**

p. Deed—Without memorandum required by statute—Whether admissible.—Where a certified copy of a deed tendered in evidence under 7 Wm. IV. c. 15, contained no memorandum by the justice of the acknowledgment of the due execution of the deed, according to 26 Geo. III. c. 3:—*Held*: such certified copy could not be given in evidence.—**DOE d. LYON v. SLAVIN** (1846), 3 Kerr, 258.—**CAN.**

Memorial certified by registrar.—Copies of memorials certified by the registrar to be true copies of memorials in his office, are evidence of the contents of the deeds.—**LYNCH v. O'HARA** (1857), 6 C. P. 259.—**CAN.**

r. — After notice of intention to produce.—Where the original deed is not in the possession of the parties tendering the evidence a certified copy is properly received where it is proved that notice of intention to produce it has been duly served.—**CONRAD v. HALIFAX LUMBER CO., LTD.** (1919), 52 N. S. R. 250.—**CAN.**

s. Power of attorney—From depository of notarial records—Under corporate seal of board of notaries.—A certified copy of a power of attorney to convey lands, from the depository of notarial records in Lower Canada, under the corporate seal of the board of

Sect. 9.—Copies of documents: Sub-sect. 5, A., B. & C.]

are not rebutted by evidence that the original assignments of the copyright are in writing but not produced.—*R. v. WILLETTTS* (1906), 70 J. P. 127.

Lost or destroyed documents.]—See Sect. 5, sub-sect. 5, E. (b), ante.

Documents not produced after notice.]—See Sect. 5, sub-sect. 6, C., ante.

B. Admissibility under Particular Statutes.

See Public Record Office Act, 1838 (c. 94), ss. 12, 13; Evidence Act, 1851 (c. 99), ss. 13, 14; Criminal Procedure Act, 1865 (c. 18), ss. 1, 6; Prevention of Crimes Act, 1871 (c. 112), s. 18.

2446. Under Land Tax Redemption Act, 1802 (c. 116).—Original document in evidence.—Rejected.]—*BURDON v. RICKETS* (1809), 2 Camp. 121, n., N. P.

2447. Under Insolvent Debtors Act, 1826 (c. 57).—Proceedings & order of Insolvent Debtors' Court.]

—A copy of an order of the Insolvent Debtors' Ct., referring the matters of an insolvent's petition to the justices at sessions in Wales, in pursuance of sect. 41 of above Act, together with an affidavit of the service of the order upon the creditors, were tendered in evidence under sect. 76 of the Act, which makes copies of the petition, schedule, order & proceedings in the matters of prisoner's petition, receivable in evidence on their being certified by the proper officer, & sealed with the seal of the ct. The copy of the affidavit was certified & sealed as required by the Act, but the copy of the order which was affixed to the affidavit with a pin, was neither sealed nor certified:—*Held*: the certificate & seal on the copy of the affidavit was a sufficient verification of both instruments.—*JONES v. NICHOLLS* (1829), 3 Moo. & P. 12; 7 L. J. O. S. C. P. 167.

Annotation:—*Reid. R. v. Lands* (1855), Deans. C. C. 567.

2448. ——— Whether production of original ousted by the statute.]—The provision in sect. 76

signature.—*MONTGOMERY v. GRAHAM* (1871), 31 U. C. R. 57.—**CAN.**

f. Certificate of court of appeal.—As to result of appeal.]—A certified copy of the certificate of the ct. of appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties.—*BLACKLEY v. KENNEY* (1889), 19 O. R. 169.—CAN.****

g. Registration of certificate of judgment.]—The only proper evidence of the registration of a certificate of judgment is a certified copy of it.—*CANADA SUPPLY CO. v. ROBB* (1910), 20 Man. L. R. 33.—CAN.****

h. Depositions of witnesses.—Transcribed from notes by stenographer.]—Certificate of a stenographer, signed & dated & attached to the depositions certifying that he took faithful & accurate notes of the examination of the witnesses, & that the writing on the sheets of paper annexed is a faithful & accurate transcript made by him of his notes, is a sufficient compliance with the requirements of the order that the stenographer shall certify the transcript as correct.—*SIMPSON v. MALCOLM* (1914), 43 N. B. R. 79.—CAN.****

k. Public document.]—A copy of a document coming out of a public office, & certified by the officer in charge of that department to be a true copy, is admissible in evidence.—*UNDE RAJAH RAJE BOMMARAEZE BHADUR v. PEMMASAYE VEBKATADU NAIDOO* (1858), 4 W. R. 121; 7 Moo. Ind. App. 128.—IND.****

l. ———.]—NARAGUTY LUCHME-DAVAMAH v. VENGAMA NAIDOO (1861), 1 W. R. 30; 9 Moo. Ind. App. 66.—IND.****

m. Register of marriage.]—A certified copy of the duplicate original register of a marriage is good evidence of the marriage in an action for restitution of conjugal rights.—*RYKIE v. RYKIE* (1868), Buch. 114.—S. AF.****

n. ———.]—HIGGINS v. HIGGINS (1913), C. P. D. 242.—**S. AF.**

PART IV. SECT. 9, SUB-SECT. 5.—B.

o. Under Pounds Act, 1874 (No. 478), s. 21.]—A poundkeepers book, kept in pursuance of the above sect. is a document of such a public nature, that entries in it may be proved by a certified extract giving the essential particulars.—*JONES v. FALVEY* (1879), 5 V. L. R. 230.—AUS.****

p. Copy of memorandum of mortgage.]—A copy of a memorandum of mtge. signed & certified as a true copy by the officer to whose custody the original is entrusted is receivable in evidence under Evidence Act, 1852.—*PRICE v. PRICE*, (1889) S. A. L. R. 121.—AUS.****

q. Under 3 Vict. c. 65.—No reason for non-production of original.]—A certified copy of a grant under the above Act is admissible in evidence, without accounting for the non-production of the original.—*DOE v. McDONALD* (1850), 1 All. 673.—CAN.****

r. Under Acts of Assembly.]—A fiat in bkpey. under the above Acts may be proved by a certified copy

of above Act that a certified copy of the petition, schedule, order of adjudication, etc., "shall, at all times, be admitted in all cts. whatever, as sufficient evidence of the same" does not take away the right of producing in evidence the original order of adjudication procured from the ct.—*NORTHAM v. LATOUCHE* (1829), 4 C. & P. 140, N. P.; *subsequent proceedings*, 3 Moo. & P. 646. *Annotation*:—*Mentd. Warner v. Haines* (1834), 6 C. & P. 666.

2449. ———.]—Proceedings had in an insolvent ct. while 1 Geo. 4, c. 119, was in force, may be proved by producing certified copies under the seal of the ct., proved to be such, & purporting to be signed by the officer, that being the mode prescribed by Insolvent Debtors Act, 1826 (c. 57), & without proving the signature of the officer as required by 1 Geo. 4, c. 119.—*DOE d. PHILLIPS v. EVANS* (1833), 1 Cr. & M. 450; 3 Tyr. 339; 2 L. J. Ex. 179; 149 E. R. 476.

Annotations:—*Distd. Doe d. Threlfall v. Sellers* (1837), 6 Ad. & El. 328. *Mentd. Sturgis v. Evans* (1864), 3 New Rep. 650.

2450. ——— Who may give in evidence.—Parties other than insolvent or creditors.]—

Certified copies of the schedule, etc., may be given in evidence under above Act, by parties other than the insolvent or his creditors.—*PRICE v. ASSHETON* (1835), 1 Y. & C. Ex. 441; 160 E. R. 180.

Annotations:—*Mentd. Rickards v. Rickards* (1844), 13 L. J. Ch. 314; *Lewis v. Stephenson* (1898), 67 L. J. Q. B. 296.

2451. ——— Assignment by insolvent debtor.—Whether proof of assignment.]—The assignment of his estate by an insolvent debtor who has been discharged under 53 Geo. 3, c. 102, cannot be proved by a certified copy of the assignment as under Insolvent Debtors Act, 1826 (c. 57), s. 76.—*DOE d. THRELFALL v. SELLERS* (1837), 6 Ad. & El. 328; *Will. Woll. & Dav.* 160; 6 L. J. K. B. 135; 112 E. R. 125.

2452. ———.]—A certified copy, under the seal of the Insolvent Debtors' Ct., of the assignment from the provisional assignee is, under sect. 19 of above Act, evidence of such assignment,

thereof without production of the *Royal Gazette*, except where title is to be shown in the assignee.—*CUNNINGHAM v. SCOLLAR* (1859), 4 All. 385.—**CAN.**

s. Under 21 Vict. c. 3.—Certified by Clerk of Executive Council.]—A license by the Governor in Council to an administrator to sell land may be proved by a copy from the records of the council, certified by the Clerk of the Executive Council under the above Act.—*CAUGHEY v. INMAN* (1862), 5 All. 299.—CAN.****

t. Under 29 Vict. c. 28, s. 43.]—*R. v. ALLAN* (1867), 2 Old. 373; 7 N. S. R. 5.—CAN.****

u. Under Rev. Stat. (c. 112), s. 12.]—*FIRTH v. MCLEOD* (1873), 2 Pug. 1.—CAN.****

v. Under Ceylon Evidence Ordinance, 1905.]—The provisions of Ceylon Evidence Ordinance, 1905, relating to the admissibility in evidence of certified copies of public documents ought to be read as applicable to certificates given before the date of the Ordinance.—*MUNIANDY CHETTY v. MUTTY CARUPPEN CHETTY* (1913), 30 T. L. R. 41.—IND.****

w. Copy of deed.]—*McKENZIE v. LAMONT* (1877), 2 R. & C. 517.—CAN.****

x. ———.]—*DOE d. ANDOVER* (RECTOR) *v. KENNEDY* (1886), 26 N. B. R. 83.—CAN.****

y. Copy of will.]—*Semble*: a certified copy of a will cannot be given in evidence under 1 Rev. Stat. c. 112.—

without proof of any petition having been filed by the insolvent, or of any appointment of an assignee.—DOE d. HEMMING v. WILLETTTS (1849), 7 C. B. 709; 18 L. J. C. P. 240; 137 E. R. 280.

2453. Under Judgments Act, 1838 (c. 110)—Appointment of assignee & vesting order.]—The appointment of a provisional assignee, & the vesting order, are well proved, under sects. 46 & 105 of above Act, by a certified copy on parchment, under the seal of the Insolvent Debtors' Ct., signed "B. deputy for provisional assignee in whose custody such order is."—JACKSON v. THOMPSON (1842), 2 Q. B. 887; 2 Gal. & Dav. 598; 11 L. J. Q. B. 94; 6 Jur. 848; 114 E. R. 343; *previous proceedings, sub nom.* THOMPSON v. JACKSON (1841), 3 Man. & G. 621.

*Annotations:—*Refd. Doe d. Hemming v. Willetts (1849), 7 C. B. 709. *Mentd.* Billiter v. Young (1856), 6 L. & B. 1.

2454. ——— Evidence of appointment only—Not commencement of title.]—(1) In trover by the assignee of an insolvent debtor, for a conversion of part of the insolvent's estate before his appointment, & in the time of the provisional assignee, a copy of the adjudication of prisoner's discharge, certified pursuant to sect. 105 of above Act, showing the date of the vesting order, is good evidence of pltf.'s title.

(2) The order of appointment of the assignee is not evidence of the time from which his title accrues, but only of the appointment itself.—YORKE v. BROWN (1842), 10 M. & W. 78; 2 Dowl. N. S. 283; 11 L. J. Ex. 410; 152 E. R. 389.

2455. ——— Adjudication of discharge—Evidence of assignee's title.]—YORKE v. BROWN, No. 2454, *ante*.

2456. Under County Bankers Act, 1826 (c. 46)—Return made to stamp office—Evidence of facts stated.]—A copy of a return made to the stamp office, verified by affidavit, stating a person to be a public officer of a co., & certified by a comr. of stamps, under sect. 6 of above Act, is evidence of the facts stated in it, & it is not necessary to prove that the affidavit annexed to the return was made by the public officer.—STEWART v. DUNN (1844), 12 M. & W. 655; 1 Dow. & L. 642; 13

L. J. Ex. 324; 2 L. T. O. S. 423; 8 Jur. 218; 152 E. R. 1361; *previous proceedings* (1843), 11 M. & W. 63.

*Annotations:—*Refd. Harvey v. Scott (1817), 11 Q. B. 92. *Mentd.* Smith v. Goldsworthy (1843), 12 L. J. Q. B. 192; Powles v. Page (1846), 3 C. B. 16; *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

2457. Under Public Record Office Act, 1838 (c. 94)—Words of Act must be followed.]—(1) The officer appointed by sect. 13 of above Act to certify a copy from any record in the custody of the Master of the Rolls as a true & authentic copy, must follow the words of the Act of Parliament. If he chooses to use words of his own, the certificate & copy are inadmissible in evidence.

(2) *Qu.*: whether under above Act, an entire copy of any record is necessary, or whether, with regard to awards under an Inclosure Act, that statute is not to be construed together with 41 Geo. 3, c. 109, s. 35, so that a copy of "any part thereof" will be entitled to admission.—DOE d. BRIDE v. BRIDE (1845), 5 L. T. O. S. 36.

2458. ——— Copy of whole or part of record—Necessity for—Award under Inclosure Acts.]—DOE d. BRIDE v. BRIDE, No. 2457, *ante*.

2459. Under Merchant Shipping Act, 1854 (c. 104)—Entry in record of certificates—Evidence of matters stated therein.]—MCALLEN v. REID (1870), 23 L. T. 85, n.; 3 Mar. L. C. 491, n.

Under Banker's Books Evidence Act, 1879 (c. 11).]—See BANKERS, Vol. III., p. 307, Nos. 1007–1009.

C. How Proved.

See Evidence Act, 1845 (c. 113), s. 1.

2460. Two documents pinned together—One only certified & sealed—Whether sufficient.]—JONES v. NICHOLLS, No. 2447, *ante*.

2461. Proof of seal—Public records in rolls office—Evidence of attachment of seal.]—DOE d. ANGELL v. ANGELL (1843), 1 L. T. O. S. 508.

2462. Proof of certification by proper officer—Deed in rolls office.]—DOE d. CLAYTON v. WILLIAMS (1843), as reported in 1 L. T. O. S. 316.

2463. ——— Election writ.]—R. v. CLARKE (1859), 1 F. & F. 651.

CONNELL v. HALEY (1860), 4 All. 636.—CAN.

f. ———.]—DOE d. SIMONDS v. GILBERT (1883), 22 N. B. R. 576.—CAN.

g. ———.]—A copy of a will executed before two notaries in the province of Quebec under art. 843 C. C. certified by one of the notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia as provided in sect. 27.—MUSGRAVE v. ANGLE (1910), 30 C. L. T. 691; 43 S. C. R. 484.—CAN.

h. Copy of cutter's measurement.]—A copied specification of the entry of a cutter's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. C., c. 46, s. 19, is receivable as evidence of such measurements.—DOBELL v. ONTARIO BANK & ROCHESTER (1884), 9 A. R. 484.—CAN.

k. Copy of registered agreement.]—A registrar refused to part with a registered agreement, but a copy certified under his hand & official seal to be a true copy was produced at the trial. A witness proved the copy was a true copy.—*Held*: the registrar's certificate as to the copy was sufficient under O. J. Act, Rule 20.—McDONALD v. MURRAY (1884), 5 O. R. 559.—CAN.

l. Copy of plan.—Under Consul. Stat. (c. 46), s. 7.]—A copy of the plan of a grant coming apparently from the Crown Lands Office may be certified under the above sect. by the Deputy Surveyor-General.—KELLY v. BROWN

(1891), 31 N. B. R. 643.—CAN.

m. ———.]—The provisions of Evidence Act, R. S. N. S. 1900 (c. 160), do not permit the reception of a certified copy or a plan of survey deposited in the Crown lands office, to make proof of the original annexed to the grant of lands from the Crown.—NOVA SCOTIA STEEL CO. v. BARTLETT (1905), 35 S. C. R. 527.—CAN.

n. Franchise Act, 1898.—Copy of voters' list.]—Since Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the Clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition.—*Re* LISGAR DOMINION ELECTION (1901), 14 Man. L. R. 268.—CAN.

o. Copy of bill of indictment.]—The production by the proper officer of a certified copy of the bill of indictment, returned "no bill," is sufficient in view of Evidence Act.—TANGHE v. MORGAN (1905), 11 B. C. R. 455; 3 W. L. R. 146.—CAN.

p. Copy of entry in Stationer's Hall.]—A certified copy of the entry at Stationers' Hall of an encyclopedia is *prima facie* evidence of ownership under 1842 Act.—IMPERIAL BOOK CO. v. BLACK (1905), 35 S. C. R. 488.—CAN.

q. Under Merchant Shipping Act, 1854 (c. 60), ss. 64 & 695.]—An extract from the register book kept & certified

pursuant to the above Act is proof of ownership in an action for damages for an accident & the certificate is admissible under the above sects.—RODDINGTON v. DONALDSON (1917), N. B. R. 290.—CAN.

r. Under Railway Act (Dom.), s. 69 (2).]—Under the above sub-sect. an order of the board of railway commissioners for Canada & any regulations under the Act may be proved by copies certified to be true & correct copies of the originals on file with the board without the certificates stating that they have been made or adopted by the board.—SEIBEL v. GRAND TRUNK PACIFIC RY. CO. (1920) 2 W. W. R. 318; 52 D. L. R. 423; 15 Sask. L. R. 234.—CAN.

s. Of income tax returns.]—NAWAR MIRZA ALI KADAR BAHADUR v. INDIRA PARSHAD (1896), L. R. 23 Ind. App. 92; 1 L. R. 23 Cal. 950.—IND.

t. Of register of births & deaths.]—A register of births & deaths is a public document & a certified copy thereof is admissible under Evidence Act.—KISHNAMACHARIAR v. KISHNAMACHARIAR (1913), 1 L. R. 38 Mad. 166.—IND.

PART IV. SECT. 9, SUB-SECT. 5. C.

a. Evidence as to accuracy by person making excerpt.]—A certificate extract from the books of the War Office being produced, & the handwriting & signature being proved:—*Held*: inadmissible, the clerk who made & certified the excerpts not

Sect. 9.—Copies of documents: Sub-sect. 5, C.
Sect. 10: Sub-sects. 1, 2, 3 & 4, A.]

2464. — Who is the proper officer—Bills, answers & depositions.]—Copies of bills, answers & depositions in this ct. ordered to be certified by the clerk of records & writs, under Evidence Act, 1851 (c. 99), s. 14.—*REEVE v. HODGSON* (1853), 10 Hare, App. 1, xix.; 22 L. J. Ch. 696; 68 E. R. 1124.

Certificates of previous convictions.]—*See CRIMINAL LAW*, Vol. XIV., p. 499, Nos. 5499–5503.

SECT. 10.—STAMPS.

SUB-SECT. 1.—WHAT DOCUMENTS REQUIRE STAMPING.

See, generally, REVENUE.

Arbitration award.]—*See ARBITRATION*, Vol. II., pp. 315, 498, 531, 532, Nos. 27–29, 1393, 1677–1682.

Bills of exchange, promissory notes & negotiable instruments.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 44, 360, 384, 485, 493–501, Nos. 319, 2379, 2522, 3077, 3122–3173.

Bills of sale.]—*See BILLS OF SALE*, Vol. VII., pp. 104, 105, Nos. 624–627.

Bonds.]—*See BONDS*, Vol. VII., pp. 256–259, Nos. 973, 974, 981–1005.

Building contracts.]—*See BUILDING CONTRACTS*, Vol. VII., p. 451, Nos. 488–490.

Building societies—Advances by.]—*See BUILDING SOCIETIES*, Vol. VII., pp. 483, 481, Nos. 175–182.

Company documents—Relating to capital.]—*See COMPANIES*, Vol. IX., p. 177, Nos. 1125, 1126.

—Transfer of shares.]—*See COMPANIES*, Vol. IX., pp. 359, 404, Nos. 2280, 2281, 2586–2589.

—Acquisition & disposition of property.]—*See COMPANIES*, Vol. IX., pp. 658, 659, Nos. 4387–4389.

—Borrowing & securing money.]—*See COMPANIES*, Vol. X., pp. 784–786, Nos. 4007–4017.

—Voluntary winding-up.]—*See COMPANIES*, Vol. X., p. 1032, Nos. 7154, 7155.

—Statutory company for public purposes.]—*See COMPANIES*, Vol. X., p. 1114, Nos. 7840 *et seq.*

Compulsory purchase—Conveyance on.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 236, Nos. 1266, 1267.

Costs.]—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 271, Nos. 1965–1967.

Contract of Agency.]—*See AGENCY*, Vol. I., p. 293, Nos. 216–230.

Copyholds — Enrolment & surrender.]—*See COPYHOLDS*, Vol. XIII., p. 158, Nos. 2033–2037.

Royal grants.]—*See CONSTITUTIONAL LAW*, Vol. XI., p. 581, No. 829.

SUB-SECT. 2.—SUFFICIENCY OF STAMP.

See, generally, REVENUE.

Bills of exchange, promissory notes & negotiable instruments.]—*See BILLS OF EXCHANGE*, Vol. VI., pp. 53, 344, 501–507, 513, Nos. 410–413, 2283, 3174–3233, 3285.

Bills of sale.]—*See BILLS OF SALE*, Vol. VII., p. 105, No. 627.

being produced to depone to their accuracy, & not having been examined on commission to that effect.—*KAY v. ROBERT* (1832), 10 Sh. (Ct. of Sess.) 831.—*SCOT*.

PART IV. SECT. 10, SUB-SECT. 3.
b. General rule.]—Where a contract is reduced to writing in an instrument intended by the parties to be the binding record of the contract & that

Bonds.]—*See BONDS*, Vol. VII., p. 256, Nos. 975, 976.

Company documents—Issue of shares.]—*See COMPANIES*, Vol. IX., p. 316, No. 1964.

—Transfer of shares.]—*See COMPANIES*, Vol. IX., p. 404, No. 2590.

Post-dated cheques.]—*See BANKERS*, Vol. III., p. 214, Nos. 532–534.

SUB-SECT. 3.—EFFECT OF ABSENCE OR INSUFFICIENCY OF STAMP.

See Stamp Act, 1891 (c. 39), ss. 12, 13.

2465. Party nonsuited—Where document essential to his case—Demise by agreement in writing.]

—Where premises have been demised by an agreement in writing, but not on stamped paper, plff. is bound to give the writing in evidence; & if not stamped at the trial, plff. shall be nonsuited, & shall not be allowed to go [into] use & occupation generally.—*BREWER v. PALMER* (1800), 3 Esp. 213, N. P.

*Annotations:—***Consd.** *Teall v. Auty* (1820), 4 Moore, C. P. 542; *Hughes v. Budd* (1840), 8 Dowl. 478. **Refd.** *Jamsonbottom v. Tunbridge* (1814), 2 M. & S. 434; *R. v. Hull* (1827), 1 Ma. & Ry. K. 1, 444; *Strother v. Barr* (1828), 5 Bing. 136; *Fenn d. Thomas v. Griffith* (1830), 8 L. J. O. S. C. P. 218; *R. v. Merthyr Tydvil* (1830), 8 L. J. O. S. M. C. 114; *Davys v. Davies* (1831), 1 L. J. Ex. 10; *Spence v. Collins* (1837), 1 Jur. 21.

2466. — Subsequent right of action—

If stamps afterwards affixed.]—Numberless instances have occurred in which a party has been nonsuited because the deed under which he claimed a right of action has had an insufficient stamp; but it has never been contended that after a valid stamp has been put upon it, he has not had by retrospectation a good right of action (*GIBBS, L.C.J.*).—*ROGERS v. JAMES* (1816), 7 Taunt. 147; 2 Marsh. 425; 129 E. R. 59.

*Annotations:—***Consd.** *Burton v. Kirkby* (1816), 7 Taunt. 174; *Rose v. Tomblinson* (1834), 3 Dowl. 49. **Mentd.** *Re Drakeley, Ex p. Paddy* (1818), 3 Madd. 241.

2467. — — — — —.]—A *cognovit* containing terms of agreement must be stamped; but it is sufficient, to support an execution under it, if it is stamped by the time cause is shown against a rule for setting aside the execution, on the ground of its not having been stamped.—*ROSE v. TOMBLINSON* (1834), 3 Dowl. 49.

*Annotation:—***Refd.** *Clarke v. Jones* (1831), 3 Dowl. 277.

2468. — — — — —.]—In *assumpsit* for goods sold, & on account stated, to recover the value of growing poles purchased from plff. by defts., & afterwards carried away by them, it appeared, in evidence, that at the time of the bargain some memorandums in writing had been made, but which were neither stamped nor signed by the parties. It was also proved, that defts., after the poles were carried away, admitted that a balance was due to plff. Under these circumstances plff. was nonsuited:—**Held:** such nonsuit was proper as it was not proved that deft. had admitted a precise & definite sum to be due to plff. & therefore he could not recover on the account stated without reference to the memorandums, which were not admissible in evidence.—*TEAL v. AUTY* (1820), 2 Brod. & Bing. 99; 4 Moore, C. P. 542; 129 E. R. 895.

*Annotations:—***Mentd.** *Scorell v. Boxall* (1827), 1 Y. & J. 396; *Falmouth v. Thomas* (1832), 1 Cr. & M. 89; *Chisman v. Count* (1841), 2 Ma. & G. 307; *Lane v. Hill* (1852), 18 L. T. O. S. 224.

instrument is required by Stamp Duties Act, 1898, to be stamped, a person wishing to rely upon the contract cannot do so unless the instrument is stamped.—*MOORE v. DENT*

2469. Improperly stamped bill—Given in discharge of debt—Creditor may prove original debt.]—If a bill given in discharge of a debt is rendered inadmissible by being on an improper stamp, plff. may prove his original debt.—*BROWN v. WATTS* (1808), 1 Taunt. 353; 127 E. R. 870.

*Annotations:—**Reid. It. Mowat, Ex p. Goddes* (1824), 1 Gl. & J. 414. *Mentd. Fromant v. Ashley* (1853), 1 E. & B. 723.

2470. Document sent to be re-stamped—Argument heard on sufficiency of stamp—Mutually exclusive courses.]—*BECKWITH v. BENNER*, No. 2176, *ante*.

2471. Document rejected by court—Party to produce other evidence if any.]—In trespass *qu. cl. fr.* under a special traverse of plff.'s title, plff.'s witness said certain letters had passed annually between plff. & his lessor as to the demise:—*Held*: on the judge rejecting the letters for want of a stamp, it was not competent for plff.'s counsel to except to this ruling, as implying that his case could not be proved without the documents, but he was bound to go on with any further evidence he might have had sufficient to maintain the issue, & then to have excepted to the rejection of that further evidence.—*HUTCHINSON v. FERRIER* (1852), 19 L. T. O. S. 116, H. L.

2472. Does not affect validity of document.]—Deft. guaranteed to pay plff. according to his arrangements with J. On proof that deft. had entered into a written agreement with J., the judge decided that it should be produced; but on production, the objection being taken that it was unstamped, & that plff. ought to be non-suited, the judge treated the agreement as a nullity, & found for plff.:—*Held*: the judge was wrong, as the document, though unstamped, was an agreement, & ought not to have been treated as a nullity, as it was capable of being stamped at any future time.—*ALCOCK v. DELAY* (1855), 4 E. & B. 660; 24 L. T. O. S. 256; 119 E. R. 243; *sub nom* *DELAY v. ALCOCK*, 21 L. J. Q. B. 68; 1 Jur. N. S. 498.

*Annotation:—**Mentd. Cook v. Montague* (1873), 28 L. T. 494.

2473. Ground for refusing new trial—Not if document able to be stamped at trial.]—*WHITEHOUSE v. HEMMANT*, No. 2503, *post*.

2474. Cross-examination of witness on such document—Not permissible.]—A party cannot be cross-examined as to the contents of a document not admissible for want of a stamp.—*BAKER v. DALE* (1858), 1 F. & F. 271.

(1919), 19 S. R. N. S. W. 314; 35 N. S. W. W. N. 111.—*AUS.*

c. —.] — *BOYLAN v. BENNETT* (1812), 4 Ann. M. & O. 371.—*IR.*

d. —.] — *BROWN v. MURDOCK* (1815), 6 Pat. App. 94.—*SCOT.*

PART IV. SECT. 10, SUB-SECT. 4. — A.

2475 i. General rule—[Inadmissible.]—A document must be stamped before being admitted in evidence.—*KALSTON v. SOUTH GRETA COLLIERY CO.* (1912), 13 S. R. N. S. W. 6; 30 N. S. W. W. N. 5.—*AUS.*

2475 ii. —. —.]—Secondary evidence of the contents of an unstamped document which ought to have been stamped is inadmissible.—*LOUIS v. GRIGG* (1913), 14 S. R. N. S. W. 78; 30 N. S. W. W. N. 17.—*AUS.*

2475 iii. —. —.]—Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped.—*ARUNACHELLUM CHETTY v. OLAGAPPAH CHETTY* (1868), 4 Mad. 312.—*IND.*

2475 iv. —. —.]—In replevin for goods distrained for rent, a proposal in writing, accepted by parol, cannot be read in evidence as proof of the terms

of the tenancy, without a stamp.—*BOWEN v. HORNIDGE* (1842), 4 Ann. M. & O. 318.—*IR.*

2475 v. —. —.]—*WHITE v. ENSOR* (1892), 11 N. Z. L. R. 586.—*N.Z.*

2475 vi. —. —.]—*SUMMERS v. FAIRSERVICE* (1842), 4 Dunl. (Ct. of Sess.) 317.—*SCOT.*

2475 vii. —. —.]—In an action of count & reckoning for the adjustment of partnership accounts, an unstamped acknowledgment of the receipt of money was tendered in evidence of the particular partner by whom the payment had been made:—*Held*: it was inadmissible.—*SCOTT v. BURD* (1845), 8 Dunl. (Ct. of Sess.) 25; 18 Sc. Jur. 30.—*SCOT.*

2475 viii. —. —.]—A party produced in process a book containing a credit side, on which payments made by him were entered from time to time, & subscribed by the creditor, but containing no debit side:—*Held*: the book being unstamped, it was incompetent to look at it to any effect.—*COOPER v. YOUNG* (1819), 12 Dunl. (Ct. of Sess.) 190; 22 Sc. Jur. 29.—*SCOT.*

2475 ix. —. —.]—*GRAY v.*

Arbitration award.]—*See* ARBITRATION, Vol. II., p. 531, No. 1676.

Bills of exchange & promissory notes & negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 53, 507, 508, 513, Nos. 414, 3234–3241, 3280–3281.

Document inadmissible.]—*See* Sub-sect. 4, A., *post*.

SUB-SECT. 4.—ADMISSIBILITY OF UNSTAMPED OR INSUFFICIENTLY STAMPED DOCUMENTS.

A. In General.

See Stamp Act, 1891 (c. 39), s. 14.

2475. General rule—[Inadmissible.]—*R. v. HOLBECK, LEEDS (INHABITANTS)* (1742), Burr. S. C. 198.

*Annotation:—**Mentd. R. v. Casterton* (1844), 6 Q. B. 507.

2476. —. —.]—"You will be pleased to receive the register of the brig 'Gratitude,' which I enclose, & which I lodge in your hands as a security for the payment of all demands & charges on account of the said vessel, since she has been in this port, & which I hope will be satisfactory to you," is not receivable in evidence, in an action by the writer to recover possession of the register, without an agreement stamp.—*BOWEN v. FOX* (1828), 2 Man. & Ry. K. B. 167; 6 L. J. O. S. K. B. 235.

*Annotation:—**Distd. Parker v. Dubois* (1836), 5 L. J. Ex. 90.

2477. —. —. Where evidence to prove point in litigation.]—(1) Where a paper purports to be a receipt, & as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to show the agreed state of accounts only, though it has not been previously stamped. Its admissibility under such circumstances is restricted to this extent, so far as it relates simply to proving the statement of account, & is not produced for the purpose of proving the receipt of money. An unstamped receipt is admissible to prove matter collateral to the proof of payment of the specified sum; as where the unstamped receipt showed the relation of landlord & tenant between the parties. It cannot be used for the purpose of proving the receipt of money in any way.

In an action for work & labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of

SUTHERLAND (1849), 12 Dunl. (Ct. of Sess.) 438.—*SCOT.*

2475 x. —. —.]—*HOGARTH v. CRICHTON* (1850), 22 Sc. Jur. 413.—*SCOT.*

e. Exception to rule.]—An English contract inadmissible as evidence in England for want of a stamp, is admissible in the Cape Colony if stamped according to the Cape law.—*MURDOCK v. ROEBUCK* (1880), 1 S. C. 1.—*S. AF.*

f. —. —.]—A money-broker, through whom a loan on heritable security was transacted, granted to the lender a letter acknowledging that he had received the amount of the loan & binding himself to see the heritable security duly completed. In a question between the lender & the borrower, who denied that the full sum had been advanced to the broker:—*Held*: this letter might be admitted in evidence, although unstamped.—*MACKINTOSH v. PITCAIRN* (1851), 14 Dunl. (Ct. of Sess.) 188; 24 Sc. Jur. 81; 1 Stuart, 169.—*SCOT.*

g. —. —.]—*TODD v. WOOD* (1897), 24 R. (Ct. of Sess.) 1104.—*SCOT.*

h. Stamped copy — Of lost

London v. Evans (1898), 79 L. T. 496; *Re Gu Ex p. Trustee* (1919), 88 L. J. K. B. 479.

2489. —[M. being indebted to pltf.s., gave them an unstamped document addressed to C., who was trustee of his father's will, in the following words: "I hereby authorise & direct you to pay to pltf.s. or their order the sum of £140 out of the moneys now due or hereafter to become due to me under the will of my late father, & before making any payment to me thereout":—*Held*: such document was an equitable assignment & not a bill of exchange under Stamp Act, 1870 (c. 97), s. 48, & could, therefore, be produced in evidence on the payment of the proper duty & penalty.—*FISHER v. CALVERT* (1879), 27 W. R. 301.
Annotation:—*Mentd.* *Re Whitting, Ex p. Hall* (1879), 10 Ch. D. 615.

C. On Undertaking to pay Duty.

2490. Court will accept undertaking—By party.]—Where a letter, written by pltf. to deft., containing terms of agreement, is called for by him at the trial, & produced on notice by deft., it is in the custody of the ct., & if it appears not to be stamped, the judge will permit pltf. to send a person with it to the stamp-office, accompanied by an officer of the ct.—*CLEMENTS v. MAY* (1836), 7 C. & P. 678, N. P.

2491. — *By party's solicitor.*—*JENNINGS v. CHRISTOPHER* (1855), cited in [1900] 1 Ch. p. 478; 69 L. J. Ch. p. 218; 82 L. T. p. 24; 48 W. R. p. 462; 16 T. L. R. p. 162.
Annotation:—*Consd.* *Re Coolgardie Goldfields, Re Cannon, Son & Morten*, [1900] 1 Ch. 475.

2492. —[The ct. accepts the undertakings of solrs. to pay sums of money & apply them to particular purposes as for instance to pay the penalty for not stamping an agreement & various other acts. If it afterwards came to my knowledge that the act, without the performance of which the case could not have been properly heard, had not been performed or that the money had not been paid, I should compel the solr. to make good his undertaking or assertion in the faith of which the ct. had acted (*ROMILLY, M.R.*).—*Re WARD* (1862), 31 Beav. 1; 54 E. R. 1037.
Annotations:—*Consd.* *Re Coolgardie Goldfields, Re Cannon & Morten*, [1900] 1 Ch. 475. *Mentd.* *Re Dangar's Trusts* (1889), 41 Ch. D. 178; *Marsh v. Joseph*, [1897] 1 Ch. 213.

2493. Failure to fulfil undertaking—Effect of.]—*Re WARD*, No. 2492, *ante*.

2494. —[On motions which were acceded to by the ct. an undertaking was given at the bar by counsel for resps., a co., on the instructions of their solrs., that unstamped documents tendered in evidence on behalf of resps. should be duly stamped, which undertaking was not fulfilled. The ct. directed the order made on the motions to be drawn up without entering the unstamped documents, & made a four-day order on the solrs. to produce the documents to the registrar duly stamped.—*Re COOLGARDIE GOLD-FIELDS, LTD., Re CANNON, SON & MORTEN*, [1900] 1 Ch. 475; *sub nom.* *Re COOLGARDIE GOLDFIELDS, Ex p. FLEMING*, 69 L. J. Ch. 215; 82 L. T. 23; 48 W. R. 461; *sub nom.* *Re COOLGARDIE GOLD-FIELDS, Ex p. HAMILTON & FLEMING*, 16 T. L. R. 161; 44 Sol. Jo. 230.

D. To Refresh Memory of Witness.

2495. Admissible—Acknowledgment of accounts.]

—Where pltf. entered an account in writing of goods & cash furnished to deft. from time to time,

each page of which was authenticated by deft.'s acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to pltf. to prove that upon calling over each article to deft. he admitted that he had received the same; & the witness may refresh his memory by referring to the account.—*JACOB v. LINDSAY* (1801), 1 East, 460; 102 E. R. 178.

Annotations:—*Refd.* *Millen v. Dent* (1847), 10 Q. B. 846. *Mentd.* *Wellard v. Moss* (1823), 1 Bing. 134.

2496. — *Receipt.*—Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory.—*RAMBERT v. COHEN* (1802), 4 Esp. 213, N. P.
Annotation:—*Refd.* *Hill v. Barry* (1812), 7 Jur. 10.

2497. — *Read over to blind witness.*—An accountable receipt for money given by the agent of one who receives money from different customers for the purpose of investing annuities, etc., requires a stamp. Such agent having become blind, the receipt, although unstamped, may be read over to him in ct. for the purpose of refreshing his memory.—*CATT v. HOWARD* (1820), 3 Stark. 3, N. P.

Annotation:—*Mentd.* *Clarke v. Chaplin* (1847), 5 Ry. & Can. Cas. 294.

2498. — *Intention of such user to be expressly stated.*—If an unstamped receipt is intended to be used for the purpose of refreshing the memory of a witness, that intention should be expressly stated, otherwise a new trial will not be granted on the ground of its rejection.—*SORDEN v. COWTON* (1839), 3 Jur. 1027.

2499. —[*Iliscox v. BATCHELOR* (1867), 15 L. T. 543.

Annotation:—*Mentd.* *Green v. Wright* (1876), 1 C. P. D. 591.

— *Promissory note.*—*See BILLS OF EXCHANGE*, Vol. VI., p. 513, No. 3284.

2500. — *Printed prospectus—Containing terms of employment.*—Pltf. having signified by a printed prospectus the terms on which he is ready to engage to perform particular services, may in an action against one who has employed him to render those services under a parol agreement, read the printed prospectus to show what the terms were, although it is not stamped.—*EDGAR v. BLICK* (1816), 1 Stark. 464, N. P.

Annotations:—*Distd.* *Bowen v. Fox* (1828), 2 Man. & Ry. K. B. 167. *Refd.* *Clay v. Crofts* (1851), 17 L. T. O. S. 484. *Carill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484.

2501. — *Copy of deed—Not produced after notice.*—Where on the non-production of a deed after notice to produce, the opposite party calls a witness who proves a copy compared by him with the original deed, such copy may be read without being stamped; for it is only used, in point of law, to refresh the witness's memory as to the contents of the deed.—*BRAYTHWAYTE v. HITCHCOCK* (1842), 10 M. & W. 494; 152 E. R. 565; *sub nom.* *BRAITHWAITE v. HITCHCOCK*, 2 Dowl. N. S. 444; 12 L. J. Ex. 38; 6 Jur. 976.

Annotations:—*Refd.* *Stowe v. Querner* (1870), L. R. 5 Exch. 155. *Mentd.* *Coatsworth v. Johnson* (1885), Cab. & El. 543.

E. To Prove Collateral Matters.

(a) In General.

See Stamp Act, 1891 (c. 38), s. 14.

2502. Whether admissible.]—If the terms of a

PART IV. SECT. 10, SUB-SECT. 4.—C.

2490 i. Court will accept undertaking—By party.]—If a stamp may be required

by Stamp Act the unstamped paper may still be read on an undertaking to get it stamped if necessary.—*MOORE v. M'KAY* (1828), 2 Mol. 134.—*IR.*

PART IV. SECT. 10, SUB-SECT. 4.—E. (a).

2502 i. Whether admissible.]—An unstamped instrument having been

Sect. 10.—Stamps: Sub-sect. 4, E. (a), (b) & (c).]

contract are reduced into writing, the paper must be stamped in order to be read in evidence though collaterally.—*HEARNE v. JAMES* (1788), 2 Bro. C. C. 309; 29 E. R. 169.

2503. —[—]*WHITWELL v. DIMSDALE*, No. 2525, post.

2504. —[—]*—*—An unstamped instrument was admitted as evidence for a collateral purpose.—*BLAIR v. BROMLEY* (1847), as reported in 11 Jur. 617, L. C.

Annotations:—*Mentd.* *Ingram v. Thorp* (1848), 7 Harc. 67; *Wilson v. Short* (1848), 6 Hare. 366; *Coomer v. Bromley* (1852), 5 De G. & Sm. 532; *Bishop v. Jersey* (1854), 2 Drew. 143; *Imperial Gas Light & Coke Co. v. London Gas Light Co.* (1854), 10 Exch. 39; *Hunter v. Gibbons* (1856), 1 H. & N. 459; *Bourdillon v. Roche* (1858), 27 L. J. Ch. 681; *Esseil v. Hayward* (1860), 24 J. P. 819; *Slim v. Croucher* (1860), 8 W. R. 347; *Eager v. Barnes & Bridges* (1862), 7 L. T. 408; *Re Cameron's Coalbrook, Ex p. Hunt* (1863), 2 New Rep. 50; *Alliance Bank v. Tucker* (1867), 17 L. T. 13; *Sawyer v. Goodwin* (1867), 36 L. J. Ch. 578; *St. Aubyn v. Smart* (1868), 3 Ch. App. 646; *Wiltshire v. Bolton* (1869), L. R. 8 Eq. 294; *Plumer v. Gregory* (1874), L. R. 18 Eq. 621; *Keel. Commrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394; *Biggs v. Broo* (1881), 51 L. J. Ch. 64; *Gibbs v. Guild* (1882), 9 Q. B. D. 59; *Re Mutual Aid Permanent Benefit Bldg. Soc., Ex p. James* (1883), 49 L. T. 530; *Hughes v. Twisdon* (1886), 55 L. J. Ch. 481; *Moore v. Knight* (1890), 60 L. J. Ch. 471; *Moore v. Knight*, [1891] 1 Ch. 547; *Thorne v. Hoard*, [1894] 1 Ch. 599; *Bellemann v. Bellemann* (1895), 73 L. T. 2; *Mara v. Browne*, [1895] 2 Ch. 69; *Whitman v. Watkin* (1898), 78 L. T. 188; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648.

2505. —[—]*MATHESON v. ROSS*, No. 2477, ante.

2506. —[—]*FENGL v. FENGL*, No. 2183, ante.

2507. Unstamped promissory note—To prove bribery.—[A note given by a voter who has been bribed, for payment of the sum given to him, in order to secure his vote, in an act of debt for the bribery, may be given in evidence, though not stamped, to prove the fact of bribery.—*DOVER v. MAESTAER* (1803), 5 Esp. 92, N. P.; *subsequent proceedings* (1804), 4 East, 435.

Annotations:—*Distd.* *R. v. Castle Morton* (1820), 3 B. & Ald. 588. *Refd.* *Strother v. Barr* (1828), 5 Bing. 136.

2508. Notice of dissolution of partnership—To prove notice of dissolution.—[A written notice of the dissolution of a partnership reciting the dissolution, & signed by the parties for its insertion in the gazette, may be read in evidence to prove notice of the dissolution, although it has not been stamped.—*JENKINS v. BLIZARD* (1810), 1 Stark. 418, N. P.

2509. Unstamped cheque—To prove fraud—Admissible against defendant not party to fraud—Sale of goods.—[The same evidence is admissible in a civil action to prove a fraud, committed by a third party, as if he himself were indicted, with the exception of his admissions subsequent to the transaction. Therefore, in an action for money had & received, where it was necessary for pltf. to prove that his property had been obtained fraudulently by means of a cheque given by a third party:—*Held*: the cheque, though unstamped, was admissible in evidence against deft., who was no party to the fraud.—*KEABLE v. PAYNE* (1838),

8 Ad. & El. 555; 3 Nev. & P. K. B. 531; 1 Will. Woll. & H. 383; 7 L. J. Q. B. 218; 3 Jur. 40; 112 E. R. 948.

Annotation:—*Mentd.* *Arbounin v. Anderson* (1841), 1 Q. B. 498.

2510. Unstamped guarantee—As to delivery up of guarantee.—[The declaration stated, that in consideration that pltf. gave up to deft. a certain guarantee then held by pltf., deft. undertook to see certain bills paid at maturity. Pleas, *non assumpsit*, & that pltf. did not give up the guarantee. At the trial, it was proved, that the guarantee had been given up to deft., & destroyed by him, & also that it had never been stamped. The judge allowed a copy to be given in evidence. Upon a motion for a new trial, for the reception of this evidence:—*Held*: the paper was admissible without a stamp.—*HAIGH v. BROOKS* (1840), 10 Ad. & El. 309; 3 Per. & Dav. 452; 9 L. J. Q. B. 194; 113 E. R. 119; *affd.* on other grounds *sub nom.* *BROOKS v. HAIGH*, 10 Ad. & El. 323, Ex. Ch.

Annotations:—*Refd.* *R. v. Watts* (1853), 18 J. P. 87. *Mentd.* *Allnutt v. Ashender* (1843), 5 Man. & G. 392; *Meinertzhagen v. Davis* (1844), 1 Coll. 335; *Chapman v. Sutton* (1846), 2 C. B. 634; *Goldshede v. Swan* (1847), 1 Exch. 154; *Kearns v. Durell* (1848), 6 C. B. 596; *Curlews v. Clark* (1849), 3 Exch. 375; *Edwards v. Jevons* (1849), 8 C. B. 436; *Steele v. Hoe* (1849), 14 Q. B. 431; *Bainbridge v. Wado* (1850), 16 Q. B. 89; *Bell v. Welch* (1850), 9 C. B. 154; *Colbourn v. Dawson* (1851), 10 C. B. 765; *Southall v. Rigg* (1851), 11 C. B. 481; *Money v. Jordan* (1852), 2 De G. M. & G. 318; *Broom v. Batchelor* (1856), 1 H. & N. 255; *Mather v. Maidstone* (1856), 27 L. T. O. S. 261; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Cheale v. Kenward* (1858), 3 De G. & J. 27; *Hart v. Miles* (1858), 4 C. B. N. S. 371; *Westlake v. Adams* (1858), 5 C. B. N. S. 248; *Way v. Hearn* (1862), 13 C. B. N. S. 292.

2511. Unstamped letter—To prove notice of allotment of shares.—[S. applied for fifty shares in a co., which were allotted, & notice of allotment sent to him by letter on Oct. 15, 1874. This allotment letter was unstamped. On Oct. 19, & Nov. 14, S. wrote to the co., declining to pay calls till certain information as to the position of the co. was afforded him. On Dec. 2 a duplicate letter of allotment duly stamped was sent by the co. to S. On Dec. 15, S. wrote to the co. that it was his intention to withdraw his application for shares, & he returned the allotment letters, with a request for the return of his deposit. On Dec. 22, S. was informed by the secretary that his name was entered on the register for fifty shares. From that date till Oct. 1875, several letters were sent by S. to the co., by which he repeated his refusal to take up the shares, & asked for a cancellation of the allotment, & a return of the deposit. The co., however, did not cancel the allotment, nor return the deposit, & S.'s name remained on the register at the date of the winding-up order in Oct. 1875. Upon an application by S. that his name might be removed from the list of contributors:—*Held*: the first allotment letter, though unstamped, was receivable as evidence that S. had received notice of the allotment, & at any rate, the defect, if any, was cured by the second stamped letter.—*Re WHITLEY, LTD., STEEL'S CASE* (1879), 49 L. J. Ch. 170; 42 L. T. 11; 28 W. R. 241.

sought to be given in evidence on the ground that it was for a collateral purpose:—*Held*: as the case of the party seeking its admission in evidence could not have been made out without such instrument, the judge properly refused to receive it in evidence.—*MARKLEY v. MASSEY* (1831), 4 Ir. L. Rep. 1st Ser. 285.—*IR.*

2502 II. —[—]*—*—Action for reduction of the assignation of a lease on the grounds of death bed, & of the grantor being incapable of knowing the con-

tents of the deed:—*Held*: a document produced to prove collateral facts received, though not stamped.—*ERSKINE v. ERSKINE* (1819), 2 Murr. 181.—*SCOT.*

2502 III. —[—]*—*—A notarial instrument of intimation of an assignation of subrents was extended on paper inadequately stamped, & after several years a new instrument was extended on paper properly stamped:—*Held*: both were admissible, the first being a memorandum which supplied such

materials to the notary as enabled him to extend the second, & the second being duly stamped.—*BALFOUR v. LYLE* (1832), 10 Sh. (Ct. of Sess.) 853.—*SCOT.*

2502 IV. —[—]*—*—A writ which might have required a stamp before it could be founded on in ct. for its full enforcement as a deed, might nevertheless be used as an admissible of evidence, to a collateral effect, without being stamped.—*MACKENZIE v. CRAWFORD* (1839), 1 Dunl. (Ct. of Sess.) 1091; 14 Fac. Coll. 1106.—*SCOT.*

Bills of exchange & promissory notes.]—See *BILLS OF EXCHANGE*, Vol. VI., pp. 510-512, Nos. 3250-3273.

Bills of sale.]—See *BILLS OF SALE*, Vol. VII., p. 104, No. 624.

(b) *Unstamped Receipts.*

2512. Not put in as receipt.]—A paper in the form of a receipt, if it is not given in evidence as a receipt does not require a stamp.—*BROOKES v. DAVIES* (1825), 2 C. & P. 186, N. P.

*Annotations:—*Consd. *Millen v. Dent* (1847), 2 New Pract. Cas. 363. Apprvd. *Matheson v. Ross* (1849), 2 H. L. Cas. 286.

2513. To prove sale of goods.]—A bill of parcels delivered by pltf. having at the foot of it a receipt written at the same time with the bill is nevertheless admissible without a receipt stamp for the purpose of proving that the goods mentioned were sold to a third person & not to deft.—*MILLEN v. DENT* (1847), 10 Q. B. 846; 2 New Pract. Cas. 368; 16 L. J. Q. B. 374; 9 L. T. O. S. 495; 11 Jur. 818; 116 E. R. 321.

2514. To prove tenancy.]—*MATHESON v. ROSS*, No. 2477, ante.

2515. As evidence of contract—Agreement to purchase.]—Upon the trial of an issue, whether A. had agreed with B., for the purchase of certain leasehold premises, a receipt for the purchase-money by B., not properly stamped, was received in evidence to prove the agreement to purchase. On motion for a new trial:—*Held*: proof of the payment of the purchase-money was not a collateral matter, but went directly to the matter in issue; & consequently, the receipt, not being duly stamped, was improperly admitted as evidence to prove the agreement to purchase.—*EVANS v. PROTHERO* (1850), 2 Mac. & G. 319; 20 L. J. Ch. 448; 15 Jur. 113; 42 E. R. 123, L. C.; *subsequent proceedings* (1852), 1 De G. M. & G. 572, L. C.

*Annotations:—*Consd. *R. v. Overton* (1854), Dears. C. C. 308. *Mentd.* *Elborough v. Ayres* (1870), L. R. 10 Eq. 367; *Re Simpson, Ex p. Morgan* (1876), 2 Ch. D. 72.

2516. —.]—A document containing all the requisites to make it a valid contract, & purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, may be received as evidence of the contract.—*EVANS v. PROTHERO* (1852), 1 De G. M. & G. 572; 21 L. J. Ch. 772; 19 L. T. O. S. 117; 42 E. R. 674, L. C.; *previous proceedings* (1850), 2 Mac. & G. 319, L. C.

*Annotations:—*Apld. *Walker v. Atkinson* (1859), 1 F. & F. 463. *Distd.* *Parmiter v. Parmiter* (1861), 3 De G. F. & J. 461; *Ashling v. Boon*, [1891] 1 Ch. 568. *Refd.* *Diplock v. Hammond* (1854), 5 De G. M. & G. 320; *Re Walden, Ex p. Odell* (1878), 10 Ch. D. 76. *Mentd.* *Elborough v. Ayres* (1870), L. R. 10 Eq. 367; *Re Simpson, Ex p. Morgan* (1876), 2 Ch. D. 72; *Whiting to Loomes* (1881), 17 Ch. D. 10.

PART IV. SECT. 10, SUB-SECT. 4.—
E. (b).

2512 i. Not put in as receipt.]—Though an unstamped acknowledgment cannot be "acted upon" as an acknowledgment of a particular sum being due, still it may be used for the collateral purpose of showing an acknowledgment of an existing liability in respect of goods sold.—*FATECHAND HARCHAND v. KISAN* (1893), 1 L. R. 18 Bom. 614.—*IND.*

2512 ii. —.]—An unstamped receipt used to prove a matter collateral to proof of payment of the money mentioned in it, is admissible.—*ROSS v. MATHESON & SON* (1849), 6 Bell. Sc. App. 374; 21 Sc. Jur. 373.—*SCOT.*

2512 iii. —.]—An unstamped receipt was inadmissible in evidence, even

to prove the handwriting of the party alleged to have signed it.—*COOPER v. YOUNG* (1849), 12 Dunl. (Cl. of Sess.) 190; 22 Sc. Jur. 207.—*SCOT.*

2512 iv. —.]—D. & G., entered into a contract with a council for the construction of water-works. The contract was joint. The instalments of the contract price were paid by the council to G., who granted stamped receipts therefor, & paid over to D. his share of each instalment. Neither D. nor G. kept any account of the division of the instalments, but on the back of a copy of the specification for the contract there were writings in the following form: "Received to account the sum of £ an amount specified & always over £2 with a date & signature 'D.' or 'G.' as the case may be. These

(c) *Unstamped Agreements.*

2517. To prove acknowledgment.]—A stamp is only necessary where a paper is used as evidence of an agreement directly, & not where it is used incidentally; so the paper is evidence of an acknowledgment contained in it, though not stamped.—*WHELDON v. MATTHEWS* (1815), 2 Chit. 399.

2518. To determine admissibility of parol evidence.]—Where a pauper hired a house under an unstamped written agreement:—*Held*: the sessions might look at it to see whether it related to the premises in question, in order to determine upon the admissibility of parol evidence on the same subject, with a view to raise the presumption of a contract which would confer a settlement.—*R. v. BATHWICK (INHABITANTS)* (1824), 4 Dow. & Ry. K. B. 335; 2 Dow. & Ry. M. C. 331.

2519. To determine variation—In former stamped agreement.]—Where a party declared upon two written agreements, by the second of which variations were made in the first, & there were also counts upon each separately; & it appeared, when the instruments were produced in evidence by pltf. that the first only was stamped:—*Held*: the second could not be read in evidence to support pltf.'s case, but might be looked at in order to ascertain whether the first was altered by it.—*REED v. DEERE* (1827), 7 B. & C. 261; 108 E. R. 720.

*Annotations:—*Distd. *Sweeting v. Halse* (1829), 9 B. & C. 365. Consd. *Fiedler v. Ray* (1829), 6 Bing. 332; *Maguay v. Knight* (1840), 1 Man. & G. 944. Apld. *Athorstone v. Bostock* (1841), 2 Scott, N. R. 637. *Refd.* *Jones v. Jones* (1833), 1 Cr. & M. 721; *Crowther v. Solomons* (1848), 6 C. B. 758.

2520. To prove usury.]—An unstamped agreement is admissible in evidence between the parties to it for the purpose of proving usury.—*NASH v. DUNCOMB & GRIFFIN* (1831), 1 Mood. & R. 104, N. P.

2521. To prove illegal purpose.]—A petition having been presented to the House of Commons against the return of a member, on the ground of bribery, petitioner entered into an agreement, in consideration of a sum of money, & upon other terms, to proceed no further with the petition:—*Held*: the written agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, in answer to an action for the sum so agreed to be paid, without its being stamped.—*CROCK v. BOWEN* (1838), 4 M. & W. 361; 1 Horn & H. 310; 8 L. J. Ex. 9; 2 J. P. 695; 2 Jur. 923; 150 E. R. 1468.

*Annotations:—*Distd. *Williams v. Gerry* (1842), 10 M. & W. 296. Apld. *R. v. Stewart* (1845), 1 Cox, C. C. 174; *Holmes v. Sixsmith* (1852), 7 Exch. 802; *Ponsford v. Walton* (1868), 16 W. R. 363. *Refd.* *Gale v. Williamson* (1841), 8 M. & W. 405; *Smart v. Nokes* (1844), 7 Scott, N. R. 786; *Rourke v. Mealy* (1879), 41 L. T. 168.

2522. To explain former stamped agreement.]—

indorsements were not stamped. In an action by D. against G. for payment of a balance alleged to be due to D. & in the hands of G.:—*Held*: the indorsements above described were not receipts within Stamp Act, 1891, s. 101, & therefore the indorsements signed "D." & although not stamped were admissible as evidence to instruct the receipt by D. of sums which the council had paid on his account to G.—*DAY v. GLAISTER* (1900), 2 F. (Cl. of Sess.) 963; 37 Sc. L. R. 736; 8 S. L. T. 55.—*SCOT.*

PART IV. SECT. 10, SUB-SECT. 4.—
E. (c).

1. To prove contract.]—*JEFFERIES v. EVANS* (1849), 13 L. R. 64; 1 Ir. Jur. 151.—*IR.*

Sect. 10.—Stamps: Sub-sect. 4, E. (c), F., G & H.]

Deft. hired certain apartments of pltf. upon the terms contained in the following memorandum: "I hereby agree, according to our conversation of last evening, to pay you for the occupation of your first floor, furnished, from Monday, Mar. 4, 1839, to Sept. 4, 1839, the sum of £52 10s.: I also agree either to occupy the said rooms from Sept. 4, to Dec. 4, furnished, on the same terms, viz., £26 5s. for the three months, or take them unfurnished at the rate of £84 *per annum*."

The above letter was produced by pltf., stamped with a 30s. stamp. In order to explain, as he contended, that letter, deft. put in a second, which was not stamped:—*Held*: inadmissible; for, if treated as a separate & independent agreement, it should have had a 30s. stamp; &, if the terms of the agreement were to be collected from the two letters, a 35s. stamp would be requisite on one of them.—*ATHERSTONE v. BOSTOCK* (1841), 2 Man. & G. 511; Drinkwater, 96; 2 Scott, N. R. 637; 10 L. J. C. P. 113; 5 J. P. 259; 133 E. R. 850.

2523. To prove tenancy—Agreement as to distress.]—A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding £20, which B. admits to be due from him as tenant to A., until a future day, B. declares, that in case of default it shall be lawful for A. to enter & distrain, & to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible in evidence to prove the tenancy without an agreement stamp.—*HILL v. RAMM* (1843), 5 Man. & G. 789; 6 Scott, N. R. 571; 1 L. T. O. S. 109; 134 E. R. 779.

2524. To prove admission contained in recital.]—In an action by the payee against the maker of a promissory note for £485, in which deft. had pleaded that he did not make the note, it was proposed, in addition to proof of deft.'s handwriting of the signature of the note, to put in an unstamped agreement between the same parties, of the same date as the note, in which it was recited, that the one had bought of the other the lease of a public house for £485, & had given a note for that sum as a security for the purchase-money, & by which it was agreed, that the vendor should hold the lease of the house till the purchase-money was paid:—*Held*: as the agreement was one that ought to have borne a stamp, it was not receivable in evidence, even for the purpose of proving the admission contained in the recital.—*KEANE v. JANES* (1848), 2 Car. & Kir. 725, N. P.

2525. To show fraud.]—An agreement not stamped cannot be received as evidence for any purpose whatever, not even to show that the party meant to commit a fraud by that agreement.—*WHITWELL v. DIMSDALE* (1792), Peake, 224, N. P.

2526. —.]—A document, which purports to be an agreement, & is valid upon the face of it, but which is tendered in evidence to show the transaction with which it is connected to be a fraud, is admissible, although unstamped.—*HOLMES v. SIXSMITH* (1852), 7 Exch. 802; 21 L. J. Ex. 312; 19 L. T. O. S. 159; 16 Jur. 618.

2527. —.]—A memorandum stamped as a receipt having been rejected, because requiring a stamp as an agreement, an agreement for the hire of goods of which the value was mentioned only by reference to the receipt:—*Held*: not to require a stamp, the value of the hire not appearing to exceed the amount of £20, & the rejected receipt allowed to be looked at, with reference to the real

date of the transaction, & in order to show fraud.—*CHITTENDEN v. DAY* (1860), 2 F. & F. 77, N. P.

2528. Matters relating to valuation—Tenancy agreement.]—An agreement which might amount to a lease, not stamped as such, is admissible as an admission by deft. on a matter collateral to the lease, & relating to a valuation, the subject of the suit.—*WALKER v. ATKINSON* (1859), 1 F. & F. 465, N. P.

2529. Matters relating to contract—Purchase of goods.]—A. brings an action against B. for the price of a gun ordered by the latter. He may read in evidence, for a collateral purpose, part of a letter written by B. to him, although the remainder of the letter contains directions for making the gun, & is not stamped as an agreement.—*FORSYTH v. JERVIS* (1816), 1 Stark, 437, N. P.

Annotation:—*Folld. Marson v. Short* (1835), 2 Bing. N. C. 118.

2530. — Terms of sale—Of company.]—An agreement in writing for the sale of its undertaking was entered into between a co. & a trustee for a new co., but was not stamped. On an application to restrain the agreement being carried out, the ct. looked at a copy of the document, not as an agreement, but as a document, evidencing the terms upon which the co. proposed to sell if not restrained from so doing.—*MASON v. MOTOR TRACTION CO., LTD.*, [1905] 1 Ch. 419; 74 L. J. Ch. 273; 92 L. T. 234; 21 T. L. R. 238; 12 Mans. 31.

Annotations:—*Mentd.* Fuller v. White Feather Reward, [1906] 1 Ch. 823; *Bissgood v. Henderson's Transvaal Estates*, [1908] 1 Ch. 743.

F. To Prove Act of Bankruptcy.

2531. Unstamped deed of assignment—Whether admissible.]—In an action by assignees of a bkpt., for the proceeds of goods alleged to have been on the order & disposition of the bkpt., it appearing that the goods were assigned to deft., it was doubted whether the deed of assignment, not being stamped, was admissible in evidence for pltf. as proving the act of bkcy., & the point being doubtful, a copy was admitted.—*REYNOLDS v. HALL* (1858), 1 F. & F. 18.

2532. —.]—An unstamped deed of arrangement, although admissible in evidence to prove an act of bkpy., cannot, after it has ceased to be available as an act of bkpy., be put in evidence without a stamp where the fact that the deed is void for want of registration is relied upon by the trustee in a subsequent bkpy. of the debtor to establish a title to the property comprised in the deed.—*Re SHAW, Ex p. OFFICIAL RECEIVER* (1920), 90 L. J. K. B. 204; [1920] B. & C. R. 156.

— — —.]—*See, further*, BANKRUPTCY, Vol. IV., p. 52, Nos. 431–436.

G. Documents amounting only to Proposal.

2533. General rule.]—This brings one to the second question, whether the advertisement, which is the only written or printed document affecting the contract, requires to be stamped as an agreement before it can be admitted in evidence. This depends upon the language of the Stamp Act, 1891 (c. 39), which requires an agreement, or any memorandum of an agreement under hand only, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, to be duly stamped. Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, & issued. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. A mere pro-

posals or offer until accepted amounts to nothing (HAWKINS, J.).—**CARLILL v. CARBOLIC SMOKE BALL CO.**, [1892] 2 Q. B. 484; 61 L. J. Q. B. 696; 56 J. P. 665; 8 T. L. R. 680; 36 Sol. Jo. 628; *affd.*, [1893] 1 Q. B. 256, C. A.

Annotations:—Mentd. Stoddart v. Sagar, Sagar v. Stoddart (1895), 73 L. T. 215; World's Tea Co. v. Gardner, World's Tea Co. v. Gardner (1895), 59 J. P. 358; R. v. Riley, [1896] 1 Q. B. 309; *Re* Consort Deep Level Gold Mines, *Ex p.* Stark, [1897] 1 Ch. 575; Stollery v. Maskelyne (1898), 15 T. L. R. 79; Johnston v. Boyes, [1899] 2 Ch. 73; R. v. Stoddart (1900), 70 L. J. Q. B. 189; Hawke v. Hulton (1905), 22 T. L. R. 169; Chaplin v. Hicks (1911), 27 T. L. R. 244; Western Electric Co. v. G. F. Ry., [1914] 3 K. B. 554; Lyons v. Fox, [1919] 1 K. B. 11; Reynolds v. Atherton (1921), 125 L. T. 690.

2534. Admissible—Order for goods.—In an action for delivering goods made by deft. for pltf. in pursuance of an order a memorandum in writing ordering the goods, but not proving the contract between the parties may be read in evidence without a stamp.—**INGRAM v. LEA** (1810), 2 Camp. 521, N. P.

2535. — Estimate for work.—In an action for work & labour, a proposal on the part of deft., which was not finally acceded to, containing an estimate for the amount of the work, may be read in evidence by deft., although it be not stamped.—**PENNIFORD v. HAMILTON** (1819), 2 Stark, 475.

Annotation:—Apld. Parker v. Dubois (1836), Tyr. & Gr. 243.

2536. — Proposal as to a tenancy.—Where a witness deposed that the settled draft of a lease was the final agreement between the parties, for one of whom he acted as agent:—**Held**: an unstamped memorandum, written afterwards by himself but not signed by anybody, was admissible in evidence as a mere proposal, to show that the settled draft was not the final agreement between the parties.—**HAWKINS v. WARRE** (1825), 3 B. & C. 690; 5 Dow & Ry. K. B. 512; 107 E. R. 889.

Annotation:—Consd. Matheson v. Ross (1849), 2 H. L. Cas. 286.

2537. — — — — ——In order to establish a derivative settlement by renting a tenement, an unstamped document was tendered in evidence. It was in form a proposal by A. to become tenant of B. on certain terms. A. occupied as tenant from the time of the proposal; & B. afterwards wrote to his agent a formal acceptance of the terms proposed by A.: but that acceptance was never communicated to A.:—**Held**: the document was admissible without a stamp.—**R. v. ST. JAMES', WESTMINSTER** (1852), 18 L. T. O. S. 222; 16 J. P. 745.

2538. — Engagement of actor.—A., the manager of a theatre, by letter, proposes to B., an actor, an engagement at £2 per week, determinable by a month's notice. B. performs under this proposal. Notice is given by letter to B. to determine the employment, unless B. will consent to a reduction of salary. In a third letter, A. writes, "I have received your letter, & upon reconsideration, will give you the same terms, £2 for the summer season":—**Held**: the first & third letters contained merely proposals, & as

no agreement was constituted between the parties until those proposals had been expressly accepted, or tacitly acquiesced in, by B., the correspondence was admissible in evidence without an agreement stamp.—**HUDSPETH v. YARNOLD** (1850), 9 C. B. 625; 19 L. J. C. P. 321; 15 L. T. O. S. 227; 14 Jur. 578; 137 E. R. 1036.

Annotations:—Distd. Hegarty & Clark v. Milne & Smith (1854), 18 Jur. 496. **Refd.** Smith v. Neale (1857), 2 C. B. N. S. 67; Carlill v. Carbolic Smoke Ball Co. (1892), 67 L. T. 837.

H. Documents fulfilling Two Objects.

2539. Stamp not required for one object—Document only provable as a whole—Inadmissible.—

—An unstamped draft drawn on "A. B. brick-layer" is not within the exception of 23 Geo. 3, c. 49, s. 4, in favour of drafts drawn on persons acting as bankers within ten miles of the place where the draft is drawn. If at the bottom of such a draft there be an acknowledgment of the drawee that a third person paid for him, that acknowledgment cannot be received in evidence.—**CASTLEMAN v. RAY** (1801), 2 Bos. & P. 383; 126 E. R. 1340.

2540. — Stamp requisite but not affixed for other object—Admissible to prove non-dubitable object only—Receipt & agreed statement of accounts.—**MATHESON v. ROSS**, No. 2477, *ante*.

2541. — — — — — Assent of creditor & power of attorney.—The assent of creditors to a deed under Bkpcy. Act, 1861 (c. 134), s. 192, may be given before the deed is executed or even prepared; all that is necessary is that the deed when drawn up should substantially correspond with the terms of the deed specified in the assent.

The assent is not rendered invalid by the mere fact that the document containing it also professes to empower a third person to execute the deed for the creditor, & is not stamped as a power of attorney.—**RUTTY v. BENTHALL** (1867), L. R. 2 C. P. 488; 36 L. J. C. P. 194; 16 L. T. 287; 15 W. R. 744.

Annotations:—Mentd. Horsfall v. Swan Bank & Brick Works Co. (1868), 16 W. R. 934; Whiting to Loomes (1881), 17 Ch. D. 10.

2542. Stamp required in respect of both objects—Affirmed only in respect of one—Admissible as to such object only.—If a receipt for money & an agreement are written on the same piece of paper, this is receivable in evidence as a receipt if it has a receipt stamp, without an agreement stamp.—**GREY v. SMITH** (1808), 1 Camp. 387, N. P.

Annotation:—Consd. Millen v. Dent (1817), 10 Q. B. 816.

2543. — — — — ——A receipt indorsed on the back of a stamped deed may be separate & read in evidence, though it be part of an indorsement requiring another stamp.—**ODYE v. COOKNEY** (1835), 1 Mood. & R. 517.

2544. — — — — — Two agreements—Action brought on one not fulfilled.—Upon an unstamped paper bearing two agreements between A. & B., A. procures one agreement stamp to be affixed for the purpose of an action upon one of the agreements:—**Held**: sufficient to render the paper admissible in evidence in such action, although

PART IV. SECT. 10, SUB-SECT. 4.—G.

2536 i. Admissible—Proposal as to a tenancy.—A paper writing in the words following, viz., "I propose for that part of the lands of M., lately in the possession of B., to pay £15 yearly, the gale days to be Mar. 25 & Sept. 29, to commence from Mar. 25, 1836," & which was signed by D., was admissible in evidence, against D., although not stamped; the document not being *ver se* an agreement.—**HARTE v. PHIBBS** (1840), 1 Craw. & D. 490.—**IR.**

m. — — — Offer to account.—In *assumpsit* on the money counts, pltf. offered in evidence the following memorandum: "Received from C. £38, for which I will account on demand":—**Held**: such memorandum was admissible in evidence without a stamp, being merely an acknowledgment of a legal responsibility.—**CAREY v. ECCLESTON** (1831), Craw. & D. Abr. C. 6, n.—**IR.**

n. — — — Document containing several distinct proposals.—In ejectment on

the title, a document containing several distinct proposals, having but one stamp, & produced by pltf. admitted in evidence.—**HEADLY (LADY) v. WALSH** (1841), 1 Leg. Rep. 288.—**IR.**

PART IV. SECT. 10, SUB-SECT. 4.—H.

2542 i. Stamp required in respect of both objects—Affirmed only in respect of one—Admissible as to such object only.—**TORIN v. FARRELL** (1850), 2 Ir. Jur. 46.—**IR.**

Sect. 10.—Stamps: Sub-sect. 4, H., J. & K.; sub-sect. 5.]

the other agreement had been acted upon.—**EVANS v. PRATT** (1842), 3 Man. & G. 759; 1 Dowl. N. S. 505; 4 Scott, N. R. 378; 11 L. J. C. P. 87; 6 Jur. 152; 133 E. R. 1344.

Annotations:—*Mentd.* **Challand v. Bray** (1842), 11 L. J. Q. B. 204; **Bentlinc v. Connop** (1844), 5 Q. B. 693; **Carr v. Martinson** (1859), 1 E. & A. 456; **Coombs v. Dibble** (1866), 14 L. T. 415; **Sadler v. Smith** (1869), L. R. 4 Q. B. 214.

J. In Criminal Proceedings.

2545. General rule.]—If an agreement, or other written instrument, be charged to be part of a fraud or other crime, it is immaterial whether it is stamped or not.—**R. v. FOWLE** (1831), 4 C. & P. 592, N. P.

Annotations:—*Consd.* **Williams v. Gerry** (1842), 10 M. & W. 296. *Refd.* **Keable v. Payne** (1838), 8 Ad. & El. 555; **King v. R.** (1845), 9 Jur. 833. *Mentd.* **R. v. Kenrick** (1843), 5 Q. B. 49; **White v. R.** (1876), 13 Cox, C. C. 318.

2546. —.]—A cheque drawn under circumstances which would render a stamp essential to its validity may be given in evidence though unstamped to prove the fact of its having been drawn by prisoner.—**R. v. STEWART** (1845), 1 Cox, C. C. 174.

Annotations:—*Mentd.* **R. v. Prince** (1868), 38 L. J. M. C. 8; **R. v. Middleton** (1873), L. R. 2 C. C. R. 38; **R. v. Brereton** (1914), 10 Cr. App. Rep. 201.

2547. —.]—**FENGLE v. FENGLE**, No. 2483, *ante*.

2548. To prove fraud—Memorandum—Endorsed on stamped insurance policy.]—Upon an indictment on 43 Geo. 3, c. 58, s. 1, for feloniously burning a house, with intent to defraud the insurers, an unstamped memorandum indorsed on a stamped policy effected by deed, is not admissible in evidence against prisoner.—**R. v. GILLSON** (1807), 1 Taunt. 95; 2 Leach, 1007; 127 E. R. 767; *sub nom.* **R. v. GILSON**, Russ. & Ry. 138.

Annotation:—*Refd.* **Keable v. Payne** (1838), 8 Ad. & El. 555.

2549. —. Warrant of attorney—Given by way of inducement.]—In the course of proving a conspiracy to defraud, carried into effect by prevailing upon the prosecutor to accept bills, a warrant of attorney, given to him for the purpose of inducing him to accept, reciting the acceptance, may be given in evidence, though unstamped.—**R. v. GOMPERTZ** (1846), 9 Q. B. 824; 16 L. J. Q. B. 121; 8 L. T. O. S. 469; 11 J. P. 350; 11 Jur. 204; 2 Cox, C. C. 145; 115 E. R. 1491.

Annotations:—*Fold.* **Holmes v. Sixsmith** (1852), 7 Exch. 802. *Apld.* **Tunstord v. Walton** (1868), L. R. 3 C. P. 167. *Mentd.* **Sydesoff v. R.** (1847), 11 Q. B. 245; **R. v. Asphall** (1876), 2 Q. B. D. 48; **White v. R.** (1876), 13 Cox, C. C. 318.

2550. To prove embezzlement—Admissibility of receipt.]—A clerk on receiving money on his master's account, gives to the debtor a receipt on plain paper, a stamp being necessary. This receipt is not evidence against prisoner on an indictment for embezzling the money so received.—**R. v. HALL** (1821), as reported in 3 Stark. 67.

Annotations:—*Distd.* **R. v. Gompertz** (1846), 9 Q. B. 824. *Consd.* **Matheson v. Ross** (1849), 2 H. L. Cas. 286. *Mentd.* **Re Jones**, *Ex p. Jones* (1833), 3 Doac. & Ch. 525.

2551. —. —.]—O. was indicted for embezzlement & for the purpose of proving his identity as the person receiving certain moneys from S. & Co. for prosecutors, an entry in a book of S. & Co. was read in evidence.—*Held*: the entry, as explained by the evidence, amounted to a receipt, & even for the purpose of proving identity, the whole entry could not be read without a stamp.—**R. v. OVERTON** (1854), Dears. C. C. 308; 23 L. J. M. C. 29; 18 J. P. 119; 18 Jur. 134; 2 W. R. 228; 6 Cox, C. C. 277, C. C. R.

2552. To prove identity—Admissibility of receipt.]—**R. v. OVERTON**, No. 2551, *ante*.

To prove forgery—Bills of exchange.]—*See* **BILLS OF EXCHANGE**, Vol. VI., p. 512, Nos. 3274–3278.

K. Duplicates and Copies.

2553. Unstamped duplicate—Whether admissible—As secondary evidence of unstamped original.]—

If there are two parts of a written agreement, both executed at the same time, but the one stamped, & the other unstamped, the unstamped part is receivable as secondary evidence of the contents of the stamped part.—**WALLER v. HORSFALL** (1808), 1 Camp. 501, N. P.

Annotation:—*Refd.* **Munn v. Godbold** (1825), 3 Bing. 292.

2554. —. —. —.]—Pltf. had lost his part of an agreement under seal after it had been duly stamped. At the trial of an action on the agreement, deft., upon notice, produced his part, unstamped, & pltf., the draft of the agreement:—*Held*: deft.'s part, unstamped, might be received in evidence.—**MUNN v. GODBOLD** (1825), 3 Bing. 292; 2 C. & P. 97; 11 Moore, C. P. 49; 4 L. J. O. S. C. P. 54; 130 E. R. 526.

2555. —. —. —.]—(1) In an action on a charterparty against the charterer, a copy of the charter signed by or on his behalf, though that copy is signed by the shipowner, is a copy, & admissible unstamped, notwithstanding 5 & 6 Vict. c. 79, if there is any evidence that the original was stamped.

(2) It is for the objector to a copy, even if a charterparty, on the ground that the original was not stamped, to make out that fact; at all events, very slight evidence to the contrary will be sufficient to rebut the objection, & a memorandum on the charter "the brokers hold the original stamped," is sufficient.—**SMITH v. MAGUIRE** (1858), 1 F. & F. 199; *subsequent proceedings*, 3 H. & N. 554.

2556. —. —. —. Stamped original also in evidence.]—If pltf. put in one part of a written agreement which is signed, by deft. only, & is duly stamped, deft. may put in the other part of the agreement which is signed by one of pltf. for himself & the other exors., although that part of the agreement is not stamped.—**TURNER v. HARDEY** (1842), Car. & M. 449, N. P.; *previous proceedings*, 9 M. & W. 770.

Annotation:—*Refd.* **Wright v. Webb** (1846), 7 L. T. O. S. 433.

2557. —. —. —. Stamped original procurable.]—In an action against an attorney for negligence respecting a reference of an action for breach of promise of marriage, brought by S. against the present pltf., in which he was attorney for the present pltf., it appeared that there were two parts of the agreement to refer, one signed by S.'s attorney, unstamped, which was in the possession of the present deft., the other signed by the present deft. as attorney for the present pltf., & in the hands of S.'s attorney. The latter had been stamped within twenty one days after its execution, & the expense of the stamping, & part of the expense of the making of it, had been paid by the present pltf., the rest being taxed off. The part in the hands of the present deft. being called for & produced under a notice to produce, being unstamped, could not be read in evidence:—*Held*: (1) the present pltf. was entitled to have the stamped part of the agreement produced by S.'s attorney, although S. had desired her attorney not to produce it; (2) S.'s attorney was not bound to produce letters written to him by present deft., as attorney for present pltf., he having stated that he was desired by S. not to produce them; (3) if letters written by S.'s attorney to present

deft. were not produced when called for under a notice to produce, S.'s attorney was bound to give secondary evidence of their contents, although desired by S. not to do so.—*HIGGS v. TAYLOR* (1843), 1 Car. & Kir. 85, N. P.

2558. Admitted copy—Unstamped—Written proof of stamping of original.]—*TRAVISS v. HARGREAVE*, No. 2805, *post*.

Duplicates & copies as secondary evidence.]—*See* Sect. 5, sub-sect. 4; Sect. 9, *ante*.

Presumptions as to stamping.]—*See* Sub-sect. 6, *post*.

SUB-SECT. 5.—TIME FOR STAMPING.

2559. Date of stamp—Court will not take notice of.]—It is not a good objection to a guarantee that it was not stamped at the date of the bkpey. The ct. does not look at the date of a stamp.—*Re SHEPARD, Ex p. NICHOLSON* (1840), 10 L. J. Bey. 8; 4 Jur. 1066, Ct. of R.

2560. When document may be stamped—After production.]—An original letter stamped, after production, to make it evidence.—*FORD v. COMPTON* (1786), 2 Bro. C. C. 32; 29 E. R. 17, L. C.

2561. — Before action brought.]—*BOWEN v. PITMAN* (1799), 2 Esp. 728, N. P.

2562. — During hearing.]—Receipt for purchase-money allowed to be stamped as an agreement during the hearing.—*COLES v. TRICOTHICK* (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592, L. C.

Annotations:—*Mentd.* *Randall v. Errington* (1805), 10 Ves. 423; *Blagden v. Bradbeer* (1806), 12 Ves. 466; *Morse v. Royal* (1806), 12 Ves. 355; *Buckmaster v. Harrop* (1807), 13 Ves. 456; *Emmerson v. Hoelis* (1809), 2 Taunt. 38; *Peacock v. Evans, Evans v. Peacock* (1809), 16 Ves. 512; *Kemys v. Proctor* (1813), 3 Ves. & B. 57; *Copls v. Middleton* (1817), 2 Madd. 410; *Kenney v. Wexham* (1822), 6 Madd. 355; *Henderson v. Barnwell* (1827), 1 Y. & J. 387; *Goshell v. Archer* (1835), 2 Ad. & El. 500; *Graham v. Munson* (1839), 7 Scott, 769; *Re Robinson, Ex p. Holdsworth* (1841), 1 Mont. D. & De G. 475; *Carter v. Palmer* (1842), 8 Cl. & Fin. 657; *Strickland v. Turner* (1852), 7 Exch. 208; *Tottenham v. Green* (1863), 32 L. J. Ch. 201; *Coles v. Bristowe* (1868), L. R. 6 Eq. 149; *Seal v. Claridge* (1881), 7 Q. B. D. 516; *Plowright v. Lambert* (1885), 52 L. T. 646; *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500; *Potter v. Peters* (1895), 64 L. J. Ch. 357; *Re Boles & British Land Co.'s Contract* (1901), 71 L. J. Ch. 130.

2563. — — —.]—*Semble*: if a document has been rejected as not being evidence, a new trial will not be refused merely because it is not duly stamped, especially if the point is doubtful, supposing it is possible to remove that objection by stamping it at the trial, under the C. L. P. Act, 1854 (c. 125), s. 27, for the party might, at a second trial, elect so to remove the objection.—*WHITEHOUSE v. HEMMANT* (1858), 27 L. J. Ex. 295; *sub nom. WHITEHOUSE v. CLEMENT*, 31 L. T. O. S. 120; 6 W. R. 488.

2564. — After decree—Before delivery thereof.]—Bill founded on a letter not stamped. Decree made, but directed not to be delivered out until the letters stamped were produced to the registrar.—*CHERVET v. JONES* (1822), 6 Madd. 267; 56 E. R. 1093.

2565. — On application for rule nisi—Whether before or after application.]—Demise, in writing, of apartments for a period of three months certain, comes within 1 Geo. 4, c. 87. If such an instrument of demise requires either an agreement or lease stamp, within Stamp Act, 1815 (c. 184), it is not necessary that it should be stamped before the rule is granted under 1 Geo. 4, c. 87, it being time enough at any time before the trial of the ejectment.—*DOE d. PHILIPS v. ROE* (1822), 5

B. & Ald. 786; 1 Dow. & Ry. K. B. 433; 106 E. R. 1371.

2566. — — —.]—An agreement on which an application is made by a landlord against a tenant under 1 Geo. 4, c. 87, s. 1, must be stamped at the time when the application is made. It is not enough to get it stamped in the interval between obtaining the rule & showing cause.—*DOE d. CAULFIELD v. ROE* (1836), 3 Bing. N. C. 329; 2 Hodg. 279; 6 L. J. C. P. 40; 132 E. R. 437.

2567. — After proceedings begun.]—A deed stamped after proceedings have begun is good *ab initio*.—*BROWNE v. SAVAGE* (1859), 4 Drew. 635; 5 Jur. N. S. 1020; 7 W. R. 571; 62 E. R. 244.

Annotations:—*Mentd.* *Forward v. Edginton* (1860), 8 W. R. 206; *Willes v. Greenhill* (No. 1) (1860), 29 Beav. 376; *Willes v. Greenhill* (No. 2) (1860), 29 Beav. 387; *Newman v. Newman* (1885), 28 Ch. D. 674; *Low v. Bouverie*, [1891] 3 Ch. 82; *Lloyd's Bank v. Pearson*, [1901] 1 Ch. 885; *Re Dallas*, [1904] 2 Ch. 385.

2568. Documents stamped after time—Admissibility—Assignment of indenture of apprenticeship.]—The assignment of an indenture of apprenticeship is not within 8 Anne, c. 9; & therefore, if it be produced properly stamped, although stamped after the time limited by that statute for stamping indentures of apprenticeship, it will be available.—*R. v. IDE (INHABITANTS)* (1831), 2 B. & Ad. 866; 1 L. J. M. C. 9; 109 E. R. 1304.

2569. — Payment of penalty—Letters of administration.]—After 5 & 6 Vict. c. 45, the administrator of the author of a dramatic piece first acted in 1843, by deed, dated Apr. 14, 1859, in consideration of £100 assigned to pltf., the copy-right & acting right in all dramatic pieces written by the author; no entry of the assignment to pltf. had been made in the registry book in pursuance of sect. 22 of above Act. The letters of administration were not stamped until Mar. 1863:—*Held*: deft. could not object to the admissibility of the letters of administration in evidence, on the ground that they had not been stamped within six months after discovery of the mistake in omitting to get them stamped, & the penalty had not been paid, in pursuance of Stamp Act, 1815 (c. 184), s. 43.—*LACEY v. RHYS* (1864), 4 B. & S. 873; 3 New Rep. 374; 33 L. J. Q. B. 157; 9 L. T. 607; 10 Jur. N. S. 612; 122 E. R. 687; *sub nom. LACEY v. RHYS*, 12 W. R. 309.

Annotation:—*Mentd.* *Marsh v. Conquest* (1864), 17 C. B. N. S. 418.

2570. — — — Marine reinsurance covering note.]—A "covering note" or "open cover" by which underwriters undertake to reinsure marine risks to be afterwards declared is not a policy of sea insurance within Stamp Act, 1891 (c. 39), & therefore cannot be stamped after execution & produced in evidence on payment of a penalty under sect. 95, sub-sect. 2, of that Act.—*HOME MARINE INSURANCE Co. v. SMITH*, [1898] 2 Q. B. 351; 67 L. J. Q. B. 777; 78 L. T. 734; 46 W. R. 661; 14 T. L. R. 459; 8 Asp. M. L. C. 408; 3 Com. Cas. 201, C. A.

Annotations:—*Consd.* *Gonforskrings Akt. (Skandinavia Reinsurance Co. of Copenhagen) v. Da Costa*, [1911] 1 K. B. 137. *Refd.* *Itoyal Exchange Assce. Corp'n. v. Sjöforskrings Akt. Vega*, [1902] 2 K. B. 384; *Glasgow Assce. Corp'n. v. Symondson* (1911), 104 L. T. 254. *Mentd.* *Empress Assce. Corp'n. v. Bowring* (1905), 11 Com. Cas. 107.

— What documents may be stamped.]—*See* REVENUE.

Arbitration award.]—*See* ARBITRATION, Vol. II., p. 532, No. 1683.

Bills of exchange, promissory notes & negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 507, 508, Nos. 3234–3241.

Bonds.]—*See* BONDS, Vol. VII., p. 256, Nos. 978, 979.

Sect. 10.—Stamps: Sub-sect. 6, A. & B.; sub-sect. 7, A. & B.]

SUB-SECT. 6. —PRESUMPTION AS TO STAMPING

A. Lost or Destroyed Documents.

2571. Presumed properly stamped—Presumption rebuttable.]—The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side it will be presumed to have been stamped. But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped, the *onus* of proof is shifted, & the party who relies on the instrument must prove it to have been duly stamped.—*MARINE INVESTMENT CO. v. HAVIDSIDE* (1872), L. R. 5 H. L. 624; 42 L. J. Ch. 173, H. L.

2572. — Though no record in stamp office—Indenture of apprenticeship.]—The ct. presumed that an indenture of apprenticeship executed thirty years before, & under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, & proved to be lost, & when the parish in which he was settled under such indenture had relieved him for the last twelve years, was properly stamped in proportion to the apprentice fee of £12 received by the master; although the Deputy Register & Comptroller of the Stamp Duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period.—*R. v. LONG BUCKBY (INHABITANTS)* (1805), 7 East, 45; 3 Smith, K. B. 92; 103 E. R. 18.

*Annotations:—***Refd.** Hart v. Hart (1841), 1 Hare, 1; Crowther v. Solomons (1848), 6 C. B. 758; Marine Investment Co. v. Havidside (1872), L. R. 5 H. L. 624. **Mentd.** Doe d. Howson v. Waterton (1819), 3 B. & Ald. 149.

2573. — Order for payment of money.]—Deft., being indebted to plff. in £150, & being employed by T. to perform works for which he was receiving a percentage, wrote an order to T. to pay plff. £150 out of the first moneys due to deft. Afterwards, being indebted to B. in £907, he executed a deed reciting the above facts, assigning & transferring to B. such sums as then were or should become due to him, deft., from T., in trust, first to pay plff. in £150, & secondly, to retain the residue towards payment of the £907; with covenants that he would not receive the money, nor revoke, etc., that he had right to assign, had not incumbered, & for further assurance. Deft. afterwards received £150 from T.; & plff. sued him for money had & received, & on an account stated:—**Held:** (1) plff. was entitled to give secondary evidence of the order, upon proof of a *bond fide* search for the original among plff.'s papers only.

(2) Such secondary evidence was furnished by a paper, admitted by deft.'s attorney to be a true copy of an affidavit sworn, but not filed, by deft. in proceedings against another party, such paper stating the order to have been written by deft., & setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order. (3) On such secondary evidence it must be presumed that the order was properly stamped.—*POOLEY v. GOODWIN* (1835), 4 Ad. & El. 94; 1 Har. & W. 507; 5 Nev. & M. K. B. 460; 111 E. R. 722.

*Annotations:—***As to (3) Consd.** Hart v. Hart (1841), 1 Hare, 1. **Refd.** Crowther v. Solomons (1848), 6 C. B. 758; Closmadene v. Carrel (1856), 18 C. B. 36; Marine Investment Co. v. Havidside (1872), L. R. 5 H. L. 624.

2574. —.]—HART v. HART, No. 2020, ante.

2575. Document proved at one time unstamped—Presumed to continue unstamped.]—Where proof is given of a loss of a written instrument by a document which itself shows that such instrument was originally insufficiently stamped the ct. will not presume that the instrument was ever properly stamped, nor admit ordinary secondary evidence of its contents. But the ct. received as secondary evidence a draft of such written instrument produced at the hearing, with such a stamp as the instrument itself required, although the instrument appeared to have been duly lost by the party sought to be charged, & was not proved to have been fraudulently destroyed by him.—*BLAIR v. ORMOND* (1847), 1 De G. & Sm. 428; 9 L. T. O. S. 431; 11 Jur. 665; 63 E. R. 1134; *subsequent proceedings* (1850), 14 Q. B. 732, Ex. Ch.

*Annotation:—***Refd.** Arbor v. Fussell (1862), 11 W. R. 26.

2576. — — — — — Presumption rebuttable.]—It lies upon the party objecting to secondary evidence of the contents of a lost document on the ground of the want of a stamp, to show that it was not stamped. If it be shown that at one time it was unstamped, that fact by itself will raise the presumption that it continued without a stamp. But where it appeared that a charterparty, at the time of its execution, was unstamped, & within the fourteen days allowed by the 5 & 6 Vict. (c. 79), s. 21, for stamping such instrument it was taken to the district stamp office at C., & the duty & postage paid, in order that it might be sent to London to be stamped, & the clerk to whom it was delivered proved that he sent to London all documents left with him for that purpose; the clerks in London said they were unable to say whether such a document was or was not returned, but if it was, it would be returned, in the usual course, to the district office in the country; & the clerk there could not say whether it was returned or not, but, on search being made for it, no trace of it could be discovered:—**Held:** the evidence left it altogether uncertain whether the document was stamped or not; the presumption of its being unstamped was done away with; & the secondary evidence was admissible.—*CLOSMADENE v. CARREL* (1856), 18 C. B. 36; 25 L. J. C. P. 216; 27 L. T. O. S. 135; 2 Jur. N. S. 474; 4 W. R. 547; 139 E. R. 1276.

*Annotations:—***Refd.** Arbor v. Fussell (1862), 11 W. R. 26; Marine Investment Co. v. Havidside (1872), L. R. 5 H. L. 624.

2577. — — — — —.]—MARINE INVESTMENT CO. v. HAVIDSIDE, No. 2571, ante.

Presumption as to stamping generally.]—See REVENUE.

Rebuttal of presumption—On whom burden lies.]—See Sub-sect. 7, C., post.

B. Documents not produced after Notice

2578. Presumed properly stamped—Against party refusing to produce—Presumption rebuttable.]—Against a party who refuses, after notice, to produce an agreement it is to be presumed that it is stamped. But the party refusing is at liberty to prove the contrary.—*CRISP v. ANDERSON* (1815), 1 Stark. 35, N. P.

*Annotations:—***Apprvd.** Crowther v. Solomons (1848), 6 C. B. 758. **Refd.** Hart v. Hart (1841), 1 Hare, 1; Closmadene v. Carrel (1856), 18 C. B. 36.

2579. — — — — — Evidence that original unstamped.]—Upon deft.'s refusal, after notice, to produce at the trial the original of an agreement on which plff. relied, a witness for plff. produced an unstamped copy; but, on his cross-examina-

tion, he stated that the original agreement was not stamped at the time it was executed & acted upon; & it appeared that pltf.'s attorney had had inspection of the original shortly before the action:—*Held*: the presumption of the document's being regularly stamped, which would have arisen from deft.'s refusal to produce it, being thus rebutted, the copy was properly rejected.—*CROWTHER v. SOLOMONS* (1848), 6 C. B. 758; 18 L. J. C. P. 92; 13 J. P. 218; 136 E. R. 1446.

Annotations:—*Refd.* *Cloismadeuc v. Carrel* (1856), 18 C. B. 36; *Marine Investment Co. v. Haviside* (1872), L. R. 5 H. L. 624.

2580. ————.]—On secondary evidence being proffered of a written agreement, if it appear to have been unstamped when seen by the witness such evidence is excluded.—*ARBON v. FUSSELL* (1862), 3 F. & F. 152, N. P.; *subsequent proceedings*, 1 New Rep. 31.

SUB-SECT. 7.—STAMP OBJECTIONS.

A. In General.

2581. Objection to counterpart—By party executing it—*Insufficient stamp on original*.]—A lessee, who executes the counterpart of a lease, cannot dispute its admissibility in evidence, or impeach its validity, upon the ground of the original not being properly stamped.—*PAUL v. MEEK* (1828), 2 Y. & J. 116.

Annotation:—*Refd.* *Hughes v. Clark* (1851), 10 C. B. 905.

2582. ———— *Original presumed stamped*—*Sufficiency of evidence*—*To override objection*.]—*SMITH v. MAGUIRE*, No. 2555, *ante*.

2583. Power of court—*To restrain party from taking objection*.]—*Qu.*: as to the power of the ct. to restrain a party from taking an objection to evidence at *Nisi Prius*, e.g. the production of an unstamped agreement.—*TRAVIS v. COLLINS* (1832), 2 Cr. & J. 625; 2 Tyr. 726; 1 L. J. Ex. 244; 149 E. R. 263.

Annotation:—*Consd.* *Rankin v. Hamilton* (1850), 15 Q. B. 187.

2584. Substantiating objection—*All necessary facts to be proved*.]—On a stamp objection, the party who makes it is bound to prove all the facts necessary to constitute the objection a good one (*ERLE, J.*).—*R. v. WILLIAMS* (1845), 5 L. T. O. S. 433; 1 Cox, C. C. 234.

2585. Objection not raised by party—*Whether all objection thereby precluded*.]—Where the attorneys on both sides enter into an agreement to admit a copy of a document, without any objections thereto:—*Held*: such admission obviated the necessity of proving the execution of the original document by the attesting witness, & it was not confined to the answer of objections to the stamp.—*HARTLEY v. BOSSOM* (1849), 14 L. T. O. S. 209, N. P.

2586. ———— *Function of court to object*.]—An admission of a document by a party does not shut out a stamp objection.

It was formerly the practice for a judge at *Nisi Prius* not to inquire into matters which were admitted on both sides, but Lord Campbell has decided such a course to be wrong. I must therefore have the fact of the sale proved in the regular way before pltf. can be entitled to claim his commission from deft. & I am bound, sitting here, to see that the Queen's revenue is not defrauded (*MARTIN, B.*).—*HUMPHREYS v. DUDDING* (1861), 2 F. & F. 546, N. P.

2587. ————.]—A case was stated for the opinion of the ct. in which the question was whether pltf. were entitled to recover from defts. a sum due on an alleged contract of insurance. It appeared that no stamped policy had been issued, & that the covering note or memorandum of insurance was also unstamped. For the purposes of the case, however, the parties agreed that a valid policy should be deemed to have been executed in defts.' ordinary form, in accordance with the covering note. The ct. ordered the case to be struck out, on the ground that they could not hear it without sanctioning what amounted to an evasion of the stamp laws.—*NIXON v. ALBION MARINE INSURANCE CO.* (1867), L. R. 2 Exch. 338; 36 L. J. Ex. 180; 16 L. T. 568; 15 W. R. 964.

Annotation:—*Mentd.* *Lockett v. Wood* (1908), 24 T. L. R. 617.

2588. ————.]—*BOWKER v. WILLIAMSON* (1880), 5 T. L. R. 382.

Bills of exchange & promissory notes.—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 508, Nos. 3243, 3244.

Jurisdiction of court as to admissibility.—*See* *Sub-sect. 8, post*.

B. When to be made.

2589. Objection to be made promptly.—*JUSTAN v. YATES* (1852), 20 L. T. O. S. 71; *sub nom.* *INSTAN v. YATES*, 1 W. R. 24.

2590. ————.]—The objection to the admissibility of a document in evidence for want of a stamp ought to be taken at the earliest possible moment. Where, therefore, pltf., who were suing as exors., had put in evidence probate of the will of their testator, & the same had been read without objection:—*Held*: deft. could not afterwards, by giving extrinsic evidence of the value of the estate, object to the admissibility of the probate for want of a sufficient stamp.—*ROBINSON v. VERNON (LORD)* (1860), 7 C. B. N. S. 231; 29 L. J. C. P. 310; 7 Jur. N. S. 146; 141 E. R. 804.

Annotation:—*Mentd.* *Schroder v. Ward* (1863), 13 C. B. N. S. 410.

2591. Proper time to object—*When document offered in evidence*.]—*JONES v. SANDYS* (1753), Barnes, 463; 94 E. R. 1005.

Annotation:—*Mentd.* *Baker v. Jardino* (1784), 13 East, 235, n.

2592. ———— *Though other party has not seen it*.]—A written paper being offered in evidence by pltf., on a trial, deft.'s counsel desired to see it. Before it was handed to him, it was laid before the judge, & afterwards, while counsel's attention was accidentally diverted, & before the paper was handed to him, it was read in evidence. The judge at *Nisi Prius* held that the counsel could not afterwards object to the want of a stamp, & pltf. having obtained a verdict, this ct. refused to grant a rule *nisi* for a new trial, on counsel's statement of the above facts.—*FOSS v. WAGNER* (1834), 7 Ad. & El. 116, n.; 112 E. R. 414.

2593. ———— *Agreement relied on as a lease*.]—A memorandum of agreement had only an agreement stamp. On the trial of an ejectment, it was given in evidence as an agreement. Counsel producing it were afterwards obliged, during the trial, to rely upon it as a lease. No objection was then or previously taken to the stamp. On argument in banc, as to the operation of the document, the want of a proper stamp was urged:

PART IV. SECT. 10, SUB-SECT. 7.—B.

2591 i. Proper time to object—*When document offered in evidence*.]—*RAM BHEM LAL v. ABLUCKH SINGH* (1863), 1207; 2 Hay. 148.—*IND.*

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—*Held*: the objection came too late, & should have been taken at that period of the trial when counsel first stated that they should rely upon the instrument as a lease.—*DOE d. PHILLIP v. BENJAMIN* (1839), as reported in 9 Ad. & El. 644; 2 Will. Woll. & H. 96; 112 E. R. 1356.

Annotations:—*Mentd.* *Doe d. Wood v. Clarke* (1815), 7 Q. B. 211; *Marshall v. Powell* (1846), 16 L. J. Q. B. 5; *Jaques v. Millar* (1877), 6 Ch. D. 153; *Marshall v. Berridge* (1881), 10 Ch. D. 233; *Furness v. Bond* (1888), 4 T. L. R. 457.

2594. ———.]—On an application for a new trial on the ground of misdirection, & also that an appraisement, for making which the action was brought, was not proved to have been delivered on stamped paper, according to 46 Geo. 3, c. 43, s. 9:—*Held*: the misdirection, if any, being only as to the weight of the evidence & not on any point of law, was not sufficient ground, & as to the want of an appraisement the objection ought to have been made at the trial, & this was not remedied, although the sect. requiring the stamp was brought under the notice of the ct. for another purpose.—*JACQUES v. GARDNER* (1843), 7 J. P. 181.

2595. ———.]—*PROSSER v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO., LTD.* (1890), 6 T. L. R. 285, C. A.

Annotation:—*Mentd.* *Ellen v. G. N. Ry.* (1901), 49 W. R. 395.

Arbitration award.]—*See* ARBITRATION, Vol. II., p. 532, No. 1684.

Bills of exchange, promissory notes & negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., pp. 508, 509, Nos. 3245–3247.

Bonds.]—*See* BONDS, Vol. VII., p. 256, No. 980.

C. Who may object.

2596. On whom burden of proving objection lies

—*On party impeaching the document.*]—A stamp is required only where the value of the subject-matter exceeds £20; therefore it was for deft., who relied upon the objection, to make out the affirmative of that proposition (*LORD TENTERDEN, C.J.*).—*DOE d. MORGAN v. AMOS* (1828), as reported in 2 Man. & Ry. K. B. 180.

Annotation:—*Mentd.* *Doe d. Marlow v. Wiggins* (1842), 3 Gal. & Dav. 504.

2597. ———.]—*HART v. HART*, No. 2020, ante.

2598. ———.]—The *onus* of showing that a deed, otherwise regular, has not been duly stamped lies on the party impeaching it.—*DOE d. FRYER v. COOMBS* (1842), 3 Q. B. 687; 3 Gal. & Dav. 193; 12 L. J. Q. B. 36; 6 J. P. 687; 6 Jur. 930; 114 E. R. 670.

2599. ———.]—An instrument, which operated as a lease, reserved a rent of £50, but contained a stipulation that the landlord should insure the premises for £1,000 & that the premiums of insurance should be added to the rent of £50, & become due & payable in like manner as the rent:

—*Held*: this was not a “deed not otherwise charged” within 55 Geo. 3, c. 184, tit. “Deed,” but was properly stamped with an *ad valorem* lease stamp of £1 10s., as on a rent exceeding £20 & not exceeding £100; & if the premiums of insurance, added to the rent, exceeded £100 it lay upon the party seeking to impeach the instrument to show that they did so.—*WILSON v. SMITH* (1844), 12 M. & W. 401; 13 L. J. Ex. 113; 2 L. T. O. S. 285; 8 J. P. 522; 152 E. R. 1253.

2600. ———.]—In debt for rent, the declaration making profert of a counterpart of the indenture sealed by deft., pltf. produced the

counterpart, stamped as such; & it being objected that the other counterpart of the lease should have been produced to show that it was stamped with a lease stamp, & that the one produced was really a counterpart, & properly stamped with the counterpart stamp only:—*Held*: it was not necessary to produce the counterpart, signed by pltf., as that would be presumed to be in deft.’s possession, & it lay on him to show that it was not properly stamped, if the fact were so.—*HUGHES v. CLARK* (1851), as reported in 17 L. T. O. S. 64.

2601. ———.]—*CLOSMADÉUC v. CARREL*, No. 2576, ante.

2602. ———.]—*SMITH v. MAGUIRE*, No. 2555, ante.

2603. ———.]—By Stamp Act, 1854 (c. 83), s. 5, no person shall be entitled to recover in an action brought on any foreign bill of exchange, unless it had upon it at the time it was transferred to him the stamp required by the Act. In an action on a foreign bill of exchange, the required stamp was upon the bill at the time of the trial, but no evidence was given to show that it was on the bill at the time it was indorsed to pltf.:—*Held*: it must be presumed to have been so, the contrary not having been shown by deft.—*BRADLAUGH v. DE RIN* (1868), L. R. 3 C. P. 286; 37 L. J. C. P. 146; 18 L. T. 904; 16 W. R. 1128.

Annotation:—*Refd.* *Marc v. Rouy* (1874), 31 L. T. 372.

2604. ———.]—*MARINE INVESTMENT CO. v. HAVISIDE*, No. 2571, ante.

2605. Associate—Limitation of objection.]—(1) An admitted copy of a document may be received in evidence without a stamp, & without proof that the original is stamped.

(2) Under C. L. P. Act, 1854 (c. 125), s. 28, the associate can make only such objections, for want of a stamp, as the parties might have made if that Act had not passed.—*TRAVIS v. HARGREAVE* (1866), 4 F. & F. 1078.

2606. When burden shifted—Presumption in favour of stamping rebutted—Document proved to have been unstamped.]—*MARINE INVESTMENT CO. v. HAVISIDE*, No. 2571, ante.

Arbitration award.]—*See* ARBITRATION, Vol. II., p. 532, No. 1684.

Bills of exchange, promissory notes & negotiable instruments.]—*See* BILLS OF EXCHANGE, Vol. VI., p. 508, No. 3242.

SUB-SECT. 8.—JURISDICTION OF COURT.

See R. S. C., Ord. 39, r. 8.

2607. Officers of court—Rule office—Document attached to affidavit.]—The officers of the ct. can take cognisance of the want of a stamp on a document attached to an affidavit used on a motion.—*HILL v. SLOCOMBE* (1841), 5 Jur. 220.

2608. Finality of judge’s ruling—Judge at Nisi Prius.]—At the trial of a cause a document tendered in evidence was objected to on the ground that it required a stamp; a verdict was taken by consent for pltf., subject to be set aside & a nonsuit entered if the ct. should be of opinion that a stamp was necessary:—*Held*: C. L. P. Act, 1854 (c. 125), s. 31, did not prevent the ct. entertaining the question.—*EAMES v. SMITH* (1855), 1 Jur. N. S. 1025; 4 W. R. 9.

Annotations:—*N.F.* *Siordet v. Kuczyński* (1855), 17 C. B. 251; *Tattersall v. Fearnley* (1856), 17 C. B. 368.

2609. ———.]—Under C. L. P. Act, 1854 (c. 125), s. 31, the question whether or not a document offered in evidence is sufficiently stamped, is to be decided by the judge at Nisi

Prius, & cannot properly be reserved for the opinion of the ct.—**Siorde v. Kuczynski** (1855), 17 O. B. 251; 25 L. J. C. P. 2; 26 L. T. O. S. 219; 4 W. R. 153; 139 E. R. 1067.

Annotations:—**Folld. Tattersall v. Fearnley** (1856), 17 C. B. 368. **Consd. Sharples v. Rickard** (1857), 26 L. J. Ex. 302. **Folld. Blewitt v. Tritton**, [1892] 2 Q. B. 327. **Refd. Kaiser v. Grout** (1859), 29 L. J. Ex. 20; **Rutty v. Benthall** (1867), L. R. 2 C. P. 488.

2610. ———.]—Under C. L. P. Act, 1854 (c. 125), s. 31, the question whether or not a document offered in evidence requires to be, or is sufficiently, stamped, is to be decided by the judge at *Nisi Prius*, & cannot properly be reserved for the opinion of the ct.—**TATTERSALL v. FEARNLEY** (1856), 17 C. B. 368; 139 E. R. 1115.

2611. ———.]—*Semle*: a question as to the sufficiency of a stamp ruled at the trial to be sufficient cannot be reserved.—**HEISER v. GROUT** (1859), 5 H. & N. 35; 157 E. R. 1090; *sub nom.* **HAISER v. GROUT**, 1 L. T. 44; 8 W. R. 79; *sub nom.* **KAISER v. GROUT**, 29 L. J. Ex. 20.

2612. ———.]—**Judge sitting without jury—No appeal to Court of Appeal.**—Where a judge, trying an action without a jury, rules that the stamp upon any document is sufficient, or that the document does not require a stamp the decision is final, & no appeal lies to the Ct. of Appeal by way of application for a nonsuit, or to enter judgment, or for a new trial.—**BLEWITT v. TRITTON**, [1892] 2 Q. B. 327; 61 L. J. Q. B. 773; 67 L. T. 72; 41 W. R. 36, C. A.

Annotations:—**Folld. Mander v. Ridgway** (1898), 67 L. J. Q. B. 335. **Consd. Lowe v. Dorling** (1905), 93 L. T. 398.

2613. ———.]—**County court judge—No appeal to High Court.**—An appeal to the High Ct. does not lie from the ruling of a county ct. judge that a document tendered in evidence at the trial of an action before him is sufficiently stamped & admissible.—**MANDER v. RIDGWAY**, [1898] 1 Q. B. 501; 67 L. J. Q. B. 335; 78 L. T. 118; 46 W. R. 366; 14 T. L. R. 230; 42 Sol. Jo. 291, D. C.

Annotation:—**Consd. Lowe v. Dorling** (1905), 93 L. T. 398.

2614. ———.]—An appeal does not lie from the admission in evidence by a county ct. judge of an unstamped document without exacting any penalty under the Stamp Act, 1891 (c. 39).—**LOWE v. DORLING & SON** (1905), as reported in 74 L. J. K. B. 794; 93 L. T. 398; *sub nom.* **LUCY v. DORLING**, 21 T. L. R. 616; 49 Sol. Jo. 582, D. C.; *affd.* on other grounds, [1906] 2 K. B. 772, C. A.

Annotation:—**Mentd. Shenstone v. Freeman**, [1910] 2 K. B. 84.

Function of court to object—Where objection to stamp waived by party.—*See* Nos. 2583–2588, *ante*.

SUB-SECT. 9.—PRODUCTION FOR PURPOSE OF STAMPING.

See **DISCOVERY**, Vol. XVIII., pp. 114, 163, 170, 171, Nos. 652, 1151, 1230–1239.

SUB-SECT. 10.—CONFLICT OF LAWS.

See **CONFLICT OF LAWS**, Vol. XI., pp. 308, 309, 393, Nos. 14–16, 668–670.

Bills of exchange, promissory notes & negotiable instruments.—*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 439–441, Nos. 2820–2836.

SUB-SECT. 11.—SECONDARY EVIDENCE OF UNSTAMPED DOCUMENTS.

A. Lost or Destroyed Documents.

2615. Whether secondary evidence inadmissible—Although destroyed by wrongful act of party—Taking objection.—Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents, even if it has been destroyed by the wrongful act of the party who takes the objection.—**RIPPINER v. WRIGHT** (1819), 2 B. & Ald. 478; 106 E. R. 440.

Annotations:—**Refd. R. v. Bathwick** (1821), 4 Dow. & Ry. K. B. 335; **Bousfield v. Godfrey** (1829), 5 Bing. 418; **Hart v. Hart** (1841), 1 Hare, 1; **Crowther v. Solomons** (1848), 6 C. B. 758. **Mentd. Giles v. Smith** (1834), 1 Cr. M. & R. 462.

2616. ———.]—A ct. of equity cannot, any more than a ct. of law, receive parol evidence of the contents of a written agreement, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced.—**SMITH v. HENLEY** (1844), 1 Ph. 391; 13 L. J. Ch. 221; 3 L. T. O. S. 49; 8 J. P. 228; 8 Jur. 434; 41 E. R. 680, L. C.

Annotation:—**Consd. Blair v. Ormond** (1817), 1 Do G. & Sm. 428.

2617. ———.]—**Tenancy agreement.**—An agreement in writing, unstamped, for the letting a tenement at a certain rent, having been lost:—**Held**: parol evidence of its contents was not admissible, for the sake of proving thereby the value of the tenement.—**R. v. CASTLE MORTON (INHABITANTS)** (1820), 3 B. & Ald. 588; 106 E. R. 776.

Annotations:—**Consd. Strother v. Barr** (1828), 5 Bing. 136. **Refd. R. v. Holy Trinity, Kingston-upon-Hull** (1827), 7 B. & C. 611; **Hart v. Hart** (1841), 1 Hare, 1; **Crowther v. Solomons** (1848), 6 C. B. 758; **Matheson v. Ross** (1849), 2 H. L. Cas. 286.

2618. ———.]—**Declaration of trust—Circumstantial evidence against stamping.**—The ct. refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to show that the original instrument was not stamped.—**ROSE v. CLARKE** (1842), 1 Y. & C. Ch. Cas. 534; 62 E. R. 1005.

Annotations:—**Mentd. Moore v. Jarvis** (1815), 2 Coll. 60; **Wilson v. Short** (1818), 6 Hare, 366.

2619. ———.]—**BLAIR v. ORMOND**, No. 2575, *ante*.

2620. ———.]—**Plan of property.**—A. made his will, whereby he devised lands to C. for life, with remainders over. A. afterwards contracted to sell part of the lands to E., & the contract partly described them, & partly referred to a plan. E. did not pay the whole purchase-money, but entered into possession of the land, & then became bkpt. The Ct. of Review made an order in the bkpty. declaring that A. had a lien for his unpaid purchase-money, & directed a sale. A. became the purchaser for a less sum than was due to him, & proved against E.'s estate for the difference. A. entered into possession, & so continued until his death. The plan had never been stamped, & was lost:—**Held**: parol evidence was not admissible to show what was contained in the lost unstamped plan.—**ANDREW v. ANDREW** (1856), 8 De G. M. & G. 336; 25 L. J. Ch. 779; 27 L. T. O. S. 161; 2 Jur. N. S. 719; 4 W. R. 520; 44 E. R. 419, L. JJ.

Annotation:—**Mentd. Patch v. Shore** (1862), 11 W. R. 142.

2621. ———.]—**Draft of lost document—Bearing such stamp as original required.**—**BLAIR v. ORMOND**, No. 2575, *ante*.

Presumption as to stamping, *see* Sect. 10, sub-sect. 6, A., *ante*.

PART IV. SECT. 10, SUB-SECT. 11.—A.

2619 i. Whether secondary evidence inadmissible.—Secondary evidence cannot be given of a lost instrument requiring a stamp which was not stamped.—**ARUNACHELLUM CHETTY v. OLAGAPPAN CHETTY** (1868), 4 Mad. 312.—**IND.**

Sect. 10.—Stamps; Sub-sect. 11, B. Sect. 11: Sub-sects. 1 & 2.]

B. Existing Documents.

2622. Whether secondary evidence admissible.—Note given for debt.—Evidence as to debt.]—When plff. declares on a note which has been given for a debt, the party may go into evidence of the debt for which the note is given, if the note has not the proper stamp so that it cannot be given in evidence.—*WILSON v. KENNEDY* (1794), 1 Esp. 245, N. P.

2623. — Agreement between masters of apprentice.—Evidence of assignment of agreement.]—To enable an apprentice to gain a settlement by serving a second master, the service must be performed with the consent of the first master. If the agreement between the first & second master expressing such consent cannot be received in evidence because not stamped parol evidence of the agreement ought not to be admitted.—*R. v. ST. PAUL'S, BEDFORD (INHABITANTS)* (1795), 6 Term Rep. 452; 101 E. R. 644.

Annotation:—Refd. R. v. Enderby (1831), 2 B. & Ad. 205.

2624. — Provided admissible as evidence.]—Evidence in writing not admitted, as an agreement unstamped does not prevent parol evidence, if otherwise admissible.—*HIERN v. MILL* (1806), 13 Ves. 114; 33 E. R. 237, L. C.

Annotations:—Mentd. Robinson v. Carrington (1833), 1 Mont. & A. 1; *Kennedy v. Green* (1834), 3 My. & K. 699; *Dryden v. Frost* (1838), 3 My. & Cr. 670; *Jones v. Jones* (1838), 8 Shm. 633; *Cockerell v. Dickens* (1840), 2 Moo. Ind. App. 353; *Jones v. Smith* (1841), 1 Hare, 43; *Fuller v. Bennett* (1843), 2 Hare, 394; *West v. Reid* (1843), 2 Hare, 249; *Hewitt v. Loosemore* (1851), 9 Hare, 449; *Lang v. Purves* (1862), 15 Moo. P. C. C. 389; *Dresser v. Norwood* (1863), 32 L. J. C. P. 201.

2625. — Bill of lading.—Parol proof of title.—Action of trover.]—Where goods consigned to A. upon their arrival are landed on deft.'s wharf, plff., in an action of trover, may prove his title by parol, although the bill of lading which has been indorsed to him cannot be received in evidence for want of a stamp.—*DAVIS v. REYNOLDS* (1815), 1 Stark. 115; 4 Camp. 267, N. P.

Annotations:—Refd. Strother v. Barr (1828), 5 Bing. 136. *Mentd. Dixon v. Yates* (1833), 5 B. & Ad. 313.

2626. — Written contract.—For work.]—To an action of debt on simple contract, deft. pleaded a set-off for work & labour. In the course of plffs.' case, it appeared that deft. was employed to do the work by a written contract. Deft. called witnesses to prove work done *ultra* the written contract, on which it was objected that the contract must be produced, & the judge so ruled. On its being produced, it appeared to be unstamped:—*Held*: the judge could not look at it, to see to what work it extended, & no parol evidence at all could be given in support of the set-off.—*BUXTON v. CORNISH* (1844), 12 M. & W. 426; 1 Dow. & L. 585; 13 L. J. Ex. 91; 2 L. T. O. S. 313; 152 E. R. 1264.

2627. — For sale of goods.]—*ALCOCK v. DELAY*, No. 2472, *ante*.

PART IV. SECT. 10, SUB-SECT. 11.—B.

o. Whether secondary evidence admissible.]—Plff. in a suit on a promissory note written on unstamped paper is not debarred from giving independent evidence of consideration.—*GOLAP CHAND MARWAREE v. THAKURANI MOHOKROOM KOOREE* (1878), 1 L. R. 3 Calc. 314.—**IND.**

p. ——*HINJA RAM v. RAJMOHUN ROY* (1881), 1 L. R. 8 Calc. 282.—**IND.**

PART IV. SECT. 11, SUB-SECT. 2.

q. Admissibility.—Partnership winding-up.]—An award having been

made between the parties, who were partners, plff. afterwards filed a bill to dissolve & wind up the partnership as if no such award had been made, & swore that he was advised & believed the award was invalid:—*Held*: this bill was not evidence against him to show that he had so treated the award, but he should not have used the award to support his case.—*DOUPE v. STEWART* (1869), 28 U. C. R. 192.—**CAN.**

r. — Suit by auction purchaser.—Award between proprietor & third parties.]—An auction purchaser at a sale for arrears of Govt. revenue does not derive his title from the defaulting

2628. — Bought-note.—For purchase of shares.]—*KNIGHT v. BARBER* (1840), 16 M. & W. 66; 2 Car. & Kir. 333; 1 New Pract. Cas. 557; 4 Ry. & Can. Cas. 674; 16 L. J. Ex. 18; 8 L. T. O. S. 121; 10 Jur. 929; 153 E. R. 1101.

Annotation:—Refd. Clay v. Crofts (1851), 17 L. T. O. S. 231.

2629. — Agreement.—To take goods in discharge of debt.]—Where goods are claimed under an agreement, the terms of which are contained in a written instrument, which is inadmissible in evidence by reason of its not being stamped, parol evidence cannot be received of the claimant's title to such goods.

The goods of M. were taken in execution, & S. claimed them by virtue of an arrangement between himself & M., whereby the goods were to be taken by S. for a debt due to him from M. An action being brought by S. in the county ct. against the sheriff for a wrongful seizure, a document said to contain the terms of the arrangement between M. & S. was tendered in evidence, but rejected for want of a stamp:—*Held*: parol evidence could not be received to explain the nature of the transaction between M. & S.—*SMITH v. YORKE* (1851), 16 Jur. 63; *sub nom. YORKE v. SMITH*, 21 L. J. Q. B. 53.

2630. — As to land.]—*VENKATA SVETA (RAJAH OF BOBBILI) v. INUGANTI BHAVAYYAMMI GARU* (1899), 15 T. L. R. 475, P. C.

SECT. 11.—JUDICIAL PROCEEDINGS.

SUB-SECT. 1.—AFFIDAVITS.

See Part VII., Sect. 10, post.

SUB-SECT. 2.—AWARDS.

*See Arbitration Act, 1889 (c. 49), s. 11 (2); & generally, ARBITRATION, Vol. II., pp. 462 *et seq.**

2631. Admissibility.—Award against landlord & tenant.—Action against tenant holding under different landlord.]—*BRETON v. KNIGHT* (1837), cited in *Roscoe Nisi Prius*, 19th ed. p. 196.

2632. — Indictment for perjury.—Award in favour of prosecutor.—Admissibility against defendant.]—(1) Upon an indictment for perjury in an affidavit to found an application for a *capias*, alleging that prosecutor, deft. in the action, was indebted in £50, an award made in pursuance of an order of reference at *Nisi Prius* in favour of prosecutor is not admissible against deft.

(2) Where deft. has pleaded guilty on an indictment for an assault, the record is evidence against him in an action for the same assault.—*R. v. FONTAINE MOREAU* (1848), 11 Q. B. 1028; 3 New Pract. Cas. 108; 17 L. J. Q. B. 187; 11 L. T. O. S. 150; 12 J. P. 531; 12 Jur. 626; 116 E. R. 757.

2633. — Against surety of debtor.—Action by creditor.]—In the absence of special agreement a

proprietor, & proceedings, an award & decree thereon, between the defaulting proprietor & third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction purchaser as against him.—*RADHA GOBIND KOER v. RAKHAL DAS MUKHERJI* (1885), 1 L. R. 12 Calc. 82.—**IND.**

s. — Action of ejectment.]—When a notice to quit was in the alternative, & civil bill ejectments had been brought upon it after the first period, & an agreement had been entered into at the sessions to refer all matters to arbitration, & an ejectment in the

judgment or an award against a principal debtor is not binding on the surety, & is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.—*Re KITCHIN, Ex p. YOUNG* (1881), 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90, C. A.

2634. How proved.—Verified copy—Sufficiency of verification.]—The rule to set aside an award was drawn up on reading the affidavit of deft.'s attorney, & the paper writing thereto annexed; & the affidavit stated that the paper writing was delivered by the arbitrator personally into the hands of deponent as a copy of the award:—*Held*: this sufficiently showed the paper to be a copy of the award.—*LAND v. HUDSON* (1843), 12 L. J. Q. B. 385.

2635. ————,]—Where an affidavit of the managing clerk of pltf.'s town agent, stated, "that the paper writing annexed is a true copy of the award of L., to whom all matters in difference were referred, as deponent has been informed & believes, & that deponent has received the said paper from H., of B., in the county of York":—*Held*: a sufficient verification of the copy of the award.—*HAWKS v. STOCKS* (1845), 9 Jur. 451; *sub nom.* *HAWKYARD v. STOCKS*, 2 Dow. & L. 936; *sub nom.* *HAWKYARD v. GREENWOOD*, 14 L. J. Q. B. 236.

Annotations:—*Mentd. Cock v. Gent* (1845), 3 Dow. & L. 271; *Doe d. Body v. Cox* (1846), 15 L. J. Q. B. 317; *Everest v. Ritchie* (1862), 31 L. J. Ex. 350.

Copies of documents generally, *see* Sect. 9, sub-sects. 3 & 4, *ante*.

—.]—See, further, ARBITRATION, Vol. II., pp. 313, 314, 582, Nos. 6, 7, 10-14, 2154.

2636. Of what award is evidence—Liability to repair highway.]—Upon an indictment against the parish of IL., for not repairing a highway an award made by comrs. under an Inclosure Act, which awarded the highway to be in a different parish :—*Held* : not to be admissible evidence for defts. without showing that the comrs. had given the previous notices required by the Act before they ascertained the boundaries ; it appearing that the usage had not been pursuant to the award, defts. having since the award, as well as before, repaired the highway.—*R. v. HASLINGFIELD (INHABITANTS)* (1814), 2 M. & S. 558 ; 105 E. R. 489.

Annotations:—**Mentd.** Heysham v. Forster (1829), 5 Man. & Ry. K. B. 277; R. v. Whiston (1836), 1 Ad. & El. 607; Cubitt v. Maxse (1873), 29 L. T. 244.

2637. — **Title.**]—In ejectment on the several demises of a mtgor. & mtgee., deft. offered to prove that, seven or eight years back, & after execution of the mtge., he brought ejectment against the mtgor., at that time in possession; that the

superior cts. was brought by same lessor of plff. against one of the parties, defts. below, respecting same premises, on same notice to quit at the latter of the two periods :—*Held*: an award which might, in a ct. of equity, be considered void as an award, was, nevertheless, admissible in evidence as an act of the arbitrators to which the parties assented, in order to show a waiver of the notice.—*NIXON v. FARRELLY* (1843), 1r. Cir. Rep. 779.—*IR.*

2634 i. *How proved.—Verified copy.—Sufficiency of verification.*—In trespass to land, deft. justified under an award of fence viewers. The township clerk produced a copy, which he swore was a true copy of the award, the original being in his custody:—*Held*: such copy was admissible in evidence, these awards being made by a statutory

cause was referred to arbitration; & that the award was in favour of the now deft., who thereupon entered under a writ of possession, & had occupied the premises ever since:—*Held*: these proceedings were not admissible evidence for deft. against the mtgee., although he was present at one meeting before the arbitrator; it not appearing that he took any part in the proceedings.—*DOE d. SMITH & PAYNE v. WEBBER* (1834), 1 A. & E. 119; 3 Nev. & M. K. B. 746; 3 L. J. K. B. 148; 110 E. R. 1152.

Annotations:—**Refd.** Doe d. Bowman v. Lewis (1845), 2 Dow. & L. 667; Whale v. Hitchcock (1876), 34 L. T. 136.

2638. ——— Partition under Inclosure Acts.]—Plffs. brought an action for the recovery of certain land as representatives of a person to whom the land had been allotted in severalty by an award of partition made under the above Acts in 1880. Defts. were in possession of the land, & at the date of the award had acquired a good title thereto under Stat. Limitations, having been in undisturbed possession since 1851. The partition was not made under any inclosure scheme. None of the parties to the partition proceedings had any interest whatever in the land, & it was by mere mistake included in the schedule to their application & dealt with in the award:—*Held*: the effect of sect. 105 of Inclosure Act, 1845 (c. 118), was not to make the award conclusive as to the title of the allottee, & the award, not having been made on the application of persons interested in the land within sect. 13 of Inclosure Act, 1848 (c. 99), had been made without jurisdiction, that defts. were therefore entitled to judgment.—**JACOMB v. TURNER, [1892] 1 Q. B. 47; 8 T. L. R. 21.**

Annotations:—**Consd.** *Blackett v. Ridout*, [1915] 2 K. B. 415; *Collis v. Amphlett*, [1918] 1 Ch. 232.

2639. — Exoneration from tithes.] — Under a local Act comrs. allotted to B., pltf.'s ancestor, "in lieu of all the tithes arising within M.," three pieces of ground in the award particularly described, & drawn upon the plan thereto annexed, containing about 176 acres. B. entered upon the allotment, & continued seized in fee thereof until his death, when it vested in pltf. Deft.'s land was not drawn on the plan. In the year 1840, an assistant tithe comr. was appointed to commute the tithe of M., on which occasion deft. claimed an exemption from tithe in respect of his land, by reason of the award under the local Act. The comr. decided, that deft.'s land was not exempt : *Held* : the local Act & the award under it did not conclusively show that deft.'s land was exonerated from tithe, for the comrs. were under no obligation to make a compulsory commutation of all the tithe of the parish, but an option was left in respect of old inclosures : & therefore, if the comrs. had

public officer acting in a judicial capacity, which might affect a large portion of the public, & even municipalities. *Semble*: If the copy had been one delivered by the fence viewers under statute, it might have been received without proving it to be a true copy. — WARREN v. DESLIPES (1872), 33 U. C. R. 59.—CAN.

t. — Receipts of money paid in pursuance of award.]—Upon the trial of an action of *quare impedit*, pltf. as evidence of an award by which all matters in dispute between the party under whom he claimed, & the party whom deft. represented, had been adjusted, offered in evidence two documents, & a duplicate of one of them, which purported to be receipts, dated in the year 1829, acknowledging money paid by the party in the year 1801. pursuant to the award. They

were signed by a person describing himself as surviving partner of the firm to which the money was paid; and which firm were also stated in them to have been the attorneys for the party between whom and plt.'s ancestor the award was made; and one of the documents expressly professed to be a substitute for a previous lost receipt. The latest evidence of any litigation was in the year 1805.—*Held*: these documents were admissible in evidence to prove not only the receipt of the money, but the fact of the award.—WHALEY v. MASSIEREENE (1863), 15 Ir. Jur. 281.—IR.

a. — *Not by oath of arbiter.*] — A verbal award cannot be proved by the oath of the arbiter.—*FERRIE v. EWING* (1824), 21 Fac. Coll. 505.—**SCOT.**

b. Of what award is evidence—

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not in fact taken into account the fen land, of which deft.'s formed a part, their award was no bar to pltf.'s claim, notwithstanding he had neglected to appeal, & had received the compensation awarded in respect of the tithe of other land.—**BUNBURY v. FULLER** (1853), 9 Exch. 111; 1 C. L. R. 893; 23 L. J. Ex. 29; 23 L. T. O. S. 131; 17 J. P. 790; 156 E. R. 47, Ex. Ch.

Annotations:—Mentd. *R. v. Nunneley* (1858), E. B. & E. 852; *Poase v. Chaytor* (1863), 3 B. & S. 620; *Re The Charkich* (1873), 28 L. T. 190; *Colonial Bank of Australasia v. Willan* (1874), L. R. 5 P. C. 417; *R. v. Sheffield Recorder* (1883), 52 L. J. M. C. 78; *Ex p. Wake* (1883), 11 Q. B. D. 291; *R. v. Woodhouse*, [1906] 2 K. B. 501; *R. v. Bradford*, [1908] 1 K. B. 365; *May v. Mills* (1914), 30 T. L. R. 287; *R. v. Nat. BeU Liquors*, [1922] 2 A. C. 128.

— **Boundaries.**—*See* **BOUNDARIES**, Vol. VII., p. 318, Nos. 386-389.

— *See, further*, **ARBITRATION**, Vol. II., pp. 534, 539, 543, 544, 545, 573, Nos. 1705, 1706, 1736, 1774-1782, 1785, 2048; **COMMONS**, Vol. XI., p. 75, No. 973.

As estoppel.—*See* **ARBITRATION**, Vol. II., p. 543, Nos. 1769-1773; **ESTOPPEL**, Vol. XXI., pp. 238 *et seq.*

SUB-SECT. 3.—BANKRUPTCY PROCEEDINGS.

2640. Proceedings in bankruptcy—Admissibility —**To prove party a bankrupt.**—Where deft. pleads bkpcy., & pltf. relies on deft. having been bkpt. before, it is sufficient proof of the first bkpcy., to produce the proceedings, & to show that deft. submitted to that commission.—**GREGORY v. MERTON** (1800), 3 Esp. 195, N. P.

2641. — **In Irish courts—Although proceedings superseded.**—(1) The proceedings under a commission of bkpcy., superseded, ordered to be produced at the hearing of a cause in the Ct. of Ch. in Ireland, with a view to evidence from bkpt.'s examination. But not of course.

(2) Papers of record in another ct. of justice may be used at the hearing of a cause in the Ct. of Ch., saving just exceptions.—*Ex p. BERNAL* (1805), 11 Ves. 557; 32 E. R. 1204, L. C.

2642. — **Evidence of facts stated therein.**—Notwithstanding there has been no notice to dispute the commission, act of bkpcy., etc., under 46 Geo. 3, 1806 (c. 135), s. 10, the proceedings are not conclusive evidence of the facts therein stated; but the ct. is still to form a judgment upon them, whether they prove an act of bkpcy. or not.—**BROWN v. FORRESTALL** (1816), Holt, N. P. 190, N. P.

— *See, further*, **BANKRUPTCY**, Vol. V., pp. 988, 989, Nos. 8084-8086.

2643. Receiving order—Registrar's decision—Admissibility—In action for malicious presentation of petition.—The "full written judgment" of a registrar whose order refused resp.'s petition of sequestration against the appellant was rightly held to be inadmissible in evidence in an action against resp. for having maliciously presented his petition. Resp. was bound by the registrar's discretion as to making or refusing the order, not by his opinion upon points which he had no jurisdiction to determine.—**KING v. HENDERSON**, [1898] A. C. 720; 67 L. J. P. C. 134; 79 L. T. 37;

47 W. R. 157; 14 T. L. R. 490; 5 Mans. 308, P. C.

Annotation:—Mentd. *Re Wilson, Ex p. Jones* (1916), 85 L. J. K. B. 1408.

— *See* **BANKRUPTCY**, Vol. IV., p. 155, No. 1457.

2644. Adjudication—Admissibility—To prove bankruptcy.—Where bkpcy. is pleaded, the date of the commission, if it is subsequent to the date of the debt sued for, shall be sufficient for defendant to rely on, at least sufficient to entitle deft. to call on plt. to prove an antecedent act of bkpcy. But when the proceedings are produced, the act of bkpcy. found under the proceedings shall be sufficient for pltf., without proof of an actual act of bkpcy.—**PEARSON v. FLETCHER** (1803), 5 Esp. 90, N. P.

2645. — **To prove complicity—In fraudulent proceedings.**—On a bill of exceptions, it appeared that pltf. had tendered in evidence an adjudication of the Insolvent Ct., discharging F., after he had been in custody for one year, & had proved that immediately afterwards he was allowed to go free by deft., who was his only detaining creditor. Deft.'s counsel offered to admit that such an order was made, but objected to its being read. The judge ruled that it might be read; to which deft. excepted. It was read; & it stated the detainer for a year to be on the ground that the warrant of attorney was a fraudulent preference:—**Held:** the adjudication was admissible, not as evidence of the truth of the ground on which it purported to be made, but because that adjudication, followed by the immediate discharge of F., was evidence of deft.'s complicity with F., & pltf. was not bound to take deft.'s admission of its effect.—**BILLITER v. YOUNG** (1856), 6 E. & B. 1; 26 L. T. O. S. 327; 2 Jur. N. S. 438; 119 E. R. 765; *sub nom.* **YOUNG v. BILLITER**, 25 L. J. Q. B. 169; 4 W. R. 369, Ex. Ch.; *reversd.* on other grounds, *sub nom.* **YOUNG v. BILLITER** (1860), 8 H. L. Cas. 682, H. L.

Annotations:—Mentd. *Fitzmaurice v. Bayley* (1858), 4 Jur. N. S. 506; *Hollingsworth v. White* (1862), 6 L. T. 604; *Topping v. Keysell* (1864), 33 L. J. C. P. 225; *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478; *Marks v. Feldman* (1870), L. R. 5 Q. B. 275; *Clough v. L. & N. W. Ry.* (1871), L. R. 7 Exch. 26.

— *See* **BANKRUPTCY**, Vol. IV., p. 175, Nos. 1625, 1626.

— **How proved.**—*See* **BANKRUPTCY**, Vol. IV., p. 174, No. 1621.

2646. Petition & schedule—Admissibility of copy —**To prove admission of debt.**—(1) Where deft. had applied for relief to a comr. of bkpcy. under Judgments Act, 1835 (c. 110), s. 105, & filed a schedule & petition, including a debt due to pltf., but the proceedings were abandoned on its appearing that the debts exceeded £300:—**Held:** on an action brought to recover a debt for goods sold & delivered included in the schedule that a copy thereof was evidence to prove an admission of that debt by deft.

(2) *Semle:* the schedule & petition were admissible though the rest of the proceedings were not produced.—**GREEN v. BALLS** (1848), 11 L. T. O. S. 48.

2647. — **Evidence of act of bankruptcy.**—On an indictment against a bkpt. under 12 & 13 Vict. c. 106, s. 263, it is necessary for the prosecution to prove, not only the petition to & adjudication by the Ct. of Bkpcy., but also the

Order.—An award was not made within the time specified in the original order, but it recited a further order extending the time:—**Held:** the original of this further order being in possession of

defts., the award was sufficient secondary evidence of it.—**WRIGHT v. WINNIPEG CITY** (1886), 3 Man. L. R. 349; *on appeal*, 4 Man. L. R. 46.—**CAN.**

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c. Examination—Admissibility.—An examination of a judgment debtor cannot be given in evidence against a third party, even an alleged

preliminary matters, viz. petitioning creditor's debt, the trading & the act of bankruptcy. The act of bkpcy. relied upon being the filing of a petition in the Ct. for Relief of Insolvent Debtors, a copy of the petition, certified as required by sect. 239 of the above statute, was put in evidence, but there was no proof of the date of the filing except the indorsement at the back of the petition:—*Held*: such indorsement was no evidence of the date of the filing of the petition, & therefore no evidence of the act of bkpcy.—*R. v. LANDS (alias WHITE) (1855)*, Dears. C. C. 507; 25 L. J. M. C. 14; 19 J. P. 758; 1 Jur. N. S. 1176; 4 W. R. 88; 7 Cox, C. C. 89, C. C. R.

Annotation:—*Refd. R. v. Westley (1859)*, 8 Cox, C. C. 244.

2648. Accounts of bankrupt—Delivered by commissioners—Evidence of solvency at particular time.—(1) Where the question is as to the solvency of a party at a particular time, the general result as collected from sufficient sources may be given in evidence; & *semble*: the accounts rendered by bkpt. of his affairs to the comrs. are competent sources.

(2) *Semble*: a letter written by an attorney to his client, & produced with the client's signature indorsed upon it, is evidence against the client.—*MEYER v. SEFTON (1817)*, 2 Stark. 274, N. P.

2649. Examination—Admissibility—Must first be proved.—(1) An order had been obtained to read (*inter alia*) the examinations of M. L., taken before the comrs. under T. L.'s bkpcy.:—*Held*: they could not be read, unless proved in the cause, that there were such examinations taken before the comrs.; for the proceedings in a commission of bkpcy. against T. were, as to M., *res inter alios acta*.

(2) Where one debt is charged with a fraud, his deposition cannot be read for another debt., as it may tend to excuse him with regard to his own costs.—*EADE v. LINGOOD (1747)*, 1 Atk. 203; 26 E. R. 132, L. C.

2650. ——— Although improperly obtained.—Although a person has been improperly examined before comrs. of bkpt. upon a subject unconnected with the interests of the bkpt. estate, with a view to procure evidence in an action depending against him, the examination may be used as evidence by plff. at the trial of the action, & the judge at *Nisi Prius* cannot inquire into the abuse of the authority of the Great Seal by which the examination was obtained.—*STOCKFLETH v. DE TASTER (1814)*, 4 Camp. 10, N. P.

Annotations:—*Consd. Robson v. Alexander (1828)*, 1 Moo. & P. 448. *Mentd. Jackson v. Benson (1826)*, 1 Y. & J. 32.

2651. ——— To show knowledge of bankrupt's insolvency.—A. takes B.'s goods in execution after an act of bkpcy. committed by B., & assigns them to C. A.'s examination taken under the commission subsequently to the assignment cannot be read in an action by the assignees against C. in order to show A.'s knowledge of B.'s insolvency at the time of the execution. *Semble*: an examination taken previously to the assignment would have been admissible.—*DEADY v. HARRISON (1815)*, 1 Stark. 60, N. P.

2652. ——— Where extracts of accounts used in evidence.—If a person who has numerous dealings with a bkpt., on being examined before the comrs., does not bring his books with him, but, while under examination, consents that the

accountant to the commission shall make extracts from them; these extracts cannot be used as evidence against him, without also reading his examination.—*YATES v. CARNSEW (1828)*, 3 C. & P. 99, N. P.

2653. ——— Action by assignees against examinees—Compulsory examination.—Examinations of parties before comrs. of bkpt., are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress.—*ROBSON v. ALEXANDER (1828)*, 1 Moo. & P. 448; 6 L. J. O. S. C. P. 111.

2654. ————Where a party, examined before comrs. of bkpt., admitted that he had received a sum of money on account of the bkpt. after an Act of bkpcy., but not that it was a subsisting debt:—*Held*: this was not evidence sufficient to support a count on an account stated with the assignees. *Qu.*: whether an admission obtained by such compulsory examination can be used as evidence in such an action.—*TUCKER v. BARROW (1828)*, 7 B. & C. 623; 3 C. & P. 85; 1 Man. & Ry. K. B. 518; 6 L. J. O. S. K. B. 121; 108 E. R. 855; *previous proceedings (1827)*, Mood. & M. 137, N. P.

Annotations:—*Refd. Elcke v. Nokes (1834)*, 1 Mood. & R. 359. *Mentd. Bevan v. Nunn (1832)*, 9 Bing. 107; *Lubbock v. Tribe (1838)*, 3 M. & W. 607; *Perry v. Slade (1845)*, 8 Q. B. 115; *Edwards v. Gabriel (1861)*, 30 L. J. Ex. 245.

—*See, further, BANKRUPTCY, Vol. IV., pp. 181, 182, 235, 511, 512, Nos. 1081, 1082, 2210, 4623–4638; CRIMINAL LAW, Vol. XIV., pp. 406–408, Nos. 4264–4278.*

2655. Depositions—Admissibility—In action against petitioning creditor.—Depositions made by a witness sent by petitioning creditor to prove an act of bkpcy. before the comrs., are admissible in evidence against petitioning creditor in any subsequent action against him, although the witness is still living.—*GARDNER v. MOULT (1839)*, 10 Ad. & El. 404; 2 Per. & Dav. 403; 8 L. J. Q. B. 270; 3 Jur. 1190; 113 E. R. 178.

Annotations:—*Expld. Bollen v. Rutlin (1848)*, 2 Exch. 665. *Consd. Richards v. Morgan (1863)*, 4 B. & S. 641; *British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1921] 2 Ch. 160. Refd. Cole v. Hadley (1840)*, 11 Ad. & El. 807.

2656. ————*Re WILKINSON, Ex p. SHAW (1851)*, 18 L. T. O. S. 150, L. J.

2657. ——— Evidence for what purpose—Time of act of bankruptcy.—Depositions of an act of bkpcy., when recorded according to 5 Geo. 2, c. 30, are evidence, in an action at law, to prove the precise time when the act of bkpcy. was committed, if specified therein.—*JANSON v. WILLSON (1779)*, 1 Doug. K. B. 257; 99 E. R. 168.

2658. ——— Evidence of creditor's debt.—Where, in *assumpsit* by assignees of bkpt. the general issue was pleaded, & debt. had given notice to dispute petitioning creditor's debt the depositions before the comrs. were held conclusive evidence of it, under 6 Geo. 4, c. 16, s. 92, though debt. offered to prove its fraudulent origin, & the time allowed for bkpt. to dispute the commission had elapsed.—*YOUNG v. TIMMINS (1830)*, 1 Cr. & J. 148; 1 Tyr. 15; 9 L. J. O. S. Ex. 4; 148 E. R. 1370.

Annotation:—*Consd. Hare v. Waring (1838)*, 3 M. & W. 362.

2659. ——— How far conclusive.—To *assumpsit*

transferee from the judgment debtor, who was not present, & had no opportunity of cross-examining.—*CLINTON v. SELLARS (1908)*, 7 W. L. R. 615; 1 Alta. L. R. 135. **CAN.**

2656 i. Depositions—Admissibility.—Depositions already made in the Ct. of Insolvency by debt. in equity

are admissible in evidence in a suit to set aside a voluntary settlement on debt. by the insolvent & may be sufficient to establish plff.'s case. The whole of such depositions will be regarded as in evidence & the Ct. will attach such weight to the different parts as it considers them entitled to.—

DAVEY v. BAILEY (1884), 10 V. L. R. 240.—**AUS.**

d.—*Evidence for what purpose—To show knowledge of bankruptcy proceedings.*—*Held*: depositions by debt. in the bkpcy. were admissible evidence of the fact that debt. at the time of taking defence to ejectment

Where a convicted felon . . . brings any civil proceeding to establish claims, or to enforce rights, which result to the felon . . . from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime (SIR SAMUEL EVANS, P.).—*In the Estate of CRIPPEN*, [1911] P. 108; 80 L. J. P. 47; 104 L. T. 224; 27 T. L. R. 258; 55 Sol. Jo. 273.

Annotations.—**Folld.** *Mash v. Darley*, [1914] 1 K. B. 1. **Mentd.** *In the Estate of Hall*, Hall v. Knight & Baxter, [1914] P. 1; *Gayer v. Gayer* (1917), 116 L. T. 322.

2670. ——— **Conviction for having unlawful carnal knowledge.**—Upon the hearing of a complaint under Bastardy Laws Amendment Act, 1872 (c. 65), s. 4, the only evidence adduced in corroboration of that of complainant was the evidence of a person who deposed he had been present at the trial & conviction of the alleged father of complainant's child at the assizes upon an indictment charging him with having unlawful carnal knowledge of complainant:—**Held**: evidence of the conviction was admissible.—*MASH v. DARLEY*, [1914] 1 K. B. 1; 83 L. J. K. B. 78; 109 L. T. 873; 78 J. P. 4; 30 T. L. R. 5; *sub nom.* *WASH v. DARLEY*, 58 Sol. Jo. 49, D. C.; *affd.* on other grounds, [1914] 3 K. B. 1226, C. A.

Annotation.—**Mentd.** *Thomas v. Jones*, [1921] 1 K. B. 22.

2671. In subsequent proceedings—Conviction on information—Trial of indictment.—A. was examined before two magistrates on an information against B., for having smuggled spirits in his possession; & was afterwards examined on the trial of an indictment against B., for assaulting revenue officers while they were attempting to seize these same spirits. On this last occasion, A. swore that he had always given the same account of the transaction:—**Held**: the record of B.'s conviction on the information, in which A.'s evidence before the magistrates was set out, was not legal evidence to contradict A. by showing that he had given a different account of the transaction when first examined.—*R. v. HOWE* (1808), 1 Camp. 461; 6 Esp. 124, N. P.

2672. ——— **Conviction for penalties—Different parties.**—*HART v. McNAMARA* (1817), 4 Price, 154, n.; 146 E. R. 424.

Annotation.—**Refd.** *De Mora v. Concha* (1885), 29 Ch. D. 268.

2675 i. In subsequent proceedings—Conviction for malicious damage—Action for false imprisonment.—In an action for false imprisonment against a justice of the peace the declaration charged that he acted without jurisdiction, & also maliciously & without reasonable & probable cause. Plea justifying the imprisonment under a conviction for maliciously destroying trees. Pltf. put in evidence the warrant under which he was arrested, reciting that he had been convicted before deft. of maliciously destroying trees as stated in the plea, & was adjudged to be imprisoned for twenty days, & he proved his imprisonment under the warrant, & that he had been discharged on *habeas corpus*; but the reason for the discharge was not shown. Deft. called no evidence:—**Held**: the recital being evidence for deft. of a conviction, pltf. was bound to prove either that there was no such conviction, or that it was a matter beyond the justice's jurisdiction.—*WARD v. outhouse* (1882), 22 N. B. R. 220.—**CAN.**

e. ——— **Defective conviction.**—A conviction, though defective, is admissible in evidence in an action against the justice, in order to repel any inference of malice & want of probable cause.—*McGILVERY v. GAULT* (1879),

19 N. B. R. 217.—**CAN.**

f. ——— **Pltf. having been arrested, convicted, & imprisoned for having liquors for sale near public works, writs of habeas corpus & certiorari were issued & on the return thereof he was discharged. Under a writ of certiorari directed to defts., the convicting magistrates, the conviction, which was not under seal, was returned by defts.' solr., who in his affidavit accompanying the return swore that the conviction returned was the one made by defts.:—Held**: In an action against the magistrates the return being made to a writ of *certiorari* directed to defts., & not referring to the *certiorari* directed to the gaoler under the *habeas corpus*, & in face of the solr.'s affidavit, a properly sealed conviction, which, however, was not produced at the trial, could not be received.—*BOND v. CONMEE* (1888), 15 O. R. 716; 16 A. R. 398.—**CAN.**

g. ——— **Conviction for trespass—Action for same.**—By royal patent, lands specifically described, adjoining a seashore, were granted, " & also all & singular lands, tenements, etc., to the aforesaid premises, etc., belonging, etc., etc." The person in whom the estate of the grantee became vested brought an action for trespass on the adjacent seashore between high & low

2673. ——— **Conviction for assault—Action for the same—Not if conviction at suit of the King.**—

(1) Conviction of battery at the suit of the King cannot be given in evidence in trespass on the same battery.

(2) No record of conviction or verdict can be given in evidence but such as both parties might have produced.—*R. v. WARDEN OF THE FLEET* (1698), 12 Mod. Rep. 337; *Holt*, K. B. 133; 88 E. R. 1363.

2674. ——— **—**—**—**—**—**—**R. v. FONTAINE MOREAU**, No. 2632, *ante*.

2675. ——— **Conviction for malicious damage—Action for false imprisonment.**—In an action of trespass & false imprisonment brought against justices:—**Held**: they might give in evidence a conviction [against pltf. for malicious damage] which was filed at the Midsummer sessions, as well as one filed at the Easter sessions.—*CHARTER v. GREAME* (1849), 13 Q. B. 216; 3 New Mag. Cas. 106; 3 New Sess. Cas. 382; 18 L. J. M. C. 73; 12 L. T. O. S. 471; 13 J. P. 232; 13 Jur. 208; 116 E. R. 1245.

Annotations.—**Expld.** *Fuller v. Brown* (1819), 13 L. T. O. S. 301. **Refd.** *Er p.* *Austin* (1880), 50 L. J. M. C. 8.

In appeal to Court of Criminal Appeal.—*See CRIMINAL LAW*, Vol. XIV., pp. 522, 525, Nos. 5861–5870, 5901–5906.

B. How Proved.

2676. Copy—Original book of entry unnecessary.—*FULLER (OR FULLERS) v. FOTCH* (1695), Carth. 316; *Holt*, K. B. 287; 90 E. R. 802.

Annotation.—**Refd.** *Dingsdale v. Clarke* (1829), 8 L. J. O. S. M. C. 137.

2677. ——— **Examined copy.**—*R. v. PEMBRIDGE (INHABITANTS)*, No. 1804, *ante*.

2678. ——— **Certified copy.**—*In the Estate of CRIPPEN*, No. 2669, *ante*.

—**—**—**—**—**See, further**, Sect. 9, sub-sect. 5, C., *ante*.

2679. Records of petty sessions—Containing entries of convictions—Insufficient.—Justices not warranted in adjudicating a forfeiture of a licence without legal proof of a former conviction; a mere reference to the records of the petty sessions, where former convictions are entered, will not suffice.—*CROSS v. WATTS* (1862), 13 C. B. N. S. 239; 1 New Rep. 62; 32 L. J. M. C. 73; 7 L. T.

water-mark, & for trover & conversion of ungathered drifted sea-weed thereon, & at the trial proved convictions at petty sessions for trespasses on the *locus in quo*, & an award in his favour in a former action brought by him against an alleged trespasser:—**Held**: the convictions & award were properly received in evidence.—*BREW v. HAREN* (1874), 1 R. 9 C. L. 29; 11 L. C. L. R. 198.—**IR.**

h. ——— **Conviction for bigamy—Action for divorce.**—Where, in an action for divorce, it was impossible to produce the marriage certificate, or a certified copy thereof, the *et. accepted* proof of deft.'s conviction of bigamy together with pltf.'s testimony of the marriage as sufficient proof of the marriage.—*PRINSLOO v. PRINSLOO* (1910), T. P. D. 630.—**S. AF.**

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2678 i. Copy—Certified copy.—*Scumble*: a conviction returned to the quarter sessions, & filed by the clerk of the peace, becomes a record of the *et.*, & may be proved by a certified copy.—*GRAHAM v. McARTHUR* (1866), 25 U. C. R. 478.—**CAN.**

k. Parol evidence.—Parol evidence without a certificate of conviction affords *prima facie* evidence that

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463; 27 J. P. 7; 9 Jur. N. S. 776; 11 W. R. 210; 143 E. R. 96.

Annotation:—Mentd. Deal v. Schofield (1867), L. R. 3 Q. B. 8.

Habitual criminals.]—See CRIMINAL LAW, Vol. XIV., pp. 485, 486, Nos. 5307, 5308.

Offences after previous conviction.]—See CRIMINAL LAW, Vol. XIV., pp. 498–500, Nos. 5483–5510.

Offences relating to prisoners—Convict at large.]—See CRIMINAL LAW, Vol. XV., p. 715, Nos. 7731–7738.

C. For What Purposes admitted.

2680. Evidence of falsity of deed—Conviction for procuring forgery.]—IVY'S (LADY) TRIAL, MOSSAM v. IVY (1084), 10 State Tr. 555, 627.

Annotation:—Mentd. Darby v. Ouseley (1856), 2 Jur. N. S. 497.

2681. Liability for repairs of highway—Conviction for non-repair.]—A record of conviction on an indictment against a parish for not repairing a road is conclusive evidence of the liability of that parish to repair.—R. v. ST. PANCRAZ (INHABITANTS) (1794), Peake, 286, N. P.

Annotations:—Consd. R. v. Haughton (1853), 1 E. & B. 501. *Refd.* R. v. Blakemore (1852), 5 Cox, C. C. 513. *Mentd.* R. v. Derbyshire (1842), 6 Jur. 483.

2682. ———.]—If to an indictment for not repairing a highway against a parish consisting of three townships, viz. A., B. & C., there is a plea on the part of C. that each of the three townships has immemorably repaired its own highways separately; the records of indictments against the parish generally, for not repairing highways situate in A. & B. with general pleas of not guilty & convictions thereupon, are *prima facie* evidence to disprove the custom for each township to repair separately; but evidence will be admitted that these pleas of not guilty were pleaded by inhabitants of A. & B. without the privity of the inhabitants of C.—R. v. EARDISLAND (1810), 2 Camp. 494, N. P.

Annotations:—Refd. R. v. Haughton (1853), 1 E. & B. 501. *Mentd.* R. v. Ecclefield (1818), 1 B. & Ald. 348.

2683. ———.]—Semble: judgment by default upon an indictment for non-repair of a highway is not conclusive evidence against the parish of a liability on their part to repair such highway.—R. v. WHITNEY (INHABITANTS) (1835), 3 Ad. & Ell. 69; 3 Nev. & M. M. C. 417; 4 Nev. & M. K. B. 594; 1 Har. & W. 147; 111 E. R. 339.

Annotations:—Refd. R. v. Haughton (1853), 1 E. & B. 501. *Mentd.* Cornwell v. Metropolitan Sewers Comrs. (1855), 10 Exch. 771; R. v. Lancaster (1868), 32 J. P. 711.

2684. ———.]—Upon the trial of an indictment against parish A. for the non-repair of a highway, it appeared that A. had always repaired the road in question, which passed over waste ground in the parish of B., & connected together two separate portions of A. In 1785, the inhabitants of A. submitted to an indictment for non-repair of the same road, & paid a fine. In 1788, inclosure comrs. acting under the authority

of a statute for inclosing the commons, moors, & waste grounds within the parish of B., made an award, whereby they set out the road in question as situate in B. and to be repaired by B. After the award, as before, the inhabitants of A. continued to repair:—*Held*: the former conviction was conclusive evidence against A. that the road was situate in that parish.—R. v. NETHER HALLAM (INHABITANTS) (1854), 3 C. L. R. 94; 24 L. T. O. S. 109; 19 J. P. 165; 6 Cox, C. C. 435.

2685. ———.]—Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would otherwise be *prima facie* liable.—R. v. LORDSMERE (INHABITANTS) (1886), 54 L. T. 766; 51 J. P. 86; 2 T. L. R. 623; 16 Cox, C. C. 65, C. C. R.

Annotation:—Mentd. R. v. Oxford Canal Navigation (1903), 72 L. J. Ch. 285.

2686. Of disputed ownership—Conviction for possession of goods.]—In trespass for breaking the house of A. & taking his woollen yarn, defts. may, under the general issue, show that the yarn was afterwards condemned in order to make out that A. could have no property in it. But the condemnation of the yarn, unless the parties had a search warrant, will not justify the entering of a house.

If yarn of a description liable to be condemned were found in the house of pltf., magistrates have jurisdiction to condemn it under the statute, & to convict pltf., although the yarn was not found on the execution of a search warrant previously granted; & in an action by pltf. for taking it, the conviction is evidence for the defence, although it is founded on the evidence of one of defts.—DAVIS v. NEST (1833), 6 C. & P. 167; 2 Nev. & M. M. C. 161.

Annotation:—Mentd. R. v. Wilcock (1845), 7 Q. B. 317.

2687. To negative claim of right—Action for disturbing watercourse.]—Case for disturbing a watercourse which of right ought to flow into pltf.'s close to irrigate it. Plea, denial of right. There was evidence that pltf. & those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, & that the owners of the watercourse resisted it. On one occasion, when pltf.'s servant drew off the water, he was summoned before a justice for so doing; pltf.'s son by his direction attended & defended the servant, & paid a fine of 1s. The conviction was under a local Act, from which there was a power of appeal. Pltf. did not appeal. The conviction was tendered in evidence & rejected:—*Held*: the evidence was improperly rejected, as the conviction, unappealed against, was, in the circumstances, evidence of an acknowledgment by pltf. that the usage, to draw off the water for irrigation, was not as of right.—EATON v. SWANSEA WATERWORKS CO. (1851), 17 Q. B.

a person had been tried & convicted of a crime.—SCOTT v. M'GAVIN (1821), 2 Murr. 481.—SCOT.

PART IV. SECT. 11, SUB-SECT. 4.—C.

1. Of disputed ownership—Conviction for receiving stolen notes.]—Deft. had been convicted by a criminal ct. for receiving notes knowing them to have been stolen. The notes remained in the hands of the police, who refused to give them up to pltf. without an order of the ct. Pltf. sued for the money, & it was contended on

his behalf that it would only be necessary for him to prove that deft. had been found guilty to entitle pltf. to an order for the money to be paid him:—*Held*: pltf. must prove his claim to the notes to the satisfaction of the ct.; the verdict in the criminal ct. against deft. not being sufficient proof of pltf.'s claim.—PANNA LAL v. GAPIRAM BAZURIAH (1869), 3 B. L. R. App. 2.—IND.

m. Not as adjudication on status.]—The fact that a person has been convicted of being a prohibited

immigrant is not, on a subsequent prosecution of the same person for being a prohibited immigrant found on a subsequent occasion within the Commonwealth, evidence that he is then a prohibited immigrant.—BAIN v. AR KEE (1913), 17 C. L. R. 433.—AUS.

n. To vindicate Government.]—J. was convicted of the theft of 51 bars of gold & sentenced to a term of imprisonment. The gold found in his possession was retained by the police & afterwards sold, the proceeds being

267; 20 L. J. Q. B. 482; 17 L. T. O. S. 154; 15 Jur. 675; 117 E. R. 1282.

Annotations:—*Distd.* R. v. Fairlie (1857), 8 E. & B. 486. **Mentd.** Rolle v. Whyte (1808), 8 B. & S. 116; Glover v. Coleman (1874), L. R. 10 C. P. 108; Dalton v. Angus (1881), 6 App. Cas. 740; Hollins v. Vorney (1884), 13 Q. B. D. 304; Presland v. Bingham (1889), 60 L. T. 433; Lyell v. Hothfield, [1914] 3 K. B. 911.

2688. Evidence of commission of crime.]—A conviction for felony is *res inter alios acta*, & of itself is no evidence in any civil proceeding, that the person convicted has committed a felony (**BRAMWELL, L.J.**).—**LEYMAN v. LATIMER** (1878), 3 Ex. D. 352; 47 L. J. Q. B. 470; 37 L. T. 819; 26 W. R. 305; 14 Cox, C. C. 51, C. A.

Annotations:—*Consd.* In the Estate of Crippen, [1911] P. 108. **Refd.** Yates v. Kyffin-Taylor & Wark, [1899] W. N. 141. **Mentd.** Hay v. Tower Division JJ. (1890), 59 L. J. M. C. 79; Monson v. Tussauds, Monson v. Tussaud, [1894] 1 Q. B. 671.

2689. —.]—**YATES v. KYFFIN-TAYLOR & WARK**, [1899] W. N. 141.

Annotation:—*N.F.* In the Estate of Crippen, [1911] P. 108.

2690. — Presumptive evidence.]—In the Estate of CRIPPEN, No. 2669, *ante*.

2691. To prove betting on licensed premises—Previous conviction—In respect of same premises.]

—W. was convicted for unlawfully using licensed premises for the purpose of betting, & the holder of the licence was then summoned for suffering his premises to be used in contravention of Betting Act, 1853 (c. 119). On the hearing of this information the licensee desired to call evidence to show that no betting had taken place on his premises on the occasion, but the justices refused to admit this evidence & admitted the conviction against W. as being conclusive against the licence holder that betting had taken place & they convicted:—**Held:** the conviction against W. that he had used the premises for the purpose of betting was not admissible in evidence against the licensee, & the conviction of the licensee was therefore wrong & must be quashed.—**TAYLOR v. WILSON** (1911), 106 L. T. 44; 70 J. P. 69; 28 T. L. R. 97; 22 Cox, C. C. 647, D. C.

Of dishonest or criminal life.]—See CRIMINAL LAW, Vol. XIV., pp. 486, 487, Nos.

SUB-SECT. 5.—DECREES.

A. Admissibility.

2692. General rule—Must be a judicial decree.]

—Upon the trial of an issue in prohibition, whether the usurpation of office in a *quo warranto* information mentioned was committed out of the jurisdiction of the County Palatine, & within that of the City of Chester; a document from the remembrancer's office of the Ct. of Exch. was produced, purporting to be a decree made after hearing of a complaint against the citizens of Chester, & their answer, by the Lord High Treasurer of England, the Chancellor of the Exchequer, the Under Treasurer, & the Chief Baron, with the advice & assent of a Queen's Serjeant, & the Queen's Attorney & Solicitor-General, & others of the same Ct.:—**Held:** this document was not admissible in evidence as a decree, because it was not a decree of the Ct. of Exch. nor of any ct. known to the law at the time when it purported to have been made.—**ROGERS v. WOOD** (1831), 2 B. & Ad. 245; 109 E. R. 1134.

Annotations:—**Refd.** Crease v. Barrett (1835), 1 Cr. M. & R. 919. **Mentd.** Evans v. Rees (1839), 10 Ad. & El. 151.

paid into the public treasury. Some years after J. had served his term he sued the Govt. for restoration of the gold or payment of its value:—**Held:** the conviction of J. could be admitted

in proof of the fact that the Govt. in detaining the gold or its proceeds had not acted as a spoliator.—**JUDELMAN v. COLONIAL GOVERNMENT** (1909), 3 Buch. A. C. 446.—**S. AF.**

2693. — Must be an adjudication.]—Pltfs. derived title to a ferry under a grant from Edward III. to the priory of B. Defts. in disproof of this title, sought to show that there was a pre-existing ferry from L. to B., & from B. to L. which rendered the grant of Edward III. void as a grant of ferry. In order to show that both were ferries one way only, pltfs. from B. to L., & the other from L. to B., pltfs. gave in evidence certain proceedings & orders of the Ct. of Ch. of the Duchy of Lancaster, *temp.* Charles I.:—**Held:** none of the orders were admissible in evidence, as not amounting to any final decree, or containing any adjudication of the ct. upon the rights of the parties, but merely directing the continuance of a certain state of things *pendente lite*.—**PIM v. CURELL** (1840), 6 M. & W. 234; 151 E. R. 395.

Annotations:—*Distd.* Neill v. Devonshire (1882), 8 App. Cas. 135. **Refd.** Mercer v. Denne, [1905] 2 Ch. 538; General Estates Co. v. Beaver, [1914] 3 K. B. 918. **Mentd.** Allen v. Hayward (1845), 7 Q. B. 960; North & South Shields Ferry Co. v. Barker (1848), 2 Exch. 136; Dunraven v. Lewellyn (1850), 14 Jur. 1089; Cowes U. C. v. Southampton, Isle of Wight, & South of England Royal Mail Steam Packet Co., [1905] 2 K. B. 287; Hammerton v. Dysart, [1916] 1 A. C. 57.

2694. Chancery decrees—Whether admissible at common law.]—**MARRET v. SLY** (1658), 2 Sid. 75; 82 E. R. 1265.

2695. —.]—**TUCKER v. WILKINS**, No. 3100, *post*.

2696. — — — If pleadings not recited.]—The order for an attachment for not paying the costs of a suit in equity is in itself *prima facie* evidence that a suit had been pending.

a decree in equity is admissible in evidence though it do not recite the bill & answer, though no proof be adduced thereof.—**BLOWER v. HOLLIS** (1833), 1 Cr. & M. 393; 3 Tyr. 356; 2 L. J. Ex. 176; 149 E. R. 452.

Annotation:—**Refd.** Attwood v. Taylor (1840), 1 Man. & G. 279.

2697. — — —.]—On an issue as to the existence of an immemorial right:—**Held:** (1) a decree of the Ct. of Equity, in a cause between third parties, touching the same right, whereby an issue was directed to try whether certain sums were a reasonable recompense, was admissible in evidence; (2) the party producing it was not bound also to put in the depositions in the cause, which were referred to, in the usual form, in the decree. *Semble:* the other party would be entitled to read the depositions as his evidence. (3) Where a document has been put in by one of the parties in a cause, & portions of it have been read at the instance of the opposite counsel, he is then too late to object to its admissibility.—**LAYBOURN v. CRISP** (1838), 4 M. & W. 320; 8 C. & P. 397; 1 Horn. & H. 326; 8 L. J. Ex. 118; 150 E. R. 1451.

Annotations:—*As to (1)* **Refd.** Evans v. Rees (1839), 10 Ad. & El. 151. *Generally.* **Mentd.** Thompson v. Daniel (1853), 10 Hare, 296; Mills v. Colchester Corpn. (1867), L. R. 2 C. P. 476; Woodham v. Peterson (1871), 25 L. T. 26.

2698. — Admissibility in Irish Court.]—A mtgee. of part of an estate in Ireland, filed his bill of foreclosure in the Ct. of Ch. in England, & obtained the usual decree. A mtgee. of the other part of the same estate filed his bill of foreclosure in the Ct. of Ch. in Ireland; & on hearing this cause, deft.'s counsel desired that the decree of the Ct. of Ch. in England might be read, to the intent that the decree of the Ct. of Ch. in Ireland might be made agreeable thereto; but this request was

PART IV. SECT. 11, SUB-SECT. 5.—A.

o. General rule.]—A decretal order may be read at the trial & admitted in evidence on proof of the bill & answer,

Sect. 11.—Judicial proceedings: Sub-sect. 5, A., B. & C.]

refused, because present pltf., though deft. in the former cause, was not brought to hearing in that cause, & consequently no party to the said decree.—*EVERARD v. ASTON* (1717), 3 Bro. Parl. Cas. 561; 1 E. R. 1498, 11 L.

2699. Where parties different.]—*CROUCH v. DRURY* (1661), 1 Keb. 27; 83 E. R. 790.

2700. ———.]—*EVERARD v. ASTON*, No. 2698, *ante*.

2701. ———.]—A decree between other parties may be read as a precedent but not as evidence.—*AUSTEN v. NICHOLAS* (1717), 7 Bro. Parl. Cas. 9; 3 E. R. 7, 11 L.; *affg. S. C. sub nom. NICHOLAS v. AUSTEN* (1715), 2 Wood, 10.

2702. ———.]—A decree read in evidence where the lessee & not the impropiator was party.—*LINCOLN (Bp.) v. ELLIS* (1722), Bunb. 110; 145 E. R. 613.

2703. ———.]—The sentence of an ecclesiastical ct. in matrimonial causes is evidence against third persons.—*CLUES v. BATHURST* (1733), Lee temp. Hard. 11; 95 E. R. 7; *sub nom. CLEWS v. BATHURST*, 2 Stra. 960.

2704. ———.]—*LAYBOURN v. CRISP*, No. 2697, *ante*.

2705. Where parties the same.]—Acts of the ct. as a decree, or order, in another cause between the same parties, may be read without an order.—*BROOKS v. TAYLOR* (1729), Mos. 188; 25 E. R. 341, 1 L. C.

Annotations:—Mentd. *Clare v. Clare* (1731), Cas. temp. Talb. 21; *Greenwood v. Verdon* (1854), 1 K. & J. 74.

2706. ———.]—*ASKEW v. POULTERERS Co.*, No.

2707. Subject matter the same.]—*LAYBOURN v. CRISP*, No. 2697, *ante*.

2708. Divorce decrees—Admissibility in subsequent petition.]—A petition by C., the husband, for dissolution of marriage was dismissed, adultery counter-charged by the co-respondent in the suit having been proved against him. C. presented a fresh petition charging the wife's adultery with other co-respondents, upon which the Queen's Proctor intervened & pleaded the decree in the former suit, & the same adultery which was found against petitioner. In the second suit the verdict was in petitioner's favour on all the issues:—*Held*: the decree in the first was admissible as evidence in the second suit.—*CONRAD v. CONRAD* (1868), L. R. 1 P. & D. 514; 37 L. J. P. & M. 55; 18 L. T. 659; 16 W. R. 1023.

Annotations:—Consd. *Yates v. Kyllin-Taylor & Wark*, [1899] W. N. 141. *Refd.* *Butler v. Butler*, [1894] P. 25. *Mentd.* *Gooch v. Gooch*, [1893] P. 99.

2709. ———.]—*SWAN v. SWAN* (1903), *Times*, Mar. 24.

2710. Decree of judicial separation—On subsequent divorce petition.]—*STOATE v. STOATE*, No. 3021, *post*.

2711. Where depositions referred to in decree—Whether depositions to be put in.]—*LAYBOURN v. CRISP*, No. 2697, *ante*.

B. How Proved.

2712. Registrar's minutes—Not conclusive.]—The registrar's minutes of a decree dismissing a bill are not pleadable in bar to another suit brought for the same matter; for minutes are but evidence of the judgment of the ct. & the ground-work of the decree; but are by no means

ing of the ct. in the former suit:—*Held*: that finding was inadmissible in evidence, being the finding in a case in which G., S., & A., were all co-defts., & a third party pltf.—*GOBIND CHUNDER NUNDEY v. SRIGOBIND CHOWDHURY* (1896), L. R. 24 Calc. 330; 1 C. W. N. 179.—*IND.*

2707 i. Subject matter the same.]—A person who had been placed in a lunatic asylum made his escape. Thereafter he raised an action against the keepers of the asylum, concluding for declarator, that during the whole period of his detention he was *compus mentis*. No defences were lodged, but he was allowed to lead proof, & thereafter he obtained decree of declarator in absence. Subsequently he raised an action of damages against the keepers of the asylum, which was tried upon an issue, putting to the jury whether defenders had "wrongfully & illegally detained" him in the asylum for his loss, injury & damage:—*Held*: the proceeding & decree in the action of declaration were not admissible as evidence in this action & had been properly rejected, being irrelevant to the issue; & further, that even if the question of sanity were material it could not be *res judicata* in this action, where the question raised was not identical with that raised in the declaration.—*MACKINTOSH v. SMITH & LOWE* (1865), 3 Macph (Ct. of Sess.) 6; 4 Macq. 913; 37 Sc. Jur. 318, H. L.—*SCOT.*

PART IV. SECT. 11, SUB-SECT. 5.—B.

2712 i. Registrar's minutes—Not conclusive.]—The ct. pays no regard to the minutes of a decree in the registrar's book.—*PINGAL v. BLAKE* (1828), 2 Mol. 50.—*IR.*

2712 ii. ———.]—In an action on the case against an attorney, for negligence in not attending at the hearing of a civil bill appeal, when the declaration averred the making of the

—*NORMAN v. GUSHUE* (1851), 4 Nfld. L. R. 29.—*NFLD.*

2699 i. Where parties different.]—An action was brought against applt. as surety to an administration bond. The breaches alleged were (1) that the administratrix did not well & truly administer; (2) that she did not make a true & just account of her administration:—*Held*: in the absence of a special agreement by the surety to be bound by an order made against the principal, a decree of the equity ct. in an administration suit brought by one of the next of kin against the administratrix was not evidence against the surety who was not a party to the proceedings.—*BEGLEY v. A.-G.* (1910), 11 C. L. R. 432.—*AUS.*

2699 ii. ———.]—Deft. was not a party to suits in which decrees were obtained, & did not claim through the parties against whom they were passed:—*Held*: the decrees were not admissible in the suit as evidence against him.—*RAM NARAIN RAI v. RAM COOMAR CHUNDER PODDAR* (1885), 1 L. R. 11 Calc. 562.—*IND.*

2699 iii. ———.]—In a suit for *khas* possession of land upon the allegation that deft. refused to give up possession or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against deft. but pltf. did not claim title through the auction-purchaser who had in fact been treated as a trespasser & rejected:—*Held*: the decree was inadmissible in evidence.—*MAHENDRA LAL KHAN v. ROSOMOYI DAS* (1885), 1 L. R. 12 Calc. 207.—*IND.*

2699 iv. ———.]—Pltfs., as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by defts. Defts. denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against

same defts. for the rent of the tenures & in that suit the present pltfs. & other co-sharers of the estate were made co-defts., & the decision in that suit was that the present defts. were in possession & were liable to pay to the then pltf. his share of the rent:—*Held*: the decree in the former suit was not admissible as evidence in the present suit.—*SURENDER NATH PAL CHOWDHURY v. BROJO NATH PAL CHOWDHURY* (1886), 1 L. R. 13 Calc. 352.—*IND.*

2699 v. ———.]—Pltf. purchased land sold in execution of a decree in favour of deft., but was subsequently evicted by the son of the judgment debtor; he now sued in 1889 to recover the purchase-money paid by him on the ground that the judgment debtor possessed no saleable interest in the property in question. The son of the judgment debtor had obtained a decree in 1888 against pltf. & others declaring that the judgment debtor had no saleable interest in the property, & in that suit the present deft. had given evidence in support of the present pltf.'s contention; the judgment in that suit was now admitted in evidence against defts.:—*Held*: the judgment in the former suit was not evidence against deft., he not having been party to it.—*NILAKANTA v. IMAMSAHIB* (1892), 1 L. R. 16 Mad. 361.—*IND.*

2699 vi. ———.]—S. granted to G., & A. a *patti* of a certain share in a *zamindari*, & thereupon P. brought a suit against G., S., & A. for specific performance of an agreement to grant to him, P., a *patti* of same share. That suit was decreed with costs, the whole of which were realised from G. In a suit for contribution brought by G. against S. & A., the lower appellate ct. found that G., S., & A. had conspired in setting up a false defence in the former suit in order to defeat P.'s claim. The only evidence on which the lower appellate ct. had acted as establishing such collusion was the find-

conclusive, being sometimes mistaken by the officer, & often rectified & varied by the ct., upon a summary application.—*CHARLES v. ROWLEY* (1765), 2 Bro. Parl. Cas. 485; 1 E. R. 1081, H. L.

2713. Assignment book—Of Prerogative court.]—*R. v. RAMSBOTTOM* (1787), 1 Leach, 25, n.

2714. Minute book—Decree of Consistorial court.]—*HOULISTON v. SMYTH*, No. 3800, *post*.

2715. Decree of Court of Arches—Necessity for proof of proceedings.]—A decree of the Ct. of Arches for alimony is not admissible in evidence without proof of the proceedings in the suit.—*LEAKE v. WESTMEATH* (MARQUIS) (1811), 2 Mood. & R. 391, N. P.

2716. Copy—Where decree lost.]—*PRICE v. WOODHOUSE*, No. 1963, *ante*.

See, further, Sect. 9, ante.

2717. Verifying affidavit—With evidence of identity of parties.]—*WHITE v. COX* (1876), as reported in 2 Ch. D. 387; 45 L. J. Ch. 685.

C. For What Purposes admitted.

2718. Right to tithes—Decree for payment of tithes.]—An old decree for the payment of tithes is evidence of a vicar's right, though no endow-

ment can be shown, nor any proof of payment in pursuance of that decree.—*BERKLEY v. FOX* (1735), 3 Bro. Parl. Cas. 619; 1 E. R. 1535, H. L.

2719. Revocation of probate—Decree of Prerogative court—Contained in assignment book.]—*R. v. RAMSBOTTOM* (1787), 1 Leach, 25, n.

2720. Existence of decree.]—*BLOWER v. HOLLIS*, No. 2696, *ante*.

2721. Identity of parties—If decree recites bill & answer.]—A decretal order in chancery, reciting the substance of the bill & answer, is admissible, on proof of pedigree, to establish the identity of parties to the suit. But an answer alone, though sworn but not filed, is not admissible.—*WHARTON PEERAGE CASE* (1845), 12 Cl. & Fin. 295; 8 E. R. 1419, H. L.

*Annotations:—**Refd.* *Polini v. Gray*, *Sturla v. Freccia* (1879), 12 Ch. D. 411. *Mentd.* *Donoughmore Peerage* (1853), 3 H. L. Cas. 822.

2722. Adultery—Divorce decree.]—On a petition by a wife for dissolution of her marriage on the ground of adultery coupled with desertion, the decree in a previous suit in which her husband had been co-respondent was produced. This decree stated that the jury found that resp. had been guilty of adultery with the co-respondent, & that

decreed:—*Held*: the original entry in the book kept by the registrar at the sessions, was not primary evidence of the decree.—*DONAGH v. BERGIN* (1812), *Ann. M. & O.* 284.—*IND.*

2716 i. Copy—Where decree lost.]—After an appeal was filed, the decree was destroyed:—*Held*: a copy in the possession of applt. might be received upon evidence being given of its authenticity.—*BISHENDYAL SINGH v. KHADDEMA* (1862), *Marsh.* 213; 1 Hay, 584.—*IND.*

2716 ii. ———.]—The only evidence that a foreclosure decree had been passed was a reference to a copy of the decree contained in a judgment passed in another suit, & a statement by C., who was dead, that the mtge. had been foreclosed. The lower cts. held that the reference in the above-mentioned judgment to the copy of the foreclosure-decree was sufficient evidence of the original decree:—*Held*: there was no legal evidence that the mtge. had been foreclosed.—*KANAYALAL v. PYARABAI* (1882), 1 L. R. 7 Bom. 139.—*IND.*

p. Quarter sessions' decree.]—The primary evidence of a quarter sessions' decree is the decree itself, signed by the assistant barrister; the clerk of the peace's book is good secondary evidence of the decree.—*ALCOCK v. LARKIN* (1812), *Long & T.* 666.—*IR.*

q. Examination of assessor.]—In a complaint for setting up a public shew without the permission of the magistrates:—*Held*: the assessor of the ct., who was also deputy town-clerk, could be competently examined as a witness to prove the refusal of the magistrates to sanction the setting up of the shew.—*PATRICK v. WOOD* (1905), 8 F. (Ct. of Sess.) 4; 43 Sc. L. R. 46; 13 S. L. T. 520.—*SCOT.*

PART IV. SECT. 11, SUB-SECT. 5.—C.

r. Adultery—Decree in suit for alimony.]—Upon an application alleging that the wife had been living apart from her husband, petitioner, for two years in consequence of her adulterous conduct, resp. denied the adultery charged. The petitioner produced as evidence the decree in a suit for alimony, in which he had set up her adultery as a defence. The decree dismissed the bill, & did not state the ground of dismissal:—*Held*: such decree was not sufficient, & the application was refused.—*Re CAMPBELL* (1878), 25 Gr. 480.—*CAN.*

s. Settlement of estate—Probate decree.]—The real estate of the intestate

was partitioned by comrs. appointed under Probate Act, who, by their report, left a certain portion of the land undivided. This partition was confirmed by order of the ct., the estate having been previously settled by decree of the Judge of Probate, which was in evidence. Afterwards, H., husband of one of the heirs of intestate, petitioned the Judge of Probate for a partition of the undivided portion: & a large body of evidence of possession was put in on both sides, the whole of which this ct. held to be futile & unnecessary, as there was no ground for sustaining any possession in either party that could influence the decision. The Judge of Probate dismissed the petition on the ground that he had no power to settle disputed questions of title. On appeal to the Judge in Equity this decision was overruled, & the Judge of Probate directed to proceed with the cause, which he did, & dismissed the petition on the merits. Both parties having appealed:—*Held*: the final decree above referred to was evidence of the final settlement of the estate by the Judge of Probate.—*Re SIMON'S ESTATE* (1878), 12 N. S. R. (3 R. & C.) 357.—*CAN.*

t. Proof of age.]—*TOLTON v. MACGREGOR*, 20 C. L. T. 391.—*CAN.*

u. Ejectment—Partition decree.]—A decree of partition is evidence in an action of ejectment to show that the land in dispute, formerly part of an undivided estate, had been assigned as the separate property of plff.—*DOE v. ESTEY* (1857), 3 All. 489.—*CAN.*

a. Suit for rent arrears—Decree in previous suit.]—In a suit for arrears of rent, decrees in summary suits against deft. for rent for years subsequent to those in respect of which the rent is claimed are no evidence for such rent being due; but such decree is *prima facie* evidence in support of a claim for rent for the next ensuing year.—*AFSUROODDEEN v. SHOROOMHEE BULA DABEE* (1863), *Marsh.* 558; 2 Hay, 664.—*IND.*

b. ———.]—A decree for rent in a suit under Act X. of 1859 against deft., an intervenor which has remained unexecuted for more than three years, is not, in a subsequent suit, admissible in evidence to show that deft. had not, during a period subsequent to the decree, been in *bona fide* receipt of the rent.—*RAM SUNDER TEWARI v. SRIMUNT DEWAS* (1868), 14 B. L. R. 371, n.; 10 W. R. 215.—*IND.*

c. ———.]—A decree for rent

is admissible in evidence against deft. to prove the rate of rent he was liable to pay, although the decree has not been executed for three years, & has therefore become barred under the law of limitation.—*BEERCHUNDER MANICK BAHADOOR (MAHARAJAH) v. RAMKISHEN SHAW* (1874), 14 B. L. R. 370; 23 W. R. 128.—*IND.*

d. ———.]—Where plff. sued deft. for a year's rent at same rate which had been decreed to him for the previous year in a suit which he had brought against same deft. for rent of same property, & relied upon the former decree, which had been obtained *ex p.* as evidence of the rent due to him from deft.:—*Held*: the decree in the first suit determined the amount of rent due from deft. to plff.—*BIRCHUNDER MANICKYA v. HURRISH CHUNDER DASS* (1878), 1 L. R. 3 Cal. 383.—*IND.*

e. ———.]—In a suit for arrears of rent of a half share of land, plffs. relied upon an *ex p.* decree for rent at a certain rate, which they had obtained against the tenants of this share. Defts. relied upon a subsequent decree in a contested suit by plffs., against the tenants of the other half share, in which a lower rate of rent had been given. No other evidence than the decrees was produced on either side. It did not appear whether the *ex p.* decree had ever been executed:—*Held*: it was open to defts. to dispute the rate of rent claimed.—*BHUGHRATHI PATONI v. RAM LOCHUN DEB* (1882), 1 L. R. 8 Cal. 275.—*IND.*

f. ———.]—Decisions as to rates of rent in previous suits are admissible in a subsequent suit as evidence of local usage, though the parties in the subsequent suit were not parties to the previous suits.—*EASWARA DOSS v. PUNJAVANACHARI* (1890), 1 L. R. 13 Mad. 361.—*IND.*

g. Adoption.]—In a suit by C. against D., the widow of R., to set aside alienations by D. & to establish his title as reversionary heir to the property left by R. on the ground that R. had been adopted by J., deceased, & that, on the death of R. without issue, the right accrued to C. as an agnate of J., it was found that R. had been adopted by J., & that C. was reversionary heir. In a subsequent suit by K. against C. for a declaration of his right as heir to R. & for possession of the property on the ground that R. had not been adopted by, but took the property by gift from J.:—*Held*: the

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he had been condemned in costs, but contained no finding by the jury that the co-respondent had been guilty of adultery with resp. :—*Held*: the decree was not by itself sufficient evidence of adultery against the husband.—*RUCK v. RUCK*, [1896] P. 152; 65 L. J. P. 87.

Annotation:—*Distd.* *Eskell v. Eskell* (1919), 63 Sol. Jo. 777.

2723. ———.]—A decree in a previous suit, finding as a fact the adultery of a party to that suit, will, on identity being established, be admissible as evidence of adultery against the same person as a party to a subsequent suit.—*ESKELL v. ESKELL* (1919), 88 L. J. P. 128; 63 Sol. Jo. 777.

2724. Marriage—Decree of restitution of conjugal rights.—Petitioner obtained a decree of restitution of conjugal rights. In that suit she gave formal proof of her marriage to resp. in Scotland:—*Held*: in a suit for divorce following on the suit for restitution of conjugal rights, it was unnecessary for petitioner to prove again the marriage in Scotland.—*FREER v. FREER* (1910), 27 T. L. R. 13; 51 Sol. Jo. 874.

SUB-SECT. 6.—DEPOSITIONS AND EXAMINATIONS.

A. Admissibility.

(a) In General.

See Jud. Act, 1873 (c. 66), s. 100, R. S. C., Ord. 37, rr. 18, 24.

2725. Court where originally taken not competent—Court of Council.—Depositions taken in the Ct. of the Council at York in case of freehold refused in Ch.—*R. & HUNSDON (LORD) v. ARUNDEL (COUNTESS) & HOWARD (LORD)* (1616), Hob. 109; Moore, K. B. 823; 80 E. R. 258.

Annotations:—*Mentd.* *R. v. Knollys* (1693), 2 Salk. 509; *Lee v. Elkins* (1701), 12 Mod. Rep. 585; *Dalston v.*

Judgment in the former suit was not admissible in evidence on the question of the adoption.—*KANDYA LALL v. RADHA CHITUN* (1866), B. L. R. Sup. Vol. 602; 2 Ind. Jur. N. S. 229; 7 W. L. R. 338.—*IND.*

h. ———.]—In a suit for partition of family property, an adoption of the father of deft. by D. was put in issue, & to prove it, deft. tendered in evidence decrees in which the alleged adopted son was so described:—*Held*: the evidence of the adoption was admissible.—*KRISHNANAMI AYYANGAR v. RAJAGOPALA AYYANGAR* (1893), 1 L. R. 18 Mad. 73.—*IND.*

k. Identity of land—Decree in previous suit.—Pltf. sued for arrears of rent & for ejectment by reason of non-payment of rent. Deft. denied that the relation of landlord & tenant existed, & further said that the land now sued for was not the land then in dispute. In the first ct. the deputy collector, taking into consideration that deft. had admitted that he was partly in possession of the land, compared the proceedings in the former case with those in the present suit, & on this ground held that the lands in dispute were identical in both cases. When the case went up in appeal the judicial comr. decided that the previous decree was of very little weight, & as there was no independent evidence to show that the lands in dispute were the same in both cases, he dismissed the suit:—*Held*: the judicial comr. was wrong; if on comparison of the papers it was clear that the lands in dispute were the same, no independent evidence was necessary, & as to the former decree, so long as it remained undisputed it was binding between the

parties.—*RAMJAN KHAN v. RAMAN CHAMAR* (1883), 1 L. R. 10 Cal. 89.—*IND.*

l. Evidence of dispossession—In suit for mesne profits.—A decree for possession made by a ct. under Specific Relief Act, 1877, in a suit beyond the pecuniary limit of that ct.'s jurisdiction, is some evidence of dispossession by defts. in a subsequent suit against same defts. to recover mesne profits.—*JIAULLAH SHEIKH v. INU KHAN* (1896), 1 L. R. 23 Cal. 693.—*IND.*

m. Where judgment debtor sues for contribution.—Where the amount of a decree has been recovered from one of two judgment debtors against whom it was jointly passed, & he sues the other judgment debtor for contribution, a *prima facie* case is made by the production of the judgment & the certificate of satisfaction. That judgment is conclusive as between the judgment debtors, in the sense that it will not be open to either of them to contend that the former suit should have been dismissed, or that one of the parties should not have been held liable to the decree holder therein, or that the amount decreed was excessive or based on principles erroneous on the face of the judgment.—*SIVA PANDA v. JUUSTI PANDA* (1901), 1 L. R. 25 Mad. 599.—*IND.*

n. Evidence of reputation—Matter of public interest.—Pltf. tendered in evidence certain proceedings in two possessory suits between pltf.'s ancestor & V., who each claimed to be entitled to a several fishery in that portion of the river in half of which the several fishery was claimed by pltf. in the present cause, including the minutes

Coataworth (1721), 1 P. Wms. 731; *Cowper v. Cowper* (1734), 2 P. Wms. 720; *Cookes v. Hellier* (1749), 1 Ves. Sen. 234; *Whitfield v. Fausset* (1750), 1 Ves. Sen. 387.

2726. Where cause dismissed on merits—Not for irregularity.—*BACKHOUSE v. MIDDLETON* (1670), 1 Cas. in Ch. 173; *Freem. Ch.* 132; 3 Rep. Ch. 39; 22 E. R. 748.

Annotation:—*Mentd.* *Metcalfe v. Hutchinson* (1875), 1 Ch. D. 591.

2727. ———.]—Depositions in a cause in chancery are good evidence though the bill is dismissed.—*SMITH v. VEALE* (1699), 1 Ld. Raym. 735; 91 E. R. 1391, N. P.

2728. Record of pleadings lost—Proof of loss required.—(1) Parol testimony of a mtg. made under a jointure is evidence to show an estate for life in case at the time of a recovery suffered by tenant in tail if the jointure deed be lost.

(2) Depositions taken in Chancery may be read in evidence if the bill & answer be proved to be lost.—*HAINES BARLEY'S CASE* (1696), 5 Mod. Rep. 210; 87 E. R. 614.

2729. ———.]—Depositions in an old cause admitted, although neither bill, answer or decree could be found.—*BYAM v. BOOTH* (1816), 2 Price, 231; 3 Eag. & Y. 716; 146 E. R. 79.

Annotations:—*Mentd.* *Scott v. Lawson* (1819), 7 Price, 267; *Evans v. Row* (1825), M'Cle. & Yo. 577; *Willis v. Farrer* (1828), 2 Y. & J. 217; *Willis v. Farrer* (1829), 3 Y. & J. 264; *Masters v. Fletcher* (1830), You. 25; *Salkeld v. Johnston* (1842), 1 Hare, 196.

2730. Where cause abated.—*JOHNS v. STAFFORD* (1719), Bunb. 50; 145 E. R. 592.

2731. Depositions in cross cause—Not relating to matter in original cause.—Evidence in the cross cause concerning the matters in issue in the original cause, not allowed to be read after a decree in that cause; otherwise as to depositions in the cross cause not relating to the matters put in issue in the original.

Where neither party examines witnesses in the original cause, the depositions of witnesses examined to the same matters put in issue by that

of the decree, the original not having been found, whereby the ct. granted an injunction to quiet pltf.'s ancestor & V. in such possession as they had at the time of the filing of their respective bills:—*Held*: (1) the decree was evidence by way of reputation of the possession in fact of the several fishery at the time of the bills being filed; (2) the decree was admissible as evidence against the public, inasmuch as the possession in fact of a fishery in a tidal river, was a matter of public interest, although the particular matter in controversy was in which of two private individuals the possession was.—*DEVONSHIRE (DUKE) v. NEILL* (1877), 2 L. R. Ir. 132.—*IR.*

o. Right to estate.—In a reduction of a decree *in foro* relative to the right to an estate & the titles thereof:—*Held*: defender may produce the decree, & thereupon found on it as *res judicata*, & refuse to produce the titles till the decree is set aside.—*MAULE v. MAULE* (1827), 5 Sh. (Ct. of Sess.) 238.—*SCOT.*

PART IV. SECT. 11, SUB-SECT. 6.—A. (a).

p. Court where originally taken not competent.—*Qu.*: whether in a case falling under Evidence Act, s. 33, evidence recorded by a ct. can be regarded as not given in a judicial proceeding on the mere ground that the decree of the ct. was subsequently set aside for defect of jurisdiction.—*SRI RAJAH PRAKASHARAYAN GARU v. VENKATA RAO* (1912), 1 L. R. 38 Mad. 160.—*IND.*

q. On appeal—Necessity for court's leave.—Where a party making a

cause may be read at the hearing of the cross-cause.—*WILFORD v. BEASELEY* (1747), 3 Atk. 501; 28 E. R. 1088.

2732. On appeal—Against order for removal of pauper—Examination of pauper.]—An *ex parte* examination in writing of a pauper taken on oath before two magistrates for the purpose of removing him to the place of his settlement is not admissible in evidence upon an appeal against an order of removal on the ground of the pauper's having absconded between the notice of appeal & the trial of it before quarter sessions.—*R. v. NUNEHAM COURTNEY (INHABITANTS)* (1801), 1 East, 373; 102 E. R. 144.

2733. —Against bastardy order—Deposition of mother.]—Notice of the recognisance duly entered into to try an appeal against an order of bastardy under Bastardy Act, 1845 (c. 10), s. 3, was duly sent by post to the address of the woman who was in fact dead at the time of the sending. This fact having been proved at the trial of the appeal, the magistrate dismissed it:—*Held*: (1) as the duty of sending the notice was cast on applt. by the laws, & not by his own voluntary contract, & was by the act of God made impossible of performance, applt. was excused from sending the notice, & entitled to a writ of *mandamus* commanding the sessions to hear the appeal.

(2) It seems clear that the evidence [of the mother in the depositions] could be received (*WIGHTMAN, J.*).—*R. v. LEICESTERSHIRE JJ.* (1850), 15 Q. B. 88; 4 New Mag. Cas. 83; 4 New Sess. Cas. 124; 19 L. J. M. C. 209; 15 L. T. O. S. 132; 14 J. P. 542; 14 Jur. 550; 117 E. R. 391.

Annotation:—As to (1) *Refd. Tipperary Case* (1875), 3 O.M. & H. 19.

2734. Taken under commission—Old commission presumed lost.]—Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost; *aliter*, where under a recent one.—*BAYLEY v. WYLIE* (1806), 6 Esp. 85, N. P.

2735. —Recent commission.]—*BAYLEY v. WYLIE*, No. 2734, *ante*.

2736. Book referred to in deposition—Admitted as part of deposition.]—If a witness examined upon interrogatories refers to a writing itself not evidence, as containing a statement of the facts to which he is interrogated, this writing may be read as part of his deposition.—*FALCONER v. HANSON* (1807), 1 Camp. 171, N. P.

motion to the Div. Ct. of the Appellate Div. proposes to read, at the hearing of the motion, the depositions of certain witnesses to be taken, he must obtain leave from the Div. Ct. to examine the witnesses; an appointment issued without leave for their examination is irregular, & will be set aside.—*CROWLEY v. BOVING & CO. OF CANADA* (1918), 8 O. W. N. 219; 33 O. L. R. 491; 23 D. L. R. 696.—*CAN.*

r. Taken under commission—Foreign commission.]—*ST. JOHN v. FRIEL* (1906), 4 W. L. R. 126.—*CAN.*

2741. In action for malicious prosecution—Right of defendant to use own depositions.]—On the trial of an action for malicious prosecution, deft. tendered a deposition taken by a Justice of the peace in another matter for the purpose of showing that deft. was actuated by an indirect motive in instituting the proceedings:—*Held*: (1) the deposition was admissible to prove pltf. had, in deft.'s presence, stated something on oath which was calculated, & which by other evidence, was shown to have actuated deft. to take a particular course, & also which would be cal-

culated to displace, in his mind, a belief in pltf.'s guilt: (2) as to what was said before the Justice the deposition was the best evidence.—*MILLNER v. SANFORD* (1893), 25 N. S. R. 227.—*CAN.*

s. Depositions on rehearing—Not used at original hearing.]—A party is entitled to have an order upon *præcipe* to prove *vidæ voce* at the rehearing of a cause depositions which had not been used at the original hearing.—*CORRY v. CORBY* (circa, 1857), 1 Ch. Ch. 10.—*CAN.*

t. Foreign depositions.]—Foreign depositions may be read, although not taken in the presence of prisoner.—*IL. v. BURKE* (1889), 6 Man. L. R. 121.—*CAN.*

a. Contradicting evidence given at trial—Not admissible.]—*RUSHTON v. GRAND TRUNK RY. CO.* (1903), 23 C. L. T. 295.—*CAN.*

b. Contradicting witness.]—Held: A deposition tendered in evidence for the purpose of contradicting a witness was improperly received where the attention of the witness was not called

2737. Proof of previous cause—Necessity for—Office copy of proceedings.]—*WILLIAMS v. BROADHEAD*, No. 2796, *post*.

2738. —.]—An order of course, to read, in a suit in this Ct., evidence taken in a former suit between the same parties in the Ch. Ct. of Lancaster, discharged as irregular. The right course in such a case is to prove that the issue is the same by production of the bill & answer, & the depositions can then be read without an order.—*STEPHENSON v. BINEY* (1866), L. R. 2 Eq. 303; 14 L. T. 432; 12 Jur. N. S. 428; 14 W. R. 788.
Annotation:—*Mentd.* Allen v. Bonnett (1868), L. R. 6 Eq. 522.

2739. Opportunity to cross-examine—Not sufficient ground.]—The deposition of a witness, taken in a judicial proceeding, in the presence of the party there charged is not admissible in another proceeding against that party on the ground that he was present, & had the opportunity of cross-examining.—*MELEN v. ANDREWS* (1829), Mood. & M. 336, N. P.

Annotations:—*Expld. & Distd.* Finden v. Westlake (1829), Mood. & M. 461; Simpson v. Robinson (1848), 12 Q. B. 511.

2740. Notes of magistrates' clerk—Regular deposition subsequently drawn up.]—In an action to recover back money paid by a banker on a cheque, & afterwards allowed to his customer, on a suggestion that the cheque had been forged; the question in such action being, whether the cheque in fact was a genuine instrument or not, the notes of the magistrate's clerk, of statements made by the customer on a charge against the person supposed to have forged the cheque, are receivable in evidence, though his deposition was afterwards regularly signed pursuant to the statute.—*WILLIAMS v. WOODWARD* (1830), 4 C. & P. 346, N. P.

2741. In action for malicious prosecution—Right of defendant to use own depositions.]—Where, in case for a malicious charge of felony, pltf. puts in, to prove a formal part of his case, deft.'s & another person's depositions before the magistrates, deft. has a right to use his own deposition as evidence in the cause, but not that of the other deponent.—*JACKSON v. BULL & ALISON* (1838), 2 Mood. & R. 170, N. P.; *subsequent proceedings*, 2 J. P. 695.

2742. Examination of witnesses in second cause not concluded.]—Deft. in one suit instituted another himself as pltf.; publication passed in the first cause, & was enlarged in the second, with the consent of pltf., without prejudice, however,

to the writing before it was tendered.—*BLOIS v. MIDLAND RY. CO.* (1905), 39 N. S. R. 242.—*CAN.*

c. Taken at preliminary hearing.]—Where a deposition has been regularly taken down in writing by a magistrate at a preliminary hearing, & such deposition is available, that deposition is the best evidence of what the witness stated on that occasion.—*R. v. PRASLOSKI* (1910), 15 B. C. R. 29.—*CAN.*

d. —Statements not challenged.]—In the course of a preliminary inquiry, held under Indian Merchant Shipping Act, 1863, to investigate into a collision, deft. co. being represented by their attorney, certain officers of deft. co. made certain statements on oath:—*Held*: the failure of the attorney of deft. co. to challenge the accuracy of these statements afforded a strong presumption that the imputations against deft. co. therein contained were correct, & the statements were admissible in evidence.—*ASIATIC STEAM NAVIGATION CO. v. BENGAL COAL CO.* (1908), L. L. R. 35 Cal. 751.—*IND.*

e. To ascertain value of stolen

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to its being set down for hearing; plff. in the second cause having examined his witnesses, obtained the common order to read in the one cause "the depositions taken" in the other, "saving all just exceptions"; the order was held regular, though the examination of witnesses in the second cause was going on, & publication might happen not to pass therein before the hearing of the first cause; & a motion to discharge the order for irregularity was refused with costs, but with an intimation by the ct. that application might be made to the judge before whom the cause was, to relieve from payment thereof on merits.—*SOURTON v. MARRIOTT* (1846), 7 L. T. O. S. 318.

2743. Deposition taken in extinct court—Admissible only if embodied in decree of that court.]—*LINZEE v. LINZEE*, No. 2438, *ante*.

(b) Suits between Same Parties.

2744. General rule—Admissible only if between same parties.]—*CROUCH v. DRURY* (1661), 1 Keb. 27; 83 E. R. 790.

2745. ———.]—*RUSHWORTH v. PEMBROKE* (COUNTESS) & *CURRIER* (1668), Hard. 472; 145 E. R. 553.

*Annotations:—***Consd.** *Bullen v. Michel* (1816), 2 Price, 399. **Expld. & Distd.** *Brickell v. Hulce* (1837), 7 Ad. & El. 454. **Expld.** *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. **Refd.** *Tucker v. Sanger* (1824), McCle. 424; *Cole v. Hadley* (1840), 11 Ad. & El. 807; *Richards v. Morgan* (1863), 4 B. & S. 641.

2746. ———.]—*ANON.* (1677), 2 Cas. in Ch. 250; 22 E. R. 930.

2747. ———.]—(1) Depositions taken in a former cause, where neither plff. nor deft. were parties, cannot be read as evidence, but where either plff. or deft. was a party in the former cause, the depositions in that cause may be read against such of them as was a party.

(2) The abstract of a deed is no evidence; & much less, an attested copy of such abstract.—*PETERBOROUGH (EARL) v. GERMAINE* (1702), 3 Bro. Parl. Cas. 539; 1 E. R. 1485, II. L.; *subsequent proceedings* (1709), 6 Bro. Parl. Cas. 1, H. L. *Annotations:—***Generally, Mentd.** *Moss v. Anglo-Egyptian Navigation Co.* (1865), 1 Ch. App. 108; *Tredeggar v. Windus* (1875), L. R. 19 Eq. 607.

2748. ———.]—*BARSTOW v. PALMES* (1704),

*article.]—**Semble*: copies of the depositions taken before the judges were inadmissible at the trial before the judge, & the trial judge had no right to look at these depositions in order to discover the value of the article alleged to have been stolen.—*R. v. TAYLOR* (1914), 26 W. L. R. 632; 7 All. L. R. 72.—**CAN.**

1. Deposition of haver.]—The deposition of a haver is not received to prove the handwriting of papers produced by him.—*KEIR v. ROXBURGH* (1822), 3 Murr. 126.—**SCOT.**

g. ———.]—The deposition of a haver cannot be produced to prove a fact in the cause.—*CLARK v. SPENCE* (1824), 3 Murr. 450.—**SCOT.**

PART IV. SECT. 11, SUB-SECT. 6.—
A. (b).

2744 i. General rule—Admissible only if between same parties.]—Where a person who had given evidence in an action at law between substantially same persons as were the parties to this suit, was afterwards committed to the provincial penitentiary, & refused to be examined in this cause, the ct. ordered his evidence to be read from the notes of the judge who

Prec. Ch. 232; 2 *Eq. Cas. Abr.* 490; 24 *E. R.* 113.

2749. ———.]—*MACKWORTH v. PENROSE* (1728), Dick. 50; 21 *E. R.* 186.

2750. ———.]—Where a person has been examined here, his deposition may be read at law between the same parties.—*FRY v. WOOD* (1737), 1 Atk. 445; 26 *E. R.* 284.

2751. ———.]—In the Ct. of Ch. depositions taken in one cause are frequently read in another, saving all just exceptions, as that they are not between other parties, etc. So in courts of law the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim (*LORD KENYON, C.J.*).—*R. v. JOLLIFFE* (1791), 4 *Term Rep.* 285; 100 *E. R.* 1022.

*Annotations:—***Consd.** *R. v. Willott* (1795), 6 *Term Rep.* 294. **Mentd.** *Spencely v. De Willott* (1806), 3 Smith. K. B. 321; *Re Fernandes* (1861), 6 H. & N. 717; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *Dixon v. Farrer* (1886), 35 W. R. 95; *R. v. Tibbits*, [1902] 1 K. B. 77.

2752. ———.]—Depositions of claimant in a former case in which he was owner & master of the vessel invoked by the captor. Objection overruled. Evidence admitted.—*THE VRIENDSCHAP* (1802), 4 Ch. Rob. 166; 165 *E. R.* 573.

2753. ———.]—On a petition to expunge the debt of D. the examination of a witness on a former occasion as to a debt sought to be proved by B. cannot be read.—*Re COLES, Ex p. COLES* (1818), 3 Madd. 315; Buck, 242; 56 *E. R.* 521.

*Annotations:—***Consd.** *Ex p. Chambers* (1835), 1 Deac. 197; *Re Prescott, Ex p. Prescott* (1840), 4 Jur. 852. **Refd.** *Re Nias & White, Ex p. Scott* (1818), Buck, 279. **Mentd.** *Re Lloyd, Ex p. Brown* (1833), 3 L. J. B. 6.

2754. ———.]—Evidence with respect to a transaction between A. & B., taken on behalf of B. in a suit between B. & C. for the purpose of asserting against C. a right to property which B. claimed by virtue of that transaction, cannot be used by D. in a suit to which B., C. & D. are parties, & in which D. sets up both against B. & C. an equitable interest in the property, contemporaneous with, & growing out of, the title alleged to have been acquired by B.

A. made a voluntary settlement of lands in favour of C. & afterwards, under an alleged contract for sale, conveyed them to B., who was represented on the face of the conveyance to be a purchaser for value. B. then filed a bill against C. to have the voluntary settlement set aside &

had tried the action at law.—*E. v. BOUTON* (1851), 2 Gr. 693.—**CAN.**

2744 ii. ———.]—A charging order was made against stock in a railway co. to which a person was entitled, but such stock, it was shown, had, by his direction, been issued to his son, so that in a suit against the father the sheriff could not dispose of it under execution. Thereupon a bill was filed against the father & son stating these facts, & charging that the son gave no consideration for the stock; that same was issued to him to hold for the use of the father, & was so issued to defeat, hinder, & delay plffs. & other creditors of the father. At the hearing no evidence was given in support of plffs. case other than the pleadings & proceedings in the suit against the father, & in which such charging order had been made: but the depositions of the son, who had been examined in that suit, were not read.—*Held*: as the son had not been a party to that cause, he was not bound by the evidence therein.—*ALLAN v. PHILLIPS* (1876), 23 Gr. 395.—**CAN.**

2744 iii. ———.]—Where a witness had given testimony under oath in a judicial proceeding, in which the adverse litigant had the power to

cross-examine, the testimony so given, will, if the witness himself cannot be called, be admitted in any subsequent suit between same parties, or those claiming under them; provided, it relates to same subject, or substantially involves same material questions.—*HOVEY v. LONG* (1896), 33 N. B. R. 462.—**CAN.**

2744 iv. ———.]—*SUFANATH DASS v. MOHESH CHUNDER CHUCKERBATTI* (1886), 1 L. R. 12 Calc. 627.—**IND.**

2744 v. ———.]—A prosecution was instituted by S. against N. at the instance & on behalf of F. for criminal trespass in respect of a certain house, & on his own behalf for assault & insult. S. gave evidence at the trial in support of these charges. F. subsequently brought a civil suit against N. for possession of same house. S. died before the institution of the civil suit. At the trial of the civil suit the deposition of S. in the criminal ct. was tendered by F. as evidence on the issue of possession.—*Held*: S. being dead, & the proceedings being between same parties, & the issues being substantially the same, the deposition of S. was admissible.—*FOOLKISSORY DASSEE v. NOBIN CHUNDER BHUNJO* (1895), 1 L. R. 23 Calc. 441.—**IND.**

his own title to the lands established, & in that suit examined a witness to prove the *bona fides* of the sale. D. subsequently filed a bill against B. & C., alleging that the sale was valid, but that the price was in part paid out of monies which belonged to D., & claiming a lien to that extent upon the lands purchased. Finally, C. filed a bill against B. & D. to set aside the sale *in toto*, on the ground of its being fraudulent & collusive, & to establish the voluntary settlement:—*Held*: in the last mentioned suit, upon an issue directed between D. & C. to try whether the purchase-money was *bonâ fide* paid, it was not competent to D. to use the deposition taken in the suit between B. & C.—*HUMPHREYS v. PENSAM* (1836), 1 My. & Cr. 580; 40 E. R. 498, L. C.

Annotation:—*Consd.* Printing, Telegraph & Construction Co. of Agence Havas v. Drucker, [1894] 2 Q. B. 801.

2755. ———.]—In an issue from Chancery between A. & B., depositions produced in Chancery by B., in a suit of C. against B., are inadmissible.—*ATKINS v. HUMPHREYS* (1836), 1 Mood. & R. 523, N. P.

Annotation:—*Expld.* Richards v. Morgan (1863), 4 B. & S. 641.

2756. ———.]—The carriage of P. was driven against the carriage of M., whereby M.'s thigh was broken. On the trial of an action of trespass by M. against P. for this, S., a surgeon, was called as a witness for M., who recovered £600 damages against P. S. afterwards brought an action against M. for his services as a surgeon in attending M. after his thigh was broken. The counsel of S. proposed to go into evidence to show what S. stated as to the amount of his charge for attendance on M. in giving his evidence on the trial of the action by M. against P.:—*Held*: such evidence was not admissible.—*SUTHERLAND v. McLAUGHLIN* (1842), Car. & M. 429, N. P.

2757. ———.]—Where a bill had been filed to administer the real & personal estate of an intestate, the object being to ascertain his co-heirs & next of kin, & after decree made, but before it was drawn up, a person claiming to be a co-heir & one of the next of kin, not a party to the first suit, had filed a bill against all the parties to the first suit also praying administration, with the object of having the evidence of a witness taken *de bene esse*, & the witness had been examined & cross-examined; an application that the evidence taken *de bene esse* in the second suit might be read in the first suit was refused.—*HILL v. HIBBIT* (1869), L. R. 7 Eq. 421; 38 L. J. Ch. 447.

2758. Issue not joined in former cause.]—Depositions in a former cause, between the same parties & for the same matter not allowed to be read where issue was not joined in the former cause.—*BAKER v. SWEET* (1721), Bunb. 91; 145 E. R. 606.

2759. Deposition not equivalent to admission.—By party in whose favour made.]—In an action against A. who was member, not master, of a hunt, who had taken the shooting, etc., on pltf.'s farm, for trespass in hunting & also for laying down rabbits, etc.:—*Held*: a deposition made on A.'s

behalf in a suit in chancery between himself & pltf. as to the same subject matter, was not admissible against him.

It [the deposition] cannot be put in as it does not appear to have been so far relevant to the issue, or to have been so used or adopted by deft. as to make it admissible against him in this action as an admission made by him or with his authority (*COCKBURN, C.J.*).—*PAGET v. BIRKBECK* (1863), 3 F. & F. 683, N. P.

(c) Parties Privy to Previous Litigation.

2760. General rule.]—Depositions taken in a former cause made use of.

The depositions in the former cause ought not to be used against the now defts., unless they claim under the former defts.; but if they do, then the former depositions ought to be admitted as evidence against them (*per CUR.*).—*TOLSON v. LAMPLUGH* (1869), 2 Rep. Ch. 43; 21 E. R. 611.

2761. ———.]—Depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom those depositions were taken. But if a legatee brings a bill against the exor., & proves assets, another legatee, though no party, may have the benefit of those depositions.—*COKE v. FOUNTAIN* (1866), 1 Vern. 413; 1 Eq. Cas. Abr. 227; 23 E. R. 554.

2762. ———.]—On the trial of an issue, whether R. died intestate, the parties being at liberty to read all the evidence that was read in the cause, depositions of a witness in former suits between H. & E., & E.'s eldest son, who had the same interests in the question as the parties to the issue, were read:—*Held*: pleadings & depositions, & a decree in a former suit, the same will being in issue, were admissible, as showing the acts of the parties who had the same interests under the will as pltf.—*LORTON (VISCOUNT) v. KINGSTON (EARL)* (1838), 5 Cl. & Fin. 269; 7 E. R. 406.

2763. What amounts to privity.—Co-legatees.]—*COKE v. FOUNTAIN*, No. 2761, *ante*.

2764. ———. Tenant for life & remainderman.]—*PETERBOROUGH (LORD) v. NORFOLK (DUCHESS)* (1703), Freem. Ch. 264; Prec. Ch. 212; 2 Eq. Cas. Abr. 413; 22 E. R. 1199.

2765. ———. Tenants in tail.]—*PETERBOROUGH (LORD) v. NORFOLK (DUCHESS)* (1703), Freem. Ch. 264; Prec. Ch. 212; 2 Eq. Cas. Abr. 413; 22 E. R. 1199.

2766. ———.]—Depositions taken in a cause where a tenant in tail was deft. are binding on another tenant in tail, who came *in esse* before a decree, & who took as tenant in tail prior to the former tenant in tail, who had been made a deft.—*WESTMEATH (LORD) v. WESTMEATH (LADY)* (1818), 3 Madd. 436; 56 E. R. 565.

2767. ———. Tenant in fee & heir.]—*PETERBOROUGH (LORD) v. NORFOLK (DUCHESS)* (1703), Freem. Ch. 264; Prec. Ch. 212; 2 Eq. Cas. Abr. 413; 22 E. R. 1199.

2768. ———. Copyholders.]—*LEEDS MILL CASE*

PART IV. SECT. 11, SUB-SECT. 6.—A. (c).

2760 i. General rule.]—In an mtgce. action there was a reference to a master for sale, etc. After sale & satisfaction of pltf.'s claim out of the proceeds, a balance remained in et., which R. applied to the master to have paid out to her. Upon such application R. was examined before the master, who refused the application. An order was afterwards made by a judge referring to the master to ascertain who was

entitled to the fund, & to settle priorities. Upon such reference the master ruled that the depositions of R. taken upon the former application could be read:—*Held*: the depositions could be read subject to the right of A., an opposing claimant of the fund, to cross-examine R. upon them.—*MACLENNAN v. GRAY* (1888), 12 P. R. 431.—*CAN.*

2760 ii. ———.]—A party having been examined as a witness in a former cause:—*Held*: his depositions were

sufficiently put in issue to entitle them to be read by a general reference in the pleading to his deposition.—*HOULDTCH v. DONEGAL (MARQUIS)* (1831), 1 Mol. 366.—*IR.*

2760 iii. ———.]—*Held*: a witness before his examination was entitled to have a deposition read over to him, which he had previously omitted as a haver in another & relative action.—*BRECHIN MAGISTRATES v. GUTHRIE & Co.* (1835), 13 Sh. (Ct. of Sess.) 556; 10 Fac. Coll. 364.—*SCOT.*

Sect. 11.—Judicial proceedings: Sub-sect. 6, A. (c),

(circa 1800), cited in 4 M. & S. at p. 491; 105 E. R. 916.

*Annotation:—***Refd.** *Freeman v. Phillips* (1816), 4 M. & S. 486.

2769. ———.]—In an action by a copyholder against the lord of a manor for a false return to a *mandamus* & not guilty pleaded:—**Held:** (1) depositions made in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, & which depositions were made by witnesses on behalf of the copyholder, were admissible evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the new copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves, that they were such, or were persons acquainted with the customs of the manor; (2) their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made *post litem motam*, because the same custom was not in controversy in the former suit as in the present.—**FREEMAN v. PHILLIPS** (1816), 4 M. & S. 486; 105 E. R. 914.

*Annotations:—*As to (1) **Consd.** *Evans v. Taylor* (1838), 7 Ad. & El. 617. **Refd.** *Evans v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578. As to (2) **Appld.** *Ward v. Pomfret* (1832), 5 Sim. 475. **Consd.** *Gee v. Ward* (1857), 7 E. & B. 509. **Refd.** *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170.

2770. ———.]—In 1815 some customary tenants of a manor filed their bill on behalf of themselves & all other the customary tenants to establish their right to work minerals under their tenements without the consent of the lord. A commission was taken out in the same year to examine certain old persons *de bene esse*, & they were examined. After this the suit abated, was revived, & answers were put in in 1819, after which nothing further was done. In 1871 a bill of the same nature was filed by customary tenants, who did not derive title under any of the persons named as plffs. in the suit of 1815:—**Held:** the evidence taken *de bene esse* in the former suit was admissible on behalf of plffs. in the latter suit, the issue in the two suits being the same, & there being privity of estate between the parties to the two suits respectively.—**LLANOVER v. HOMFRAY, PHILLIPS v. LLANOVER** (1881), 19 Ch. D. 224; 30 W. R. 557, C. A.; *previous proceedings sub nom.* **MOGGRIDGE v. HALL, LLANOVER (LADY) v. HOMFRAY, PHILLIPS v. LLANOVER (LADY)** (1879), 13 Ch. D. 380.

—**Refd.** *Beresford v. A.-G.*, [1918] P. 33; *Barnett v. Cohen*, [1921] 2 K. B. 461.

2771. ———.]—**Previous suit defended by arrangement—With present defendant.**—In ejectment, *Doe d. H. v. R., M.*, a witness, since deceased, was examined under a commission. In a second ejectment, *Doe d. H. v. P.*, to recover the same property, it was proved, that before the examination R. agreed to defend the former ejectment for P.:—**Held:** on the trial of the second ejectment, M.'s deposition was receivable in evidence for P., as the two ejectments were substantially between the same parties, & it need not be shown that at the time of the examination H. knew that R. was defending for P.—**HULIN v. POWELL** (1852), 3 Car. & Kir. 323; 20 L. T. O. S. 181

PART IV. SECT. 11, SUB-SECT. 6.—
A. (d).

**h. Where all members of same com-
represented by same coun.**
CARTE v. DENNIS (1901), 21 C. L. T.

267; 5 Terr. L. R. 30.—**CAN.**

PART IV. SECT. 11, SUB-SECT. 6.—
A. (e).

k. Depositions taken before amend-

2772. ———.]—**Father & son—Action by son—On erroneous assumption of father's death.**—In a suit to recover the possession of certain land M. claimed through his father, whom he alleged to be dead; H., half brother of the father, gave evidence as to his pedigree; subsequently the father brought an action of ejectment to recover possession of the same land from a person who claimed through deft. in the former suit; H. having died in the interval, it was proposed by the father to lay before the jury the evidence given by H. as to his pedigree in the former suit; the judge having rejected the evidence:—**Held:** the father did not claim through the son, & consequently the evidence was properly excluded.—**MORGAN v. NICHOLL** (1866), L. R. 2 C. P. 117; 36 L. J. C. P. 86; 15 L. T. 184; 12 Jur. N. S. 963; 15 W. R. 110.

*Annotation:—***Refd.** *Barnett v. Cohen*, [1921] 2 K. B. 461.

2773. Deposition not adopted or used by prior party.—Depositions which have been taken in a suit to perpetuate testimony instituted by a predecessor in title of a party to an action are not admissible as evidence of admissions by him, unless they are proved to have been adopted & used by him. It is not enough that when produced from the Record Office they are found to have been unsealed.—**EVANS v. MERTHYR TYDFIL URBAN COUNCIL**, [1899] 1 Ch. 241; 68 L. J. Ch. 175; 79 L. T. 578; 43 Sol. Jo. 151, C. A.

*Annotations:—***Consd.** *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. **Refd.** *Heath v. Deane*, [1905] 2 Ch. 86; *Mercer v. Denne*, [1905] 2 Ch. 538.

(d) *As between Co-Defendants.*

2774. Dependent since struck out.—**OLDBURY v. WYNNE** (1699), Colles, 91; 1 E. R. 196.

2775. Deponent charged with fraud.—**EADE v. LINGOOD**, No. 2649, ante.

2776. Where co-defendants become opponents—Different point in dispute.—The judge's notes of the evidence given by certain witnesses on the trial of an issue between A. as pltf., & B. & C. as co-defts., will not be ordered to be received on the trial of an issue, as to the same matter, but involving a different point, between B. as pltf. & C. as deft.—**EAST INDIA CO. v. BAZETT** (1823), 1 L. J. O. S. Ch. 93.

(e) *Where Parties added.*

2777. Inadmissible against added parties.—If the cause stands over to add a material deft., the depositions taken before cannot be read against him.—**NIBLETT v. DANIEL** (1731), Bunb. 310; 145 E. R. 684.

2778. ———.]—After witnesses were examined upon the original bill, an amended bill was filed against new parties, some of whom were infants. The ct. refused to order the evidence taken on the original bill to be read against the new defts., the infants.—**QUANTOCK v. BULLEN** (1820), 5 Madd. 81; 56 E. R. 825.

*Annotation:—***Mentd.** *Hughes v. Eades* (1842), 1 Hare, 486.

2779. ———.]—The evidence already taken cannot be read against defts. added under an order made at the hearing.—**PRETTY v. PARKER** (1826), 1 Coop. temp. Cott. 38; 47 E. R. 730.

2780. ———.]—A deft. became bkpt. during the examination of witnesses, & a supplemental bill was filed against his assignees:—**Held:** the

ment.]—Where a bill is amended by adding parties pltf., the depositions of witnesses who had been previously examined in the cause may be read at the hearing.—**CHISHOLM v. SHRELDON** (1851), 2 Gr. 178.—**CAN.**

depositions taken after the commission issued, & before the supplemental cause was at issue, could not be read against the assignees.—*HICHENS v. CONGREVE* (1831), 4 Sim. 420; Mont. 225; 58 E. R. 157.

Annotations:—*Mentd.* Murray v. Arnold (1862), 3 B. & S. 287; Gluckstein v. Barnes, [1900] A. C. 240.

2781. ———.]—In a suit instituted jointly by husband & wife, in relation to the wife's separate estate, where the bill has been amended by making the husband a deft., & adding a next friend for the wife, the depositions previously taken cannot be read at the hearing.—*HAYNES v. JACKSON* (1840), 4 Jur. 457.

2782. ———.]—(1) In Dec. 1806, P. filed a bill against the lord of the manor of W. In Feb. 1870, the suit not having been heard, pltf. obtained leave to amend his bill by adding H. as co-pltf. with himself; upon appeal:—*Held*: the amendment was irregular, as the effect of it was to introduce a new plaintiff with an entirely new case.

(2) It appeared that evidence *de bene esse* had been taken in the suit on the part of deft.:—*Semle*: this evidence could not have been used in the suit as amended.—*PEEK v. SPENCER* (1870), 5 Ch. App. 548; 39 L. J. Ch. 538; 22 L. T. 459; 18 W. R. 558, L. J.

(f) Where Subject-Matter the Same.

2783. Admissible—If subject-matter the same.]—The creditors of L. obtained a decree for payment of their debts, & to set aside some conveyances gained by fraud, & J. & the legatees were made defts. The legatees having brought their bill against J.; the question was, if the depositions in the former cause touching the fraud could be read in this:—*Held*: the question being same in both causes, & J.'s defence the same, the depositions ought to be read.—*NEVIL v. JOHNSON* (1703), 2 Vern. 447; 1 Eq. Cas. Abr. 227, pl. 4; 23 E. R. 880.

Annotation:—*Refd.* Blagrove v. Blagrove (1847), 1 De G. & Sm. 252.

2784. ——— Cause & cross-cause.]—Depositions in the original cause not permitted to be read in the cross-cause because the point in issue in the cross-cause was not an issue in the original cause.—*CHRISTIAN v. WRENN* (1732), Bunb. 321; 145 E. R. 687.

2785. ——— Although witness not proved dead.]—Depositions of witnesses taken in former causes, relating to the same matter for which a new suit is instituted against another party, ought to be permitted to be read as evidence, upon the hearing of such new cause, although

the witnesses themselves are not proved to be dead.—*LONDON (CITY) v. PERKINS* (1731), 3 Bro. Parl. Cas. 602; 1 E. R. 1524, H. L.

Annotations:—*Consd.* Blagrove v. Blagrove (1847), 1 De G. & Sm. 252. *Refd.* Carrington v. Cornock (1829), 2 Sim. 567. *Mentd.* Warriock v. Queen's College, Oxford (1870), L. R. 10 Eq. 105.

2786. ———.]—On issue joined upon the plea of not possessed, in trespass *quare clausum fregit*, deft. may use as evidence the deposition of a witness, formerly called by pltf. to prove his possession in a proceeding before justices for an alleged trespass on same close. It makes no difference that the witness is still alive.—*COLE v. HADLEY* (1840), 11 Ad. & El. 807; 3 Per. & Dav. 458; 4 Jur. 483; 113 E. R. 621.

Annotations:—*Consd.* British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. *Refd.* Boileau v. Rutlin (1848), 2 Exch. 665.

2787. ———.]—*HAMILTON (DUKE) v. MEYNAL* (1754), Dick. 788; 21 E. R. 477; *sub nom.* ANON., 2 Vcs. Sen. 497, L. C.

Annotations:—*Fold.* Moggridge v. Hall, Llanover v. Homfray, Phillips v. Llanover (1879), 13 Ch. D. 380. *Refd.* Ellice v. Roupell (No. 2) (1863), 32 Beav. 308.

2788. ———.]—*LLANOVER v. HOMFRAY*, PHILLIPS v. LLANOVER, No. 2770, *ante*.

2789. ——— Previous cause dismissed.]—The deposition of a witness examined *de bene esse* when about to go abroad ordered, after the dismissal of the bill, to be published, for the purposes of another suit instituted against same deft., upon certain terms, & saving just exceptions.—*MCINTOSH v. GREAT WESTERN RY. CO.* (1855), 7 De G. M. & G. 737; 26 L. T. O. S. 163; 2 Jur. N. S. 129; 44 E. R. 286, L. J.

2790. ———.]—(1) A. being seised of two closes, which he claimed as heir-at-law, conveyed one to B. Both A. & B. were afterwards ousted by C., & brought actions of ejectment against him for the premises respectively, which they recovered. B. was again dispossessed by C., & again brought ejectment against him, claiming the same premises as in the former action, & by the same title. On the trial, B. offered to prove the deposition made by a witness, since deceased, upon the trial of the former ejectment between A. & C.:—*Held*: the evidence was inadmissible.

(2) The former action of ejectment between B. & C. was called on for trial immediately after that in which A. obtained a verdict against C. The counsel for C. in the second ejectment said, they would not trouble the ct. in this case, the evidence in both being the same, but would consent to a verdict, which was immediately taken for pltf.:—*Held*: this could not be considered as proof of

PART IV. SECT. 11, SUB-SECT. 6. — A. (1).

2783 i. Admissible—If subject matter the same.]—The testimony of a witness, since deceased, given on a former trial between same parties, may be received in evidence from the judge's notes, though the suits are different, provided the question in issue in each is substantially the same.—*BENNETT v. JONES* (1862), 5 All. 342.—*CAN.*

2783 ii. ———.]—A former suit had been instituted by pltf. which had been dismissed, as pltf. had not acquired the legal estate until after the bill was filed:—*Held*: in the evidence taken in the former suit & the examination of deft. by pltf. therein were admissible in the present one, the issue being practically the same.—*ADAMSON v. ADAMSON* (1881), 28 Gr. 221.—*CAN.*

2783 iii. ———.]—R. charged A. with breach of trust, & S. gave evidence in support of the charge. A. being

acquitted, R. was tried for making a false charge & S. for perjury:—*Held*: the depositions given by witnesses in the first case could be used against R. in the second case, but not against S. under Evidence Act, s. 33; & though additional issues were involved in the second trial, yet the evidence as to the issues common to both trials was properly admitted at the second trial against R.—*Re RAMI REDDI* (1881), 1 L. R. 3 Mad. 48.—*IND.*

2783 iv. ———.]—A witness being dead, his evidence in a former suit is admissible under Evidence Act, s. 33, provided the former suit was between the same parties, the adverse party had the opportunity to cross-examine, & the questions in issue were substantially identical.—*SITANATH DASS v. MOHESHI CHUNDER CHUCKKEERATI* (1886), 1 L. R. 12 Cal. 627.—*IND.*

2783 v. ———.]—At the trial of a civil suit the deposition of S. in the criminal ct. was tendered by P. as

evidence on the issue of possession:—*Held*: S. being dead, & the proceedings being between same parties, & the issues being substantially the same, the deposition of S. was admissible.—*POOLKISSORY DASSIE v. NOBIN CHUNDER BIJUNJO* (1895), 1 L. R. 23 Cal. 441.—*IND.*

2783 vi. ———.]—In a prosecution under the Public Health Act, 1867, for the possession of a carcass in an unsound condition, the magistrates convicted accused, & in their judgment referred to & founded upon the evidence of an expert witness which had been given by him in a former prosecution of a similar nature. This evidence had been put to a witness in cross-examination, & he had adhered to it. An objection to the conviction upon the ground that the magistrates had proceeded on incompetent evidence repelled.—*GIBSON v. AYR TOWN COUNCIL* (1892), 20 R. (Ct. of Sess.) 47; 30 Sc. L. R. 331.—*SCOT.*

Sect. 11.—Judicial proceedings: Sub-sect. 6, A. (f),

an agreement between the parties, that the evidence given in the first cause should be considered as repeated in the second; but the party relying on such agreement must show it, either by the judge's notes, or by some other distinct proof.—*DOE d. FOSTER v. DERBY (EARL)* (1834), 1 Ad. & El. 783; 3 Nev. & M. K. B. 782; 3 L. J. K. B. 191; 110 E. R. 1406.

Annotations:—As to (1) & (2) *Refd.* *DOE d. Storde v. Seaton* (1835), 5 L. J. Ex. 73; *Brisco v. Lomax* (1838), 8 Ad. & El. 198; *Hodson v. Walker* (1872), L. R. 7 Exch. 55.

2791. ———.]—*DERBY (EARL) v. FOSTER* (1835), 1 Ad. & El. 791, n.; 110 E. R. 1409.

Annotation:—*Refd.* *Llanover v. Homfray, Phillips v. Llanover* (1881), 19 Ch. D. 224.

2792. ———.]—In an action of replevin, where the question in dispute was, whether a certain tract of land was part of the freehold of pltf., or of W. M. under whom deft. held, & who was real deft. in the action, pltf. tendered in evidence the depositions of two witnesses taken in a chancery suit, instituted some years previously by one E. against the said W. M. The object of such was, to set aside a sale to W. M. of the estate of which, according to his contention in the action of replevin, the *locus in quo* formed part. The depositions which pltf. thus sought to put in, contained statements showing, if accurate, that the *locus in quo* formed no part of it:—*Held*: these depositions were properly received in evidence in the action of replevin.—*RICHARDS v. MORGAN* (1863), 4 B. & S. 641; 3 New Rep. 198; 33 L. J. Q. B. 114; 9 L. T. 662; 28 J. P. 55; 10 Jur. N. S. 559; 122 E. R. 600; *sub nom.* *RICHARDS v. MORGAN, MORGAN v. MORGAN*, 12 W. R. 162.

Annotations:—*Apld.* *Fleet v. Perrins* (1869), 9 B. & S. 575. *Consd.* *Evans v. Morthyr Tyddil U. C.* [1899] 1 Ch. 241; *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. *Refd.* *Hutchinson v. Glover* (1875), 1 Q. B. D. 138.

2793. ———.]—A., without authority, sold a trust estate to B. In a suit to recover the money from A., B., who was not a party, was examined as a witness. A suit was afterwards instituted against the representatives of B., to recover the estate itself, & an order of course was obtained in it to use the depositions in the former suit,

saving just exceptions. It was discharged as irregular.—*HOPE v. LIDDELL* (No. 2) (1855), 21 Beav. 180; 52 E. R. 828.

2794. ———.]—Although parties different.]—Depositions in a former cause between other parties, read against one that claims not under any of those parties.—*TERWIT v. GRESHAM* (1666), 1 Cas. in Ch. 73; 1 Eq. Cas. Abr. 227; *Freem. Ch.* 184; 22 E. R. 701, L. C.

2795. ———.]—The ct. will not on motion order depositions, in a tithe cause in the Exchequer, to be read in a tithe suit in this ct., against other occupiers of land in the same parish, though the objects of both suits, & the interest of the parties, are the same.—*GOODENOUGH v. ALWAY* (1826), 2 Sim. & St. 481; 57 E. R. 430.

2796. ———.]—Office copies of depositions by living persons in a tithe suit in the Exchequer may be read in a similar suit in this ct. against another deft. who makes the same defence, on production of office copies of the bill & answer in the former suit, without any order of this ct. for that purpose.—*WILLIAMS v. BROADHEAD* (1827), 1 Sim. 151; 5 L. J. O. S. Ch. 112; 57 E. R. 535.

Annotations:—*Refd.* *Manby v. Bewicke* (1857), 3 Jur. N. S. 685; *Stephenson v. Biney* (1866), L. R. 2 Eq. 303.

2797. Issue not joined in previous cause.]—*BAKER v. SWEET*, No. 2758, *ante*.

(g) Where Witness Dead.

2798. Admissibility conditional on death.]—*TERWIT v. GRESHAM* (1666), 1 Cas. in Ch. 73; 1 Eq. Cas. Abr. 227; *Freem. Ch.* 184; 22 E. R. 701, L. C.

2799. ———.]—A witness examined at a former trial of an issue betwixt the same parties, & who has been examined in the cause, in case he dies, not only his depositions may be read, but what he swore at the former trial may be given in evidence.—*COKER v. FAREWELL* (1729), 2 P. Wms. 563; 2 Eq. Cas. Abr. 736, pl. 2; 1 Swan. 390, n.; 24 E. R. 863, L. C.

Annotations:—*Mentd.* *Cholmondeley v. Clinton* (1817), 2 Mer. 171; *Dillon v. Parker* (1818), 1 Swan. 422.

2800. ———.]—*CORBETT v. CORBETT*, No. 2807, *post*.

2801. ———.]—Although there are two suits in this ct. between parties having the same respective interests, & relating to the same matters, the

PART IV. SECT. 11, SUB-SECT. 6.—A. (g).

2798 i. Admissibility conditional on death.]—Where the deposition of a witness had been taken but not used at the first trial, in consequence of witness being able to attend, but a new trial having been awarded, & the witness dying previous to such new trial:—*Held*: the deposition was receivable in evidence at such second trial.—*BROWN v. BOOLE* (1840), 1 Thom. 2nd ed. 137.—*CAN.*

2798 ii. ———.]—The testimony of a witness, since deceased, given on a former trial between same parties, may be received in evidence from the judge's notes, though the suits are different, provided the question in issue in each is substantially the same.—*BENNETT v. JONES* (1862), 5 All. 342.—*CAN.*

2798 iii. ———.]—Where deft. after having been cross-examined died, & the cause was revived against his real representatives, defts. were allowed at the hearing to read such cross-examination in answer to the statements of the bill.—*POWELL v. LEA* (1873), 20 Gr. 621.—*CAN.*

2798 iv. ———.]—The testimony of a witness, since deceased, taken on a former trial, was rejected by the

judge at the trial herein:—*Held*: it was improperly rejected.—*COPELAND v. VILLAGE OF BLENHEIM* (1885), 9 O. R. 19.—*CAN.*

2798 v. ———.]—Though the cause of action given by Lord Campbell's Act for the benefit of the widow & children of a person whose death results from injuries received through negligence is different from that which deceased had in his lifetime, yet the material issues are substantially the same in both actions, & the widow & children are in effect claiming through deceased. Therefore where an action is by a person so injured in which his evidence is taken *de bene esse* & deft. has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act.—*WALKERSON TOWN v. ERDMAN* (1894), 23 S. C. R. 352.—*CAN.*

2798 vi. ———.]—The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead.—*PECK v. PECK* (1901), 35 N. B. R. 484.—*CAN.*

2798 vii. ———.]—Depositions of witnesses in a former suit are not admissible in evidence when those witnesses

are living, & their oral evidence is procurable.—*HARISH CHANDRA CHUCKERBUTTY v. TARA CHAND SHAHA* (1868), 2 B. L. R. App. 4.—*IND.*

2798 viii. ———.]—The depositions of witnesses, since deceased, examined at an inquiry held by a sub-registrar under Indian Registration Act, s. 41 (2), regarding a will, at which the opposing parties had opportunity of cross-examination, are admissible in evidence in a subsequent suit raising same question between same parties.—*LANKA LAKSHIMANNA v. LANKA VARDKANAMMA* (1919), 1 L. R. 42 Mad. 103.—*IND.*

2798 ix. ———.]—Where a bill was filed by a person claiming as tenant in common founding his title on articles alleged to have been lost, & evidence of the contents of the articles was given:—*Held*: the depositions if read in that cause, the witnesses being dead, might be read in a suit instituted by another tenant in common, claiming in same right against same person in possession.—*BYRNE v. FRERE* (1828), 2 Mol. 157.—*IR.*

1. Death before cross-examination.—*Held*: the depositions, of deft. taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the

depositions of such only of the witnesses in the prior suit as are dead will be allowed to be read in the subsequent suit.—*CARRINGTON v. CORNOCK* (1829), 2 Sim. 567; 57 E. R. 899.

2802. —.—.]—*RHODES v. DE BEAUVOIR* (1832), 6 Cl. & Fin. 532; 6 Bl. N. S. 195; 7 E. R. 797, H. L.

Annotation :—*Refd.* *Attwood v. Small* (1840), 6 Cl. & Fin. 232.

2803. —.—.]—A tenant for life, in possession of real estate, was also tenant for life of certain personal estates under the same will, & was heir-at-law of the surviving trustee of the real estate, but was not a trustee of the personal estate. Two suits were instituted against him. One was instituted by the tenant for life in remainder, the other by the first tenant in tail in remainder, for the same objects as regarded the real estate, but praying also relief in respect of the personal estate :—*Held* : evidence taken in the former suit was not admissible in the latter, it not appearing that the witnesses were dead, or incapable of being examined.—*BLAGRAVE v. BLAGRAVE* (1847), 1 De G. & Sm. 252; 16 L. J. Ch. 346; 9 L. T. O. S. 168; 11 Jur. 744; 63 E. R. 1056.

Annotations :—*Mentd.* *Powys v. Blagrove* (1854), 2 Eq. Rep. 395; *Haddelsey v. Adams* (1856), 22 Beav. 266.

2804. Proof of death—Affidavit.—*FORTESCUE & COAKE'S CASE* (1612), Godb. 193; 78 E. R. 117.

2805. —.—.]—*Necessity for.*—Deposition of a witness examined fifty years before cannot be read, without some account of his death.—*BENSON v. OLIVE* (1731), 2 Stra. 920; 93 E. R. 942.

Annotation :—*Mentd.* *Bury St. Edmund's Corp'n. v. Evans* (1739), 2 Conn. 613.

2806. Deposition taken post litem motam.—Upon the trial of an action of ejectment, *deft.*, to make out that he was the heir-at-law of *Pl.*, who died in 1854, tendered in evidence the deposition of a deceased member of the family. *G.* had in 1806 been found lunatic under a commission, & it was thereupon referred to a master in chancery to inquire who was the proper person to be appointed committee, & who was the heir-at-law, & who were the next of kin of the lunatic. In the course of the inquiry the deposition in question was made in support of a state of facts exhibited by the relation who had petitioned for the inquiry :—*Held* : the deposition was not made *post litem motam*, & was therefore admissible in evidence.—*GEE v. WARD* (1857), 7 E. & B. 509; 3 Jur. N. S. 692; 5 W. R. 579; 119 E. R. 1335; *sub nom.* *GEE v. GOOD*, 29 L. T. O. S. 123.

Deposition admitted although witness not proved dead.—*See* Nos. 2785, 2786, *ante*.

Evidence obtained out of court.—*See* Part VIII., Sect. 3, sub-sect. 2, B. (b), *post*.

reference, prior to cross-examination, so that *pltf.* had been deprived of the opportunity of cross-examining him.—*RANDALL v. ATKINSON* (1899), 30 O. R. 242.—*CAN.*

m. In proceeding coram non judice.—The evidence of a witness given in a proceeding pronounced to be *coram non judice* cannot be used under Evidence Act, s. 33, if the witness is dead, on a retrial before a competent *ct.*—*Re RAMI REDDI* (1881), 1 L. R. 3 Mad. 48.—*IND.*

PART IV. SECT. 11, SUB-SECT. 6.—A. (h).

2808 i. Witness not to be found—Proof of search required.—Upon a prosecution for uttering forged notes, the deposition of *S.* taken before the police magistrate on the preliminary investigation was read, upon proof that

S. was absent from Canada. The chief constable of *H.* where prisoner was tried, proved ineffectual attempts to find *S.* by means of personal inquiries in some places, & correspondence with the police of other cities. *S.* had for some time lived with prisoner as his wife :—*Held* : the admissibility of the deposition was in the discretion of the judge at the trial, & it could not be said that he had wrongly admitted it.—*R. v. NELSON* (1882), 1 O. R. 500.—*CAN.*

2808 ii. —.—.]—At the trial it was proved that the other witness who had been examined before the magistrate, had disappeared, & that it had been found impossible to serve him with a summons. His deposition was put in & read :—*Held* : it was properly admitted.—*Re ITOCHIA MOHATO'S PETITION* (1881), 1 L. R. 7 Cal. 42.—*IND.*

(h) Where Witness not Available.

2807. General rule.—Depositions of witnesses, proved by affidavit from age & infirmity incapable of attending without great danger of death, with liberty to examine them on interrogatories, & the depositions of such other persons as should be proved at the trial to be dead, or unable to attend, ordered to be read; such order, whether to be made in equity, or left to the judge at law, depending on a sound discretion.—*CORBETT v. CORBETT* (1813), 1 Ves. & B. 335; 35 E. R. 131.

2808. Witness not to be found—Proof of search required.—*ANON.* (1624), Godb. 326; 78 E. R. 192.

2809. —.—.]—On an issue raising the question whether due diligence had been used to obtain the answer of *A.* to a bill in Chancery, a witness stated, on interrogatories, that he did with due diligence endeavour to obtain the answer, but could not, & that he wrote a letter on that occasion to *A.*'s agent. The letter itself was not in evidence; & there was no proof that any endeavour had been made, except writing such letter :—*Held* : the deposition, to the extent above stated, was admissible, though the part immediately following set forth the contents of the letter, & was therefore excluded.—*TUFTON v. WHITMORE* (1840), 12 Ad. & El. 370; 9 L. J. Q. B. 405; 113 E. R. 852.

2810. —.—.]—It was suggested that when a person had given evidence before a duly constituted authority in same cause between same parties, & the party proved that he could not get the witness, his deposition on the former trial could be read, even though the witness was within the jurisdiction. If so, the party must prove that he used his best endeavours to find the witness & bring him to the *ct.*, & was not able to see or hear of him (*LORD ESHER, M.R.*) :—*WIEDEMANN v. WALPOLE* (1891), as reported in 7 T. L. R. 722, C. A.

Annotations :—*Mentd.* *Quirk v. Thomas*, [1916] 1 K. B. 516; *Thomas v. Jones*, [1921] 1 K. B. 22.

2811. Witness too ill—Whether deposition admissible.—*LUTTERELL v. REYNELL* (1670), 1 Mod. Rep. 282; 86 E. R. 887.

Annotations :—*Mentd.* *R. v. Parker* (1783), 3 Doug. K. B. 242; *Wells v. Abrahams* (1872), L. R. 7 Q. B. 554; *Midland Insee. v. Smith* (1881), 6 Q. B. D. 561; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

2812. —.—.]—The mere circumstance of a witness being too ill to attend the trial is no sufficient ground for reading his deposition taken in Chancery.—*DOE d. LLOYD v. EVANS* (1827), 3 C. & P. 219.

2813. Witness kept away.—*R. v. IVIMY* (1888), 107 C. C. Ct. Cas. 570.

n. — In divorce proceedings.—In divorce proceedings the evidence of a witness who cannot be found given at a former trial proving misconduct, may be read over to petitioner at the trial & verified by her as a correct note of the evidence as given by the witness & used as proof of misconduct.—*CUNLIFFE v. CUNLIFFE* (1901), 8 B. C. R. 18.—*CAN.*

2811 i. Witness too ill—Whether deposition admissible.—It will be presumed that a witness whose evidence was taken abroad under a commission is out of the province at the time of the trial, & such deposition may be given in evidence under R. S. C. 1909 Ord. 37, r. 18, without proof that the deponent is unable from sickness or other infirmity to attend the trial.—*SIMPSON v. MALCOLM* (1914), 43 N. B. R. 79.—*CAN.*

Sect. 11.—Judicial proceedings: Sub-sect. 6, A. (h), B., C. & D. (a), (b), (c), (d) & (e).]

2814. Witness aged & infirm.—An application to read the deposition of a witness on the trial of an issue at law, directed by the Ct. of Ch. on the ground of the witness being so aged & infirm, as to be unable to attend in person must be made to the judge at the trial, & not to the Ct. which directs the issue.—*JONES v. JONES* (1785), 1 Cox, Eq. Cas. 184; 29 E. R. 1120, L. C.

Evidence obtained out of court.—See Part VIII., Sect. 3, sub-sect. 2, B. (c), (d), *post*.

B. How Proved.

2815. Copies.—*BRABANT v. PERNE* (1669), 2 Rep. Ch. 36; 21 E. R. 609.

2816. — Sworn at judge's chambers—Delivered & attested by judge's clerk.—A copy of depositions sworn at a judge's chambers delivered out by his clerk & attested by his signature is admissible evidence without proof of its having been examined with the original.—*DUNCAN v. SCOTT* (1807), 1 Camp. 100, N. P.

2817. — Office copies.—*WILLIAMS v. BROADHEAD*, No. 2796, *ante*.

See, also, Sect. 9, *ante*.

C. For What Purposes admitted.

2818. To prove terms of lost deed.—*HAINES BARLEY'S CASE*, No. 2728, *ante*.

2819. To prove contradictory statement by witness.—*FEILDERS v. WINCHESTER* (Bp.) (1729), 1 Barn. K. B. 323; 94 E. R. 219.

2820. ——Depositions of a witness in another cause, or *ct.*, may be read against him, without order in this *ct.*, to show the inconsistency of his evidence.—*ANON.* (1729), Mos. 118; 25 E. R. 304.

2821. Evidence of settlement of rights—Not

conclusive.—*ASKEW v. POULTERERS CO.*, No. 1954, *ante*.

2822. Evidence of written release—Nor without production of document.—*WOILEY v. BROWNHILL*, No. 1853, *ante*.

2823. Absence of reasonable & probable cause—Action for malicious prosecution.—In actions against a railway co. for false imprisonment & malicious prosecution, in order to show the absence of reasonable & probable cause & to sustain the complaint of malicious prosecution, the depositions of the servants of the co. before the magistrate were put in evidence.—*Held*: inasmuch as, if the facts stated in the depositions of the co.'s servants had been communicated to the co.'s attorney before appearing to prosecute, & there was no evidence that they had not been, he might reasonably have considered there was a probable cause for the prosecution, there was no evidence of the absence of probable cause, & the *onus* being with *plffs.* to show such absence, it was not for the co. to show that they undertook the prosecution with a knowledge of the testimony their servants were prepared to give.—*WALKER v. SOUTH EASTERN RY. CO.*, *SMITH v. SAME* (1870), L. R. 5 C. P. 640; 39 L. J. C. P. 346; 23 L. T. 14; 18 W. R. 1032.

*Annotations:—***Reid.** *Bradshaw v. Waterlow* (1915), 113 L. T. 1101. **Mentid.** *Boyle v. Smith* (1905), 70 J. P. 115; *Lambert v. G. E. Ry.*, (1909) 2 K. B. 776.

2824. ——*FOSS v. GREAT EASTERN RY. CO.* (1898), 105 L. T. Jo. 221.

2825. To prove custom—Of bank as to loans.—A bank manager had in a previous action by another *plff.* given evidence of the practice of a bank in making certain loans to customers.—*Held*: the manager being a person authorised to make admissions on the part of the bank, his evidence might be read on the part of *plff.* in a later action so far as relevant to the matters then

2814 i. Witness aged & infirm.—If it be a case of temporary absence, or of age, infirmity or sickness, the deposition of the proposed witness cannot be read till the disability has been proved.—*AINSLIE v. SUTTON* (1852), 1 Macq. 299; 24 Sc. Jur. 428; 1 Stuart, 702.—*SCOT.*

o. Witness out of the country.—Where on a second trial it appears that a witness who was examined at the first trial is absent from the country, his evidence then given may be received.—*SUTOR v. McLEAN* (1859), 18 U. C. R. 490.—*CAN.*

p. ——The evidence of a witness who has left the province since a former trial between the parties, may be read from the judge's notes.—*ABEL v. LIGHT* (1866), 6 All. 423.—*CAN.*

q. ——The trial judge had made an order that, if a new trial should be granted by the Ct. of Appeal, then, in the event of either of *plffs.* witnesses being out of the country, he should have the right to read the evidence such witnesses had given at the trial on the case coming up for trial again, & the *ct.* ordered this provision to be embodied in the judgment.—*SCOTT v. CANADIAN PACIFIC RY. CO.* (1909), 19 Man. L. Jt. 29.—*CAN.*

r. — Proof of absence.—Upon a prosecution for wounding with intent to murder, the deposition of C., taken before the police magistrate on the preliminary investigation, was read, upon the following proof that C. was absent from Canada: "C. is, to the best of my belief, in the United States. He was employed, about ten days ago as one of the crew on a steamer running between V. & an American port. He said when he left me he was going on

board the steamer. The steamer has not been on that route since. She is running between two American ports".—*Held*: there was sufficient proof of absence from Canada.—*R. v. PESCARO & JIM* (1881), 1 B. C. R. pt. 2, 144.—*CAN.*

s. ——Evidence that the schooner, the deposition of whose captain is sought to be used, cleared from a Canadian port a week before the trial, & put to sea, is insufficient proof of the captain being out of Canada so as to admit his deposition taken on the preliminary examination.—*R. v. MORGAN* (1893), 2 B. C. R. 329.—*CAN.*

t. Witness living at a distance.—Where one of *plffs.* witnesses lived at a distance, it was imposed as a condition that his evidence, given at the last trial, should be read from the judge's notes.—*CONLEY v. LEE* (1855), 12 U. C. R. 456.—*CAN.*

PART IV. SECT. 11, SUB-SECT. 6.—B.

2815 i. Copies.—A copy of a deposition of a witness taken before a notary public in a foreign state, & certified by a justice of the peace in another state, the demanding state, to be a true copy of the deposition on file in his office.—*Held*: improperly admitted in evidence by the extradition judge, not being certified in the manner prescribed by Extradition Act, s. 17. The certificate must be given by some one who is in a position to certify that not only the copy but the original contains a true record of the testimony of the witness.—*Re STAGGS* (1912) 23 W. L. R. 196; 6 D. L. R. 284; 5 Alta. L. R. 250.—*CAN.*

PART IV. SECT. 11, SUB-SECT. 6.—C.

a. In reply to affidavits in answer

—Inadmissible where no notice to defendant.—*Held*: on motion for an injunction against one *deft.*, the cross-examination of another *deft.* on his answer was inadmissible in reply to the affidavits filed in answer to the motion, where *deft.* against whom *plff.* moved had no notice of the cross-examination, or of *plffs.* intention to read the depositions on the motion.—*CURTIS v. DALES* (1866), 12 Gr. 244.—*CAN.*

b. Admissions as against defendant.—*Held*: the oral answers of *deft.* before a *comr.* under an order of the *ct.* were properly received against him as admissions.—*COCHRAN v. CHIPMAN* (1877), 2 R. & C. 254.—*CAN.*

c. To enable judge to decide case—Where evidence was taken before his predecessor.—A subordinate judge, having taken all the evidence in a suit before him, & having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, & the case came on for hearing before his successor. The new subordinate judge took up the case from the point at which it had been left by his predecessor, & proceeded to judgment & decree.—*Held*: the subordinate judge might, in accordance with Civil Procedure Code, s. 191, have allowed the depositions which had been taken before his predecessor to be put in; & in neglecting to take this course, & in deciding the case upon materials which were never before him, his action was illegal, & the judgment & decree were nullities.—*JAGRAM DAS v. NARAIN LAL* (1885), 1 L. R. 7 All. 857.—*IND.*

d. As evidence against pleader—On account of non-appearance.—The judgment & evidence given in a civil suit, filed by a party, against his

Annotations.—**Mentid.** Baker v. Nottingham & Nottinghamshire Banking Co. (1891), 60 L. J. Q. B. 542; Venables v. Baring, [1892] 3 Ch. 527; Bentinck v. London Joint Stock Bank, [1893] 2 Ch. 120; Thomson v. Clydesdale Bank, [1893] A. C. 282; Manchester Trust v. Furness, [1895] 2 Q. B. 539; Rodfern v. Rosenthal (1901), 85 L. T. 343; Molyneux v. Hawtrev, [1903] 2 K. B. 487; Smith v. Glyn, Mills & Co., [1905] 1 K. B. 572; Smith v. Prosser, [1907] 1 K. B. 35; Louth Northern Division Case (1911), 6 O'M. & H. 103; Fuller v. Glyn, Mills, Currie, (1914) 2 K. B. 168.

2831 ii. -----.] --When a confession is made to a magistrate by an accused person during an inquiry held previously to the case being taken up by the committing officer, & by an officer acting merely as a recording officer, it must be recorded in strict accordance with Code of Criminal Procedure, ss. 122, 346. If the provisions of these sections have not been fully complied with by the recording officer, the ct. of session cannot take evidence that the accused person duly made the statement recorded; & in cases where evidence can be taken, a ct. of session is not at liberty to treat a deposition, sent up with the record & made by the recording officer before the committing officer, to the effect that the accused did in fact duly make before him the statement recorded, as evidence of that fact. In such case the recording officer must himself be called & examined by the ct. of sessions, except in cases in which the presence of the recording officer cannot be obtained without delay or expense which the ct. of session considers unreasonable.—NORHAT MISTRY & RAM CHANDER HALDAR v. R. (1880), 1. L. R. 5 Cal. 958.--IND.

Sect. 11.—Judicial proceedings: Sub-sect. 6, D. (e)

criminal, in which it is sought to adduce the statement of the witness in evidence.—*LEACH v. SIMPSON* (1839), 5 M. & W. 309; 7 Dowl. 513; 3 Jur. 654; 151 E. R. 132.

Admissibility before grand jury.]—See CRIMINAL LAW, Vol. XIV., pp. 230, 240, Nos. 2266–2274.

Refreshing witness' memory.]—See CRIMINAL LAW, Vol. XIV., pp. 270, 271, Nos. 2770–2779.

Evidence of witness in disagreement with deposition or statement.]—See CRIMINAL LAW, Vol. XIV., pp. 271, 272, Nos. 2783–2807.

Deposition of absent witness.]—See CRIMINAL LAW, Vol. XIV., pp. 276–282, Nos. 2878–2947.

Preliminary examination.]—See CRIMINAL LAW, Vol. XIV., pp. 283, 284, 404–406, Nos. 2919–2961, 4246–4263.

Statements in other proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 406–410, Nos. 4261–4302.

Deposition taken abroad.]—See CRIMINAL LAW, Vol. XIV., p. 441, Nos. 4669–4674.

Dying declarations.]—See CRIMINAL LAW, Vol. XV., pp. 805–807, Nos. 8723–8740.

(f) Matrimonial Cases.

See Matrimonial Causes Act, 1857 (c. 85); HUSBAND & WIFE.

SUB-SECT. 7.—JUDGMENTS.

A. Conclusiveness.

See ESTOPPEL, Vol. XXI., pp. 150 et seq.; JUDGMENTS.

Judgments of ouster.]—See CROWN PRACTICE, Vol. XVI., p. 370, Nos. 2052, 2053.

Awards.]—See Sub-sect. 2, ante.

Orders.]—See Sub-sect. 8, post.

B. How Proved.

See Evidence Act, 1851 (c. 90), s. 7; County Court Act, 1888 (c. 43), ss. 28, 180.

2834. When proving itself recited in copy of conviction.]—FULERS (OR FULLER) v. POTCH (1695), Holt, K. B. 287; Carth. 316; 90 E. R. 1058.

2835. Sufficiency of copy.]—LEIGH v. STANNARD (1730), 1 Barn. K. B. 432; 94 E. R. 291.

2836. —.]—In an action upon a wager, whether a decree of the Ct. of Ch. would be reversed on appeal to the House of Lords, proof of the decree & reversal is sufficient without showing the previous proceedings below. A copy of the judgment of reversal is admissible.—*JONES v. RANDALL* (1771), 1 Cowp. 17; 98 E. R. 911.

2837. — Certified copy—County court judgment.]—Upon a plea of *nil tiel* record of a judgment in replevin in a county ct., under 9 & 10 Vict. c. 95:—*Held*: an allegation that "it was adjudged by the ct. that pltf. should take nothing by his plaint," was not sustained by a certified copy of an entry in the minute-book of the county ct., stating that the cause was "struck out for want of jurisdiction, a disputed title having been sworn to."—*TUBBY v. STANHOPE* (1848), 5 C. B. 790; 5 Dowl. & L. 781; Cox, M. & H. 105; 17 L. J. C. P. 190; 12 Jur. 357; 136 E. R. 1089; *sub nom.* *TUBLEY v. STANHOPE*, 11 L. T. O. S. 67.

2838. — Judgment of superior court.]—A judgment may be proved by a certified copy of an entry in the entry book of judgments of a superior ct.—*Re TOLLEMACHE, Ex p. ANDERSON* (1885), 14 Q. B. D. 606; 54 L. J. Q. B. 382; 52 L. T. 786, C. A.

2839. — Judgment of Irish courts.]—On the hearing of a petition that a bill of divorce may be read a second time & sent to committee, a certified copy of any judgment affecting the matter given in the Irish cts. must be supplied by the registrar of such ct. for evidence before the House.—*GALWEY'S DIVORCE BILL* (1907), 51 Sol. Jo. 306, H. L.

2840. — Verified copy—Judgment of inferior court—Original record destroyed.]—When the original judgment in an inferior ct. has been destroyed by fire, the ct. will allow execution to be issued under a verified copy of its judgment.—*CHEESEWRIGHT v. FRANK* (1838), 6 Dowl. 471; 1 Will. Woll. & H. 208.

2841. — Examined copy.]—JEFFS v. DAY, No. 2407, ante.

2842. — Office copy.]—JEFFS v. DAY, No. 2407, ante.

—*See, further, Sect. 9, ante.*

2843. Production of record.]—In debt on a judgment, the declaration alleged that pltf. recovered a judgment against deft., "in the ct. of our lady the Queen, of her Bench here at Westminster, in the county of Middlesex." Deft. pleaded "that there was not any record of the supposed recovery remaining in the said ct. of our lady the Queen, before the Queen herself at Westminster (named in the declaration the ct. of our lady the Queen of her Bench at Westminster), in manner & form as in the declaration alleged." Pltf. replied, "that there was such a record of the recovery remaining in the said ct. of our lady the Queen of her Bench here, in manner & form as pltf. had in the declaration above alleged":—*Held*: pltf. proved the affirmative of the issue, by the production of a record of a judgment recovered in this ct.—*BRADLEY v. GRAY* (1846), 3 C. B. 726; 16 L. J. C. P. 26; 8 L. T. O. S. 141; 136 E. R. 291.

2844. — Inquiry by commissioner—Corrupt practices at election.]—An inquiry by a comr. into the corrupt practices at a municipal election under 35 & 36 Vict. c. 60, ended with an order that the expenses of the petition in ct. be borne by resps., but nothing definite was said as to expenses of the ct. itself. The Treasury paid the latter expenses, & required the borough to repay them, but as they were not paid a rule for a *mandamus* was applied for to compel the mayor & treasurer to pay:—*Held*: the barristers' ct. being made a ct. of record by 35 & 36 Vict. c. 60, s. 14 (5), the judgment could only be proved by record.—*R. v. MAIDENHEAD CORPN.* (1882), 9 Q. B. D. 494; 51 L. J. Q. B. 444; 47 L. T. 529; 46 J. P. 724, C. A.

2845. Minutes — Of proceedings.]—PITCHER v. RINTER (1733), 2 Barn. K. B. 406; 94 E. R. 581.

2846. — Of process on foreign attachment—Mayor's court.]—FISHER v. LANE (1772), 3 Wils. 297; 2 Wm. Bl. 834; 95 E. R. 1063.

Annotations:—Distd. R. v. Smith (1828), 8 B. & C. 341. *Mentd. M'Daniel v. Hughes* (1803), 3 East, 367; *Douglas v. Forrest* (1828), 4 Bing. 686; *Bruce v. Wait* (1840), 1 Man. & G. 1; *London Joint Stock Bank v. London Corpn.* (1880), 5 C. P. D. 494.

PART IV. SECT. 11, SUB-SECT. 7.—B.

2837 1. Sufficiency of copy—Certified copy—County court judgment.]—DIXON v. MACKAY (1903), 22 C. L. T. 374.—CAN.

2843 1. Production of record.]—The

record roll, filed by the attorney in a cause on entering judgment, is the only evidence of a recovery.—*CHESLEY v. BONNETT* (1875), 1 R. & C. 112.—CAN.

2845 1. Minutes—Of proceedings—Whether copy sufficient.]—A copy of the

minutes of the Supreme Ct., stating the reversal of the judgment of a justice of the peace on *certiorari*, is not evidence of such reversal, it being of itself a judgment which should be made up of record & proved accordingly.—

2847. — Memorandum of steward—Manorial court.—Trespass for breaking & entering pltf.'s dwelling-house. Deft. justified under a judgment recovered in a ct. baron, & a precept issued thereon. Replication, that there was not any memorandum of the proceedings, or of the supposed judgment, remaining in the ct. baron :—*Held* : the replication was bad, inasmuch as it put in issue an immaterial fact.

It is the duty of the steward to make up a statement of the proceedings as may give the necessary information to the superior ct. If he has no written memorandum of the proceedings he may supply the defect from his memory (HOLROYD, J.).—*DYSON v. WOOD* (1824), 3 B. & C. 419; 5 Dow. & Ry. K. B. 295; 2 Dow. & Ry. M. C. 500; 3 L. J. O. S. K. B. 72; 107 E. R. 800.

2348. — — — — ——The judgment of a manor ct. in a plea of debt is sufficiently proved by production of a minute in the ct. books, containing entries of the pleadings, but setting forth, as to the judgment, only a form of caption, names of parties & suitors of the ct., & a memorandum that a *venire facias* was executed, verdict found for pltf., & final judgment entered for debt & costs, specifying the amounts : the deputy steward of the ct. stating that he was present at the trial, & that it was not usual to draw up a more formal judgment; & it appearing that a *levari facias* had issued, reciting a judgment in terms corresponding with the entry.—*DAWSON v. GREGORY* (1845), 7 Q. B. 756; 14 L. J. Q. B. 286; 5 L. T. O. S. 211; 9 Jur. 688; 115 E. R. 673.

2849. — Of manorial court book.—*DAWSON v. GREGORY*, No. 2848, *ante*.

2850. — Of deputy clerk of peace.—Where an indictment for a conspiracy alleged, that "at the ct. of quarter sessions holden, etc., an indictment against A. B. was preferred to, & found by the grand jury": *Held* : this allegation must be proved by a caption regularly drawn up of record, & the minute book kept by the deputy clerk of the peace could not be received as evidence of the finding of the bill, although no record had been in fact drawn up.—*R. v. SMITH* (1828), 8 B. & C. 341; 6 L. J. O. S. M. C. 99; 108 E. R. 1069.

Annotations:—*Refd.* *Porter v. Cooper* (1834), 6 C. & P. 354; *Campbell v. R.* (1817), 11 Q. B. 814.

2851. Day book—From judgment office.—The day book kept at the judgment office is not evidence to prove the time of the signing of a judgment.—*LEE v. MEECOCK* (1804), 5 Esp. 177, N. P.

2852. Judgment book.—The judgment book is not evidence of the judgment entered therein, though the record has not been made up, & though the person interested in proving the judgment be no party to the action.—*AYREY v. DAVENPORT* (1807), 2 Bos. & P. N. R. 474; 127 E. R. 714.

DOUGLAS v. HINKLEY (1828), N. B. Dig. 333.—**CAN.**

l. Parol evidence—Whether admissible.—In an action of damages for malicious arrest & imprisonment of pltf., under a *capias*, issued by a stipendiary magistrate in Nova Scotia, whose judgment, it was alleged, was reversed in appeal, oral evidence "that the decision of the magistrate was reversed" was held to be inadmissible to prove a final judgment.—*GUNN v. COX* (1879), 3 S. C. R. 296.—**CAN.**

m. Certificate—From prothonotary of court.—In an action on a Nova Scotia judgment signed on Mar. 7, 1855, in pursuance of a judge's order setting aside deft.'s plea as frivolous, deft. produced a certificate from the

prothonotary of the ct. entitled in the same cause, stating that judgment of *non pros.* for want of a replication was marked on Dec. 11, 1854 :—*Held* : in the absence of any record of such judgment, or of any evidence to show that "marking" was equivalent to "signing," there was not sufficient evidence of a judgment of *non pros.* to affect the validity of pltf.'s judgment.—*DENSMON v. TAYLOR* (1856), 3 All. 313.—**CAN.**

n. Original roll—Or exemplification.—Judgments may be proved at *visi prius* by producing the original roll, as well as by exemplification, but the clerk should not produce such roll without proper authority.—*PATEISON v. TODD* (1865), 24 U. C. R. 296.—**CAN.**

2853. — From judgment office.—An allegation in an indictment for perjury, that judgment was "entered up" in an action is proved by the production of the book from the judgment office in which the *incipitur* is entered.—*R. v. GORDON* (1812). Car. & M. 410.

2854. Entry in justices' note book.—Where a summons had been dismissed by justices in 1874, & no certificate of dismissal had been required or given under Summary Jurisdiction Act, 1848 (c. 43), s. 14 :—*Held* : upon a fresh summons in 1879, the former adjudication was sufficiently proved by the entry in the justices' note book, & when so proved was binding & conclusive.—*R. v. HUTCHINS* (1880), 5 Q. B. D. 353; 49 L. J. M. C. 64; 42 L. T. 766; 44 J. P. 521; 28 W. R. 595, D. C.; *reversd.* on other grounds (1881), 6 Q. B. D. 300, C. A.

Annotations:—*Mentd.* *Priestman v. Thomas* (1884), 9 P. D. 210; *Manchester Corp. v. Hampson* (1886), 3 T. L. R. 466; *Re Allsop & Joy's Contract* (1889), 61 T. L. 213; N. E. Ry. v. Dalton Overseers, [1898] 2 Q. B. 66; R. v. Ollis, [1900] 2 Q. B. 758; *Scott v. Lowe* (1902), 86 L. T. 421; *Wakefield Corp. v. Cooke*, [1904] A. C. 31; *Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 430; *Bedford v. Cowtan*, [1916] 1 K. B. 980; *Ord v. Ord*, [1923] 2 K. B. 432.

2855. Parol evidence—Judgment of manorial courts—Steward.—*DYSON v. WOOD*, No. 2847, *ante*.

2856. — — — — ——*DAWSON v. GREGORY*, No. 2818, *ante*.

2857. Judgment paper—From master's office.—*JEFFS v. DAY*, No. 2407, *ante*.

2858. Certificate of judge—County court judgment.—The ct. will treat that which a county ct. judge certifies as his judgment as conclusive.—*HUDDLESTON v. FIRNESS Ry. Co.* (1899), 15 T. L. R. 238; 43 Sol. Jo. 295, C. A.

C. Foreign and Colonial Judgments.

See Part XI., Sect. 8, sub-sect. 1, *post*.

SUB-SECT. 8.—ORDERS.

A. Admissibility and Proof.

2859. Admissibility—Not if subject-matter different.—An order of sessions upon an appeal between two parishes respecting the settlement of pauper A. is not admissible upon the trial of an appeal touching the settlement of pauper B. his sister, on a suggestion that the point at issue was precisely the same in both appeals.—*R. v. KNAPTOFT (INHABITANTS)* (1824), 2 B. & C. 883; 4 Dow. & Ry. K. B. 469; 2 Dow. & Ry. M. C. 347; 2 Bott. 791; 107 E. R. 610.

Annotations:—*Consd.* *It. v. Ycoveley* (1838), 8 Ad. & El. 806; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780.

2860. — Against client sued by attorney—

o. "Record by default."—Deft. put in as evidence of the judgment the so-called "record by default" in 4th R. S., c. 94, sched. A. form 11, signed by pltf.'s attorney :—*Held* : this was legal evidence of a judgment.—*McDONALD v. FERGUSON* (1879), 1 R. & G. 70.—**CAN.**

PART IV. SECT. 11, SUB-SECT. 8.—A.

p. Admissibility—English vesting order.—A vesting order of the Ct. of Ch. of England proves itself on production, by Evidence Act, 1851 (c. 99), & is therefore properly received in evidence.—*CAHUAC v. SCOTT, CAHUAC v. ERLE* (1872), 22 C. P. 551.—**CAN.**

q. — — — Order for debtor's discharge.]

Sect. 11.—Judicial proceedings: Sub-sect. 8, A.

For bill of costs—Order referring bill for taxation.]—Where an attorney, who is suing his client for his bill, obtains an order to refer the bill for taxation, that order is no evidence against debt.

If I had known that the order had been obtained by pltf., I should not have granted the rule nisi. The only ground on which I thought it was evidence was, that debt. by obtaining the order admitted his liability, but that was not the case. The whole question turns on whose the summons was to refer the bill for taxation. It was admitted here that it was pltf.'s; & I think that it was gross fraud to attempt to make the order thereon evidence against debt. (PATTESON, J.).—*KING v. KYPE* (1838), 1 Will. Woll. & H. 87.

2861. Proof—Copy—Order of justices—Original not produced after notice.]—*R. v. KIRKBY STEPHEN* (1770), Burr. S. C. 661; 2 Bott. 6th ed. 712.

*Annotations:—***Refd.** *R. v. Nantwich* (1812), 16 East, 228. **Mentd.** *R. v. Bishop Wearmouth* (1834), 5 B. & Ad. 942; *R. v. Oldbury* (1835), 5 Nev. & M. K. B. 547.

2862. ——— Of entry in minute book—County court.]—The copy of the note of a county ct. judge's order entered by the clerk of the ct. in the book kept for that purpose under 9 & 10 Vict., c. 95, s. 111, is conclusive evidence of the order, & may not be contradicted by the entry made by the judge in his own minute book.—*DEWS v. RILEY* (1851), 11 C. B. 434; 2 L. M. & P. 544; Cox, M. & H. 523; 20 L. J. C. P. 264; 18 L. T. O. S. 155; 16 J. P. 39; 15 Jur. 1159; 138 E. R. 542.

*Annotations:—***Refd.** *Saunders v. Swansea Finance Co. & Home* (1905), 21 T. L. R. 317. **Mentd.** *Mill v. Hawker* (1875), L. R. 10 Exch. 92; *Aspey v. Jones* (1884), 54 L. J. Q. B. 98; *Deimer v. Cook* (1903), 88 L. T. 629.

—[**Sec. further, Sect. 9, ante.**]

2863. ——— Minute book of court.]—On appeal against an order of removal, in 1837, the appts., to prove an order of the sessions for the same county in 1824, discharging a former order of removal, produced the original sessions book, which was in paper, containing the orders & other proceedings of the ct., among which was the order of sessions now in question, made up & recorded after each session by the clerk of the peace from minutes taken by him in ct., which book he considered, & stated to be, the record itself. No other record was kept. The minutes of each session were headed with an entry containing the style & date of the sessions & the names of the justices in the usual form of a caption. The minute in question stated the subject of the appeal then brought, & the order made on hearing. The book was signed at the end of the proceedings of the session, "By the ct. John Charge, clerk of the peace":—**Held:** proper evidence of the order of sessions.—*R. v. YEOVELEY (INHABITANTS)* (1838), 8 Ad. & El. 806; 1 Per. & Dav. 60; 1 Will. Woll. & H. 614; 8 L. J. M. C. 9; 3 J. P. 418; 112 E. R. 1043.

*Annotation:—***Refd.** *Metropolis Police Commissioner v. Donovan* (1903), 88 L. T. 555.

2864. ———.]—An order of sessions was

made for dismissing an appeal against a rate, & that appts., "upon service of the order or a true copy thereof, should pay resps. the sum of £91 9s. 10d. for their costs & charges by reason of the appeal." An indictment for disobeying this order stated, that a true copy of the order was, on, etc., served on defts., & that they then & there had notice of the order. On motion in arrest of judgment:—**Held:** (1) such statement was sufficient; (2) such allegation was sufficiently proved by proof of service of a copy of a formal document, containing the terms of the order drawn up from the minutes of the sessions, such document being shown to defts. at the time of service.—*R. v. MORTLOCK* (1845), 7 Q. B. 459; 1 New Mag. Cas. 329; 2 New Sess. Cas. 108; 14 L. J. M. C. 153; 5 L. T. O. S. 149; 9 J. P. 454; 9 Jur. 621; 115 E. R.

*Annotations:—***Generally, Mentd.** *Ex p. L. & B. Ry. v. L. B. & S. C. Ry.* (1848), 17 L. J. M. C. 119; *R. v. Lambeth Highways Surveyors* (1854), 3 C. L. R. 35; *Freeman v. Read* (1860), 9 C. B. N. S. 301; *Bancroft v. Mitchell* (1867), 8 B. & S. 558; *R. v. Speyer, R. v. Cassel*, [1916] 1 K. B. 595.

2865. ———.]—*DEWS v. RILEY*, No. 2862, *ante*.

2866. ———.]—An order of the ct. of summary jurisdiction under Elementary Education Act, 1876 (c. 79), imposing a penalty on the parent of a child for non-compliance with a previous order for the attendance of the child at school, may be proved in subsequent proceedings by the minute books of the ct. containing an entry of the order, & it is unnecessary to produce a copy of the order signed by the clerk of the peace or other officer of the sessions.—*LONDON SCHOOL BOARD v. HARVEY* (1879), 4 Q. B. D. 451; 48 L. J. M. C. 130; 43 J. P. 731; 27 W. R. 783, D. C.

*Annotation:—***Appld.** *Police Comr. v. Donovan*, [1903] 1 K. B. 895.

2867. ——— Admission & act of party.]—Pltf. was knocked off his cab by the furious driving of an omnibus of defts., for which one of the defts., drivers was summarily convicted under London Hackney Carriages Act, 1813 (c. 86), s. 28. Pltf. gave evidence upon the hearing but was not complainant. The magistrate asked him if £10 would compensate him for his injuries, & he said certainly not. The magistrate adjudged the payment of half this amount by the driver under the latter part of the sect., & pltf. accepted the money which was actually paid by defts. Pltf. brought this action for damages for the negligence of defts.' driver, & defts. pleaded as a bar thereto this award of the magistrate & pltf.'s acceptance of the amount. The action was tried in a county ct., & pltf. admitted the magistrate's adjudication & his own acceptance of the money, but no record of the conviction was produced. The county ct. judge considered this no sufficient evidence of the order; & that if it were, the order was no answer to the action. The jury found a verdict of £100:—**Held:** pltf.'s admission was sufficient evidence of the order, & by his acceptance of the money his claim for compensation had become *res judicata*, & could not be maintained.—*WRIGHT v. LONDON OMNIBUS CO.* (1877),

—(*CONNELL v. YERKA* (1880), 19 N. B. R. 537.—**CAN.**

F. ——— Order for destruction of liquor.]—On application to the Div. Ct. for leave to put in evidence a written order for the destruction of liquor which was not produced at the trial:—**Held:** the order was not admissible.—*BOND v. COWMER* (1888), 15 O. R. 716; 16 A. R. 398; *affd.* Ont. Dig. 807.—**CAN.**

S. ——— Order in execution proceedings.]—In a suit to establish pltf.'s title to certain land, he put in evidence an order made in certain execution proceedings in which was recited a petition by his father asserting his title. Neither defts. nor their predecessors were parties to these proceedings:—**Held:** the document was relevant & admissible in evidence.—*VENKATASAMI v. VENKATREDDI* (1891),

I. L. R. 15 Mad. 12.—**IND.**

t. Proof—Copy.]—A judge's order may be made a rule of ct. on production of a copy of it served on the party moving, verified by affidavit.—*POWELL v. HANINGTON* (1883), 22 N. B. R. 359.—**CAN.**

s. ——— (proceedings for.)—In an action at the instance of the Comrs. of Customs & Excise to recover

2 Q. B. D. 271 ; 46 L. J. Q. B. 429 ; 36 L. T. 590 ; 41 J. P. 486 ; 25 W. R. 647, D. C.
Annotations.—*Refd.* Birmingham Corp'n. v. Allsopp (1918), 88 L. J. K. B. 519. *Mentd.* Vallance v. Falle (1884), 53 L. J. Q. B. 459.

B. For What Purposes Admitted.

2868. Title as administrator—Order granting administration.]—GARRETT v. LISTER (1661), 1 Lev. 25 ; 83 E. R. 279.

Annotation.—*Apld.* Cox v. Allingham (1822), Jac. 514.

2869. Bastardy—Justices' order.]—Children born in wedlock are bastards if the husband had no access to his wife. The wife is not competent to prove that, but the order of the justices reciting that it so appeared on the examination of her & on other proof, this is sufficient. The ct. will presume that the other evidence was legal.—R. v. BEDELL (INHABITANTS) (1737), Andr. 8 ; *Lee temp. Hard.* 379 ; 2 Stra. 1076 ; Bull. N. P. 112 a ; 95 E. R. 273.

Annotations.—*Refd.* Russell v. Russell, [1924] A. C. 687. *Mentd.* R. v. Rook (1753), 1 Wils. 340 ; R. v. Luffe (1807), 8 East, 193.

2870. ——— How far evidence.]—In ejectment by a person claiming as heir-at-law, the question in dispute was his legitimacy, & his mother being called on his behalf to prove her marriage with his father before his birth, she on cross-examination denied that she had previously applied to affiliate the child, or had ever been before the magistrates at all :—*Held* : a bastardy order against the father, made on the complaint of a female whose name answered to that of the witness, & in regard to a child of the same name as plff., was admissible in evidence, there being some circumstances to show the identity of the parties, if not as bearing directly on the question of legitimacy, or as evidence of all the facts set forth on the order, at all events for the purpose of contradiction, & to show the fact that she had been before the magistrates to affiliate the child.—WATSON v. LITTLE (1860), 5 H. & N. 472 ; 20 L. J. Ex. 267 ; 2 L. T. 223 ; 8 W. R. 420 ; 157 E. R. 1266.

2871. Circumstances attending receipt of dividends—Order in Chancery.]—In dower, the tenant pleaded, in May, 1833, that demandant had elected to receive an annuity in satisfaction of dower :—*Held* : (1) the plea was not supported by showing demandant's receipt of dividends in Sept. 1833 ; (2) an order made in a suit in Chancery between demandant, the tenant, & others, was admissible in evidence for demandant in dower, to show the circumstances under which the dividends were received.—SLATTER v. SLATTER (1834), 1 Bing. N. C. 259 ; 1 Scott, 82 ; 4 L. J. C. P. 25 ; 131 E. R. 1116.

2872. Death—Order of Lord Chancellor—Discharging committee of lunatic.]—An order by the

Lord Chancellor, on the death of a lunatic tenant for life of a fund in ct., discharging her committee, to whom the dividends had been ordered to be paid, is no evidence in the Rolls Ct. of such death.—BERRY v. USHER (1830), 4 Jur. 5.

2873. ——— Order under 6 Ann. c. 72.]—An order of ct. made under the above statute & declaring that a certain person ought to be deemed & taken to be dead according to the statute, is not conclusive proof of that person's death. Accordingly, where the life of A. was insured, & such an order was made by the ct. upon an affidavit by B., who was entitled to the immediate reversion in certain property expectant on A.'s death, & the assignees of the policy sought payment from the directors of the assurance co. on the ground that A.'s death was proved to the reasonable satisfaction of the directors by the above-mentioned order & affidavit :—*Held* : the directors were not unreasonable in requiring further evidence of A.'s death before paying the policy moneys to the assignees.—DOYLE v. CITY OF GLASGOW LIFE ASSURANCE CO. (1881), 53 L. J. Ch. 527 ; 50 L. T. 323 ; 48 J. P. 374 ; 32 W. R. 476.

2874. ——— Order by county court—Presuming death.]—In 1915 an action had been commenced in the county ct. for the administration to an estate which J. would have been entitled to administer if living, & after inquiries & advertisements, the judge made an order that J. must be presumed to have died on a specified date. On a motion in the Probate Div. of the High Ct. for leave to assume the death without further evidence, with the object of enabling appet. to obtain administration to the estate of J. :—*Held* : the order of the county ct. made after inquiry in a matter within its jurisdiction was sufficient evidence without further affidavits.—*In the Goods of RISHTON* (1921), 90 L. J. P. 374 ; 125 L. T. 863 ; 37 T. L. R. 798.

2875. Evidence of debt—Order in previous suit—Giving leave to prove for amount.]—An order made in one suit giving liberty to prove in another suit for an amount to be certified by the chief clerk, & a certificate made in pursuance of such order, are not alone sufficient to establish the debt in the other suit.—MICKLETHWAIT v. WINSTANLEY (1861), 5 New Rep. 201 ; 31 L. J. Ch. 281 ; 11 L. T. 582 ; 13 W. R. 210, L. J.J.

2876. Enrolment of rules of friendly society—Order of justices—Reciting fact of enrolment.]—An order of justices requiring the stewards of a benefit society to readmit A., who had been expelled, recited that it had appeared to the justices that the rules of the society had been enrolled at the quarter sessions. On the trial of an indictment against the stewards for disobeying such order :—*Held* : the recital was not evidence of the enrolment of the rules.—R. v. GILKES (1828), 8 B. & C.

relating to " disputes as to immovable property," are merely police orders made to prevent breaches of the peace, & decide no question of title. Such orders are admissible in evidence, on general principles as well as under Evidence Act, 1872, s. 13, to show the fact that such orders were made. This necessarily makes them evidence of the following facts appearing on the orders themselves, viz., who the parties to the dispute were ; what the land in dispute was ; & who was declared entitled to retain possession.—DINOMONI CHOWDHURI v. BROJO MOHNT CHOWDHURI (1901), 1 L. R. 29 Calc. 187 ; 6 C. W. N. 386 ; L. R. 29 Ind. App. 24.—*IND.*

c. To prove quashing of conviction.]—To prove the quashing of a conviction on appeal to the quarter

penalties under Customs (War) Powers Act, 1915, s. 5 (1) :—*Held* : it was not necessary for pursuers, in the absence of challenge, to produce or prove an order issued by them under statutory powers & founded on in the action.—LORD ADVOCATE v. VAN WEEL. [1917] S. C. 227 ; 54 Sc. L. R. 258.—*SCOT.*

PART IV. SECT. 11, SUB-SECT. 8.—B.

2869 i. Bastardy—Justices' order—How far evidence.]—In a complaint before justices against the putative father for maintenance of an illegitimate child former orders made against the father for maintenance are evidence of his paternity in a subsequent proceeding, even though such orders are bad, & might have been quashed, & these former orders are an estoppel against the alleged father denying that

he was the father.—HANLEY v. MCMASTERS (1889), 15 V. L. R. 322.—*AUS.*

2869 ii. ———.]—A pre-maternity order made under Marriage Act, 1905, s. 5, against deft. for the payment of confinement expenses to a woman who subsequently gave birth to an illegitimate child, in addition to her statement on oath that deft. was the father of the child :—*Held* : sufficient evidence to justify an order against deft. for the maintenance of the child under Marriage Act, 1890, s. 43.—MCKINLEY v. DELANEY (1915), 19 C. L. R. 525.—*AUS.*

b. Whether conclusive of facts stated therein.]—Orders for possession under Act XXV. of 1861, s. 318 ; Act X. of 1872, s. 530 ; & Act X. of 1882, s. 145,

Sect. 11.—Judicial proceedings: Sub-sect. 8, B.; sub-sect. 9, A.]

430; 2 Man. & Ry. K. B. 451; 1 Man. & Ry. M. C. 487; 6 L. J. O. S. M. C. 118; 108 E. R. 1105; *previous proceedings* (1827), 3 C. & P. 52, N. P.

Annotations: Refd. R. v. Wade & Tomlinson (1831), 9 L. J. O. S. M. C. 113; R. v. Stamper (1841), 1 Q. B. 119.

2877. Whether conclusive of facts stated therein—**Statement of failure to make award.**—On a dispute between the members of a friendly society, called "The Leeds Philanthropic Society," & A., whom they had expelled, the arbitrators appointed by the rules of the society made an award that A. should be expelled the society. A. thereupon made complaint to a justice of the peace under 4 & 5 Will. 4, c. 40, s. 7, that he had been wrongfully expelled, & that arbitrators had been appointed who had neglected & refused to make any award; & two justices by their order, after reciting the above complaint, adjudged that "all & singular the allegations were true," & ordered that A. should be reinstated in the society:—*Held*: (1) the statement in the order that the arbitrators had neglected to make an award was not conclusive; but on motion to quash the order of justices, the circumstances under which the award was made might be gone into on affidavit.

There were contradictory affidavits as to whether the arbitrators wrongfully refused to hear evidence on the part of A.:—*Held*: (2) there being sufficient evidence to warrant the conclusion to which the justices had arrived, it was to be presumed that they were right as to the fact.—R. v. GRANT (1849), 14 Q. B. 43; 3 New Mag. Cas. 183; 4 New Sess. Cas. 13; 19 L. J. M. C. 59; 13 L. T. O. S. 301; 13 J. P. 408; 13 Jur. 1026; 117 E. R. 17.

Annotations: As to (2) Expi. Bache v. Billingham, [1891] 1 Q. B. 107. *Refd.* Ex p. Long (1854), 24 L. T. O. S. 73.

2878. —County court order.—DEWS v. RILEY, No. 2862, *ante*.

2879. —Order of master in lunacy.—An order of a master in lunacy in England under Lunacy Act, 1890 (c. 5), s. 116, reciting that deft. was in the opinion of the master a person of unsound mind, though not so found by inquisition, & authorising his wife to defend the action is admissible as *prima facie* evidence & if uncontradicted, ought to be regarded as sufficient evidence to justify an order under sect. 87.—HARVEY v. R., [1901] A. C. 601; 70 L. J. P. C. 107; 84 L. T. 849; 17 T. L. R. 601, P. C.

Annotation:—Consd. Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236.

2880. Due consideration of & decision on appeal—**Order of Local Government Board.**—A properly authenticated order of the Local Government Board made upon an appeal is evidence that the appeal was considered & decided by the Local Govt. Board or by some person properly appointed to hear it for & on behalf of the Board until the contrary is proved.—LOCAL GOVERNMENT BOARD v. ARLIDGE, [1915] A. C. 120; 84 L. J. K. B. 72; 111 L. T. 905; 79 J. P. 97; 30 T. L. R. 672; 12 L. G. R. 1109, H. L.; *reversg.* S. C. *sub nom.* R. v.

sessions, it is sufficient to prove an order of that *ct.* directing that the conviction shall be quashed, the conviction itself being in evidence, & the connection between it & the order shown.—NEILL v. McMILLAN (1866), 25 U. C. R. 485.—CAN.

d. To prove title.—A vesting order made in a Chancery suit, vesting all the estate of O., including the land in question in pltf.:—*Held*: sufficient proof of pltf.'s title without showing

why it was made.—GORDON v. McPHAIL (1872), 32 U. C. R. 480.—CAN.

e. —.—DINOMONI CHOWDHURI v. BROJO MOHINI CHOWDHURI (1901), 1 L. R. 29 Cal. 187; 6 C. W. N. 386; 1 L. R. 29 Ind. App. 24.—IND.

f. Interlocutory order—*To show what done between filing of bill & decree.*—There being evidence of a decree:—*Held*: interlocutory orders were admissible to show what was done in the suit

LOCAL GOVERNMENT BOARD, *Ex p.* ARLIDGE, [1914] 1 K. B. 160, C. A.

Annotations:—Mentd. Arlidge v. Hampstead Corp. (1915), 80 J. P. 36; Hall v. Manchester Corp. (1915), 84 L. J. Ch. 732; R. v. Appleby, Judge, [1915] 2 K. B. 223; Cassel v. Ingalls, [1916] 2 Ch. 211; R. v. Central Tribunal, *Ex p.* Parton (1916), 86 L. J. K. B. 799; Clements v. County of Devon Inspec. Committee, [1918] 1 K. B. 94; De Verteuil v. Knaggs, [1918] A. C. 557; R. v. London Appeal Tribunal, *Ex p.* Sparrow (1918), 62 Sol. Jo. 383; Dowling v. G. E. Ry. (1919), 88 L. J. K. B. 380; R. v. Housing Appeal Tribunal, [1920] 3 K. B. 334; Everett v. Griffiths, [1921] 1 A. C. 631; Wilson v. Esquimalt & Nanaimo Ry., [1922] 1 A. C. 202.

Evidence of boundaries.—*See* BOUNDARIES, Vol. VII., p. 317, Nos. 373-375.

SUB-SECT. 9.—PLEADINGS.

A. Admissibility.

2881. General rule.—(1) Although, in general, pleadings in one suit cannot be used in another, as evidence of the truth of the allegations contained in them, yet, where a pleading is signed by the party, it will be regarded in the light of an admission, & as such it will be evidence against him not only with reference to a different subject matter, but in a suit maintained against a different opponent.

(2) An issue was sent to trial, whether A., pltf., was, at the respective dates of twenty documents, of weak mind; & whether B., deft., taking advantage of such weakness, procured A.'s signature to these documents, or any of them, by fraud or intimidation. At the trial of the issue, certain account-books kept by A. were tendered by his counsel, the purpose not being stated, but they seemed to have been used for an improper purpose. B.'s counsel objected that they were inadmissible generally; but the judge admitted them:—*Held*: under the issue, & as no objection had been taken to the summing up, it was to be presumed the judge directed the jury to make the proper use of them.—MARIANSKI v. CAIRNS (1852), 19 L. T. O. S. 277; 1 Macq. 212, H. L.

Annotations:—Generally, Mentd. Morgan v. Morris (1858), 31 L. T. O. S. 359; R. v. Maidenhead Corp. (1882), 8 Q. B. D. 339.

2882. At trial at law—Proceedings in Chancery.—ANON. (1698), 12 Mod. Rep. 231; 88 E. R. 1283.

2883. —.—*—.*—Though a bill in Chancery cannot be received in evidence at law, yet in this *ct.* it may be read, & had been often allowed as evidence.—MEDCALFE & IVES v. MEDCALFE & JOHNSON (1737), 1 Atk. 63; 26 E. R. 42, L. C.

Annotations:—Consd. Boileau v. Rutlin (1818), 2 Exch. 665. *Mentd.* Morris v. Burroughs (1737), 1 Atk. 399; Heron v. Heron (1741), 2 Atk. 160; Eldout v. Palm (1747), 3 Atk. 486; Campbell v. Twemlow (1814), 1 Price, 81; Honner v. Morton (1828), 3 Russ. 65; Lee v. Head (1855), 1 K. & J. 620.

2884. Proceedings in chancery—Answer in spiritual court.—A man's answer in the Spiritual Ct. may be read against him in this [Chancery] *ct.*—MILDMAY v. MILDMAY (1682), 1 Vern. 53; 23 E. R. 305, L. C.

Annotations:—Refd. Feilders v. Winchester (Bp.) (1729), 1 Barn. K. B. 323. *Mentd.* Legard v. Johnson (1797), 3 Ves. 352.

between the filing of the bills & the decree.—DEVONSHIRE (DUKE) v. NEILL (1877), 2 L. R. Ir. 132.—IR.

PART IV. SECT. 11, SUB-SECT. 9.—A.

28821. At trial at law—Proceedings in Chancery.—The statements in a bill in equity, under oath, are evidence against the party filing it, in an action at law.—DOE d. PALMER v. ROSS (1862), 5 All. 346.—CAN.

2885. Against party pleading.]—ANON. (1624). Godb. 326; 78 E. R. 192.

2886. — Necessity for consent of party.]—A bill in another clause is no evidence against pltf. in it, unless it be proved to be exhibited with his privacy.—WOOLLET v. ROBERTS (1665), 1 Cas. in Ch. 64; Nels. 102; 22 E. R. 697, L. C.
Annotations:—**Consd.** Boileau v. Rutlin (1848), 2 Exch. 665. **Refd.** Handeside v. Brown (1753), 1 Dick. 236.

2887. — — —.]—BOILEAU v. RUTLIN, No. 2923, *post*.

2888. — — —.]—MILDMAY v. MILDMAY, No. 2884, *ante*.

2889. — — —.]—An admission in an answer to a bill filed by other creditors against deft. may be read as evidence against him.—GRANT v. JACKSON (1793), Peake, 268, N. P.

Annotation:—**Mentd.** Attwood v. Small (1840), 6 Cl. & Fin. 242.

2890. — — —.]—In ejectment by an exor. it is sufficient *prima facie* evidence that testator had a chattel interest in the premises, to put in deft.'s answer to a bill in equity stating that "he believed testator was possessed of the leasehold premises in the bill mentioned."—DOE d. DIGBY v. STEEL (1811), 3 Camp. 115, N. P.

2891. — — —.]—THISTLEWOOD v. CRACROFT (1815), 6 Taunt. 141; 1 Marsh. 497; 128 E. R. 987.

Annotations:—**Mentd.** Hodson v. Terrill (1833), 3 Tyr. 929; Hyams v. Stuart King, [1908] 2 K. B. 696.

2892. — Or party privy in estate.]—(1) Part of an old indenture relating to the lands in question, appearing to have been severed with a sharp instrument, & formerly in the custody of pltf.'s steward, until litigation commenced between them, afterwards handed over to the succeeding steward, from whose custody it is produced at the trial, is admissible in evidence against pltf., in support of the case of deft., who derived title from the former steward.

(2) Declarations made by a party in possession of an estate, in his answer to a bill in Chancery, are admissible in evidence against him, & person deriving from him; but declarations by him of what he heard another person state, not adding that he believed the statement, are not admissible to cut down or defeat his estate.—ROE d. TRIMBLESTOWN (LORD) v. KEMMIS (1843), 9 Cl. & Fin. 749; 8 E. R. 601, H. L.

Annotations:—**As to** (1) **Refd.** Andrew v. Motley (1862), 12 C. B. N. S. 514. **As to** (2) **Refd.** Boileau v. Rutlin (1848), 2 Exch. 665; Ward v. Pitt, [1913] 2 K. B. 130. *Generally*, **Mentd.** Atkinson v. Pocock (1818), 12 Jur. 60.

2893. Where party is infant—Answer inadmissible.]—LEIGH v. WARD (1688), 2 Vent. 72; 86 E. R. 315.

2894. — — —.]—The answer of a guardian to a bill in Chancery against his ward cannot be read in evidence in a ct. of law to conclude the infant.—EGGLESTON v. SPEKE (1689), 3 Mod. Rep. 258; 87 E. R. 170; *sub nom.* EDLESTON v. SPEAK, Comb. 156; Holt. K. B. 222; 1 Show. 89; *sub nom.* ECCLESTON v. PETTY (*alias* SPEKE), Carth. 79.
Annotations:—**Refd.** Stanton v. Percival (1855), 5 H. L. Cas. 257. **Mentd.** Symson v. Kirton (1696), Cro. Jac. 115. Onyons v. Tryers (1716), Prec. Ch. 459; Limbery v. Mason & Hyde (1734), 2 Com. 451; Christopher v. Christopher (1771), 2 Dick. 446; Goodright d. Ioffe v. Harwood (1773), Loft. 282; *Ex p.* Ilchester (1803), 7 Ves. 348.

2895. Where part of pleading read—Whole may be demanded.]—The party against whom an answer

in Chancery is produced in evidence may have the whole of it read.—BATH (EARL) v. BATHERSEA (1694), 5 Mod. Rep. 9; 2 Bos. & P. 518, n.; Bull. N. P. 236; 12 Vin. Abr. (Evidence) 111, pl. 31; 87 E. R. 487.

Annotation:—**Refd.** Doe d. Foster v. Derby (1834), 1 Ad. & El. 783.

2896. — — —.]—If an answer in Chancery is produced in evidence, the party against whom it is produced is entitled to have the whole bill in Chancery read as part of his adversary's case.—PENNEL v. MEYER (1838), 8 C. & P. 470; 2 Mood. & R. 98, N. P.

2897. Not matters founded on hearsay.]—*Semble:* if deft. gives in evidence an answer in Chancery of pltf., it will not entitle pltf. to avail himself of any matters contained in such answer which are only stated as hearsay.—ROE d. PELLATT v. FERRARS (1801), 2 Bos. & P. 542; 126 E. R. 1429.

Annotations:—**Consd.** Cobbett v. Grey (1850), 4 Exch. 729. **Apprvd.** Stanton v. Percival (1855), 5 H. L. Cas. 257.

2898. — — —.]—ROE d. TRIMBLESTOWN (LORD) v. KEMMIS, No. 2892, *ante*.

2899. Whether against co-defendant.]—In some special cases the answer of one deft. may be read against the other.—ANON. (1715), 1 P. Wms. 300; 24 E. R. 398, L. C.

2900. — Corporation or corporation servant.]—*Semble:* the answer of a deft., made a party as the officer of a corp., also defts., cannot be read in evidence against the latter.—M'INTOSH v. GREAT WESTERN RY. CO. (1851), 4 De G. & Sm. 544; 61 E. R. 950.

Annotation:—**Refd.** Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co. (1900), 83 L. T. 58.

2901. Only pleadings on record—Original bill amended—Original inadmissible.]—Where a bill has been amended, the amended bill is the only one upon record. The original bill, therefore, cannot be read as evidence to prove what a pltf. considered his right to be at the time of filing it.—HALES v. POMERET, POMERET v. HALES (1818), Dan. 141; 3 Eng. & Y. 915; 159 E. R. 801.

2902. Not against different parties.]—ANON. (1624), Godb. 326; 78 E. R. 192.

2903. — — —.]—An answer in Chancery by a mtgor., to a bill of foreclosure filed by the mtgee., is not admissible in evidence, the mtgor. having conveyed his interest in the estate to another twenty years before the answer was filed, & the person to whom the estate was conveyed being no party to the mtge., or to the proceedings in equity.—GULLY v. EXETER (BR.) (1828), 5 Bing. 171; 2 Moo. & P. 266; 130 E. R. 1026.

Annotation:—**Mentd.** Kelson v. Kelson (1853), 10 Hare, 385.

2904. — Answer filed by solicitor on behalf of client—Proceedings against solicitor.]—An answer in Chancery filed by a solr. on behalf of a client cannot be sued against the solr. filing it as evidence of any fact stated in the answer.—WILKINS v. NOKES (1846), 1 New Pract. Cas. 429; 7 L. T. O. S. 112.

2905. Bill taken pro confesso.]—WILSON v. PARKER (1816), 1 Coop. temp. Cott. 346; 47 E. R. 888, L. C.

2906. Where answer not on oath—Objection waived by opposite party.]—(1) The book called Arms & Descents of Nobility, E. 16," though

2885 i. Against party pleading.]—Where pltf. & some of defts. were co-owners of certain properties, the question at issue being whether there was a partition between them & whether under that partition defts. came to be in possession of a specific property in lieu of their shares in all

the properties, a petition & a written statement filed by defts. in certain previous suits admitting the partition & exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence.—**Held:** the documents were admissible against defts. under Evidence Act,

ss. 11 (2), 21 (3).—GIYANNESSA v. MOBARAKNESSA (1897), 1 L. R. 25 (Cal. 219; 2 C. W. N. 91).—**IND.**

g. Only pleadings on record.]—Defences prepared by a party with reference to an indictment for forging a bill, but not lodged.—**Held:** inadmissible evidence in an action of reduction

Sect. 11.—Judicial proceedings: Sub-sect. 9, A., B. & C.]

produced from the Herald's College, is not admissible in evidence, not being kept under authority of any official order, or in discharge of any official duty.

(2) An old "Collection of monumental inscriptions" in country churches is inadmissible to show what has been the inscription on a partly defaced tomb.

(3) Letters addressed to a lady who had married into a particular family were produced from the custody of a member of that family, who likewise possessed many other family papers & deeds, & held by descent some of the property formerly belonging to the husband of the addressee of the letters:—*Held*: they were admissible in evidence, to show in what character she was addressed by members of her own family.

(4) Bill filed in Chancery by A. as next friend to B. Deft. put in an answer, which was not signed; but there was indorsed a consent by A., that this answer should be received without oath. The bill & answer were produced from the proper office:—*Held*: they were admissible in evidence.

(5) A visitation was produced from the proper office; the commission under which it was taken could not be found. The visitation purported to have been taken by deputation from Clarenceux King of Arms. The deputation was produced. It recited the commission, & the power therein contained for Clarenceux to appoint his deputies:—*Held*: the visitation was admissible in evidence.

(6) It was necessary to prove that W. T. married M. D.; there was no certificate of marriage found, but the will of her uncle T. D. was produced. It was in these words: "All this I give to my nephew, W. T.," who was identified as the W. T. in question; & the Act Book from Doctors' Commons was produced, granting administration to "W. T., nephew, minor & universal legatee." Received as proof that a marriage had taken place between W. T. & M. D.—*SHREWSBURY PEERAGE* (1858), 7 H. L. Cas. 1; 11 E. R. 1, H. L. *Annotations*:—*Generallp. Mentd.* *Freud v. Buckley* (1870), 10 B. & S. 973; *Sturla v. Freccia* (1880), 50 L. J. Ch. 86; *Lyell v. Kennedy* (1889), 14 App. Cas. 437.

2907.—*Where two suits have been instituted but subsequently abandoned, & answers put in & affidavits made in those suits, some of which were made after the time for going into evidence had expired, & some before, such answers & affidavits cannot be read in a subsequent suit by the representatives of deft. in the former suits relating to the same subject-matter.*—*WILLIAMS v. WILLIAMS* (1864), 3 New Rep. 701; 10 L. T. 286; 10 Jur. N. S. 608; 12 W. R. 663.

2908. Where issue different.—*MARIANSKI v. CAIRNS*, No. 2881, *ante*.

2909.—*Two suits were instituted in different branches of the ct., the same parties being plffs. in each. An order was made at the Rolls on the petition of deft. in the second suit, allowing him to use the bill & six affidavits filed*

in the first cause, at the hearing of the second cause, saving all such exceptions. On a motion on behalf of plffs. seeking to discharge the order, it was shown that the issues in each suit were different:—*Held*: the order should be discharged with costs.—*PERU REPUBLIC v. RUZO* (1875), 32 L. T. 598; 23 W. R. 546.

2910.—*An admission contained in a statement of defence in one action cannot properly be treated as conclusive in other proceedings between the same parties, but on a different issue.*—*Re WALTERS, NEISON v. WALTERS* (1889), 61 L. T. 872; *reversd.* on other grounds, 63 L. T. 328, C. A.

2911. Suit against different opponent.—*MARIANSKI v. CAIRNS*, No. 2881, *ante*.

2912. On behalf of party pleading—No previous cross-examination on pleading—Through illness.—*The answer of a deft. who was unable to be cross-examined on account of illness was not allowed to be read as evidence on his behalf.*—*PARKER v. M'KENNA* (1874), 43 L. J. Ch. 802; 30 L. T. 807.

B. How Proved.

2913. Office copy—With evidence of identity of parties.—*Upon plea of plene administravit, plff. in order to show assets, gave in evidence a copy of a bill, & answer, purporting to be an answer by a person of the same name, & sustaining the same character as deft.:—Held*: the copy was admissible, & on the face of it there was presumptive evidence of identity, deft. not having shown any circumstances to rebut the presumption.—*v. LYON* (1817), 1 B. & Ald. 182; 106 E. R. 67.

Annotations:—*Appld.* *Studdy v. Sanders* (1823), 2 Dow. & Ry. K. B. 347; *Darnall v. Howard* (1824), 1 Tyr. & M. 169. *Consd.* *Rees v. Howell v. Bowen* (1825), M'Cle. & Yo. 383. *Appld.* *Tooth v. Bagwell* (1826), 2 C. & P. 271. *Refd.* *Logan v. Alder* (1832), 3 Tyr. 557; *A-G v. Ray* (1843), 3 Hare, 335.

2914.—*Sufficiency of proof.*—*STUDDY v. SANDERS*, No. 2374, *ante*.

2915.—*The fact that plff. had filed a bill in this ct. being relied on by deft. as having worked a forfeiture of his interest:—Held*: the mere production of the office copy was not sufficient evidence, there being no proof of identity.—*WILLIAMS v. KNIFE* (1812), 5 Beav. 273; 49 E. R. 583.

—*See further*, Sect. 9, sub-sect. 3, *ante*.

2916. Affidavit—With evidence of identity.—*WHITE v. COX* (1876), 2 Ch. D. 387; 45 L. J. Ch. 685; 31 L. T. 418.

C. For What Purposes Admitted.

2917. General rule—Not evidence of facts stated therein.—*A bill in Chancery is no evidence of the facts contained therein, not even of those on which the prayer of relief is founded.*—*DOE d. BOWERMAN v. SYBOURN* (1796), 7 Term Rep. 2; 2 Esp. 496; 101 E. R. 823.

Annotations:—*Consd.* *Bolleau v. Rutlin* (1848), 2 Exch. 665. *Mentd.* *Doe d. Hammond v. Cooke* (1829), 6 Bing. 174; *M'Queen v. Meade* (1873), 28 L. T. 768.

they are the statements of those parties, but because, for all purposes of present & prospective litigation, they must be taken as truth.—*CIVA RAU NANAJI v. JEVANARAU* (1864), 2 Mad. 31.—*IND.*

2917 II. — *The ct. never reads a bill as evidence of plff.'s knowledge of a fact. It is mere pleader's matter. The statements of a bill are no more than the flourishes of a draughtsman.*—*KILBEE v. SNEYD* (1828), 2 Mol. 186, 208.—*IR.*

of the bill.—*GAVIN v. MONTGOMERIE* (1836), 9 Sh. (Ct. of Sess.) 213.—*SCOT.*

h. Abortive reference.—*A pleading in a reference which has become abortive is not recoverable in a subsequent law suit between the same parties as to the same matter, for the purpose of being tendered as evidence against the party subscriber.*—*CHARTER v. BORTHWICK* (1848), 20 Sc. Jur. 681.—*SCOT.*

PART IV. SECT. 11, SUB-SECT. 9.—C.

2917 I. General rule—Not evidence of

facts stated therein.—*With the Indian system of pleading, a party's statement in a judicial proceeding cannot be excluded like allegations in bills in equity & pleadings at common law. But mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the ct. upon the issues joined. They are then conclusive between the same parties, not because*

2918. ———.]—*TAYLOR v. COLE* (1799), 7 Term Rep. 3, n.; 101 E. R. 824, n.

Annotation:—Consd. Boileau v. Rutlin (1848), 2 Exch. 665.

2919. ———.]—Pltf. cannot use one plea of deft. as evidence of the fact which deft. denies in another plea.—*HARINGTON v. MACMORRIS* (1813), 5 Taunt. 228; 1 Marsh. 33; 128 E. R. 675.

Annotations:—Refd. M'Lachlan v. Evans (1827), 1 Y. & J. 380; Harrison v. Wood (1832), 8 Bing. 371; Knight v. McDouall (1840), 12 Ad. & El. 438. *Mentd.* Bruce v. Wait (1840), 1 Man. & G. 1; Howard v. Danbury (1846), 2 C. B. 803; Ehrensperger v. Anderson (1848), 3 Exch. 148; Wadsworth v. Spain (Queen) (1851), 17 Q. B. 171; Westoby v. Day (1853), 2 E. & B. 605; London Corp'n. v. Cox (1867), L. R. 2 H. L. 239.

2920. ———.]—A demurrer or plea to a bill in equity does not so admit the facts charged in it, as to be evidence against deft. of those facts in a future action between the same parties.—*TOMKINS v. ASHBY* (1827), Mood. & M. 32, N. P.

2921. ———.]—In a former action between the same parties, in which pltf. sued in person, certain statements were made in deft.'s plea which were not denied by the replication, which only denied other parts of the plea; there had been a trial, but no judgment:—*Held*: neither the issue delivered by pltf. himself, nor the *Nisi Prius* record in the former action, was admissible in evidence, as proof of an admission of the facts stated in the plea in the former action, & not denied by the replication.—*HOLT v. MIERS* (1839), 9 C. & P. 191, N. P.

2922. ———.]—(1) In an action of ejectment, the sole question in the cause being whether T. of E., from whom the lessor of pltf. proved his descent, was the same person with T., carrying on business in London as a haberdasher in partnership with his brother twelve years before, a bill in Chancery, filed by that brother alone as a trader, was offered in evidence to show the dissolution of the partnership, & the answer thereto, & another bill & answer in Chancery, in a suit in which a member of the same family was deft., were offered as declarations with regard to the condition in life of that family:—*Held*: inadmissible.

(2) It is well settled that a bill in Chancery is no evidence of the facts stated in it, it is the mere statement of counsel. The answers are the declarations of strangers, which would not be admissible on a question of pedigree, which this was not; for the only question in the cause was one of identity. I hardly understand the ground of misdirection. It might be a prudent course on the part of the counsel not to put in the original register; but it was certainly a course open to observation, considering the extraordinary nature of the entry (*PATTESON, J.*).—*DOE d. ANGEL v. ANGEL* (1846), 7 L. T. O. S. 80.

2923. ———.]—A bill in Chancery is not evidence against the party in whose name it is filed unless his privity to it be shown. When that privity is established the bill is admissible to prove the fact that such a suit was instituted, & what the subject of it was; but it is not evidence by way of admission against the party by whom it was filed of the truth of the facts alleged or stated in it.—*BOILEAU v. RUTLIN* (1848), 2 Exch. 665; 12 Jur. 899; 154 E. R. 657.

Annotations:—Consd. Richards v. Morgan (1863), 4 B. & S. 641; *Re* Walters, Nelson v. Walters (1889), 61 L. T. 872; *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. *Refd.* Thomas v. Cross (1852), 7 Exch. 728; Buckmaster v. Meiklejohn (1853),

8 Exch. 634; Gordon v. Whitehouse (1856), 18 C. B. 747; Howlett v. Tarte (1861), 10 C. B. N. S. 813; Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437. *Mentd.* Hutt v. Morrell (1849), 3 Exch. 240; Butler v. Butler, [1894] P. 25; Ord v. Ord, [1923] 2 K. B. 432.

2924. ———.]—A debtor, after the service of a bkpey. notice upon him under Bkpey. Act, 1883 (c. 52), s. 4 (1) (g), commenced an action against his creditor to set aside the judgment on which such notice was founded, & prayed that an account might be taken & made other claims in the nature of a counterclaim. The debtor delivered the statement of claim in the action & applied to the ct. to dismiss the bkpey. notice. The registrar, after reading the statement of claim, adjourned the application *sine die* with liberty to apply:—*Held*: the statement of claim was not evidence.—*Re FOSTER, Ex p. BASAN* (1885), 2 Morr. 29, C. A.

2925. *Simony.*—*SNOW v. PHILLIPS* (1664), 1 Sid. 220; 1 Keb. 780; 82 E. R. 1069.

Annotations:—Apld. Handeside v. Brown (1753), 1 Dick. 236. *Mentd.* Roo v. Gatehouse (1696), 1 Ld. Raym. 145; Powell v. Milburn (1772), 3 Wils. 355.

2926. *Legitimacy—Answer in chancery by mother—Mother still living.*—To prove that a woman was married antecedent to the birth of her child, cohabitation, reputation, & other circumstances may be given in evidence, but an answer given in Chancery by the mother respecting this fact is not admissible during her life, for she may be examined to it *virâ voce*, nor are proceedings in the Spiritual Ct. admissible.—*ILLIARD v. PHALY* (1723), 8 Mod. Rep. 180; 88 E. R. 132.

2927. *Stale demand—Corroborating evidence.*—Bill in another cause was admitted to be read at the hearing of this, as a corroborating circumstance to prove a stale demand.—*HANDESIDE v. BROWN* (1753), 1 Dick. 236; 21 E. R. 250, L. C.

2928. *Partnership.*—*STUDDY v. SANDERS*, No. 2374, *ante*.

2929. ———.]—*Dissolution.*—*DOE d. ANGEL v. ANGEL*, No. 2922, *ante*.

2930. *Institution of suit—& subject-matter thereof.*—*TAYLOR v. COLE* (1799), 7 Term Rep. 3, n.; 101 E. R. 824, n.

Annotation:—Consd. Boileau v. Rutlin (1848), 2 Exch. 665

2931. ———.]—*BOILEAU v. RUTLIN*, No. 2923, *ante*.

2932. ———.]—*HARRIS v. ORME* (1809), 2 Camp. 497, n.

2933. *History of claim to fishery.*—*MALCOMSON v. O'DEA*, No. 3670, *post*.

2934. *Title in ejectment.*—In evidence in ejectment deft. made title as purchaser under a devisee, & produced only a bill in Chancery preferred by the heir under whom the lessor of pltf. claimed against the devisee, whereby the will was set forth, & confessed in the answer:—*Held*: not evidence, though a possession was proved according to the devise.—*EVANS v. HERBERT* (1666), 2 Keb. 35; 84 E. R. 23.

2935. *Date of execution of deed.*—*FERRERS (LORD) v. SHIRLEY* (1731), Fitz-G. 195; 94 E. R. 716.

Annotations:—Refd. Boileau v. Rutlin (1848), 2 Exch. 665

Mentd. Carey v. Pitt (1797), Peake, Add. Cas. 130; Doe d. Mudd v. Suckermore (1836), 5 Ad. & El. 703.

2936. *Pedigree.*—*TAYLOR v. COLE* (1799), 7 Term Rep. 3, n.; 101 E. R. 824, n.

Annotation:—Consd. Boileau v. Rutlin (1848), 2 Exch. 665.

2937. ———.]—*DOE d. ANGEL v. ANGEL*, No. 2922, *ante*.

2938. *Infancy.*—Where a party is indicted for

2938 i. *Pedigree.*—Plaint in a former suit verified by a deceased member of the family, & as such having special means of knowledge:—*Held*: admis-

sible under Evidence Act, 1872, s. 32 (5), to prove the order in which certain persons were born & their ages.

—*DHANMULL v. RAM CHUNDER GHOSH* (1890), 1 L. R. 24 Cal. 265; 1 C. W. N. 270.—*IND.*

assignees being parties in both proceedings, & the subject-matter being the same, although the question in the suit was the liability of the surety, & the question in this petition the liability of the principal debtors, on the bond.—*Re FIDGEON, Ex p. WALKER* (1839), 3 Deac. 672, Ct. of R.; *on appeal, sub nom. Re FIDGEON, Ex p. FIDGEON* (1840), 4 Deac. 217, L. C.

2946. Admissibility although record defective.]—Though in a bill of exceptions to the directions of the judge below, the evidence given at the trial upon which the allegation of error depended, was not set out at length; but parts of it, consisting of charters, entries, etc., were merely referred to, & the record appeared, on the transcript being brought up, to be so far defective; & though in strictness the House of Lords cannot proceed upon such a record, yet upon consent of counsel for both parties to select such parts as they meant to rely upon, the cause was heard & decided, the Lord Chancellor stating that a special entry should be made on the journals to guard against the mischief of such a precedent.—**KILDARE (Bp.) v. SMYTH** (1817), 5 Dow. 225; 3 E. R. 1310.

2947. Information quo warranto—Not prosecuted.]—LANCUM v. LOVELL, No. 3710, *post*.

2948. Indictment — & acquittal — Action for malicious prosecution.] — *JORDAN v. LEWIS* (1740), 14 East, 306, n.; 2 Stra. 1122; 104 E. R. 618, n.

Annotations:—**Apprvd.** Legatt v. Tollervay (1811), 14 East, 302. **Fold.** Caddy v. Barlow (1827), 1 Man. & Ry. K. B. 275.

2949. — [— — — — —.]—If pltf. in an action for a malicious prosecution offer to prove at the trial the original record of the indictment & acquittal or a true copy thereof, such evidence must be received, though there were no order of the

2346 i. *Admissibility although record defective.* - The omission of the declaration from a record roll which set forth the issue of the writ of summons, the names of the parties, the particulars of claim, the plea of confession, etc., & a variance between the date of the judgment as alleged & as it appeared on the record :- *Held* :- not to be such fatal irregularity as would prevent the admission in evidence of the roll. - **MCLEARN v. LYTLE** (1884), 17 N. S. R. (5 R. & G.) 37. - **CAN.**

2348 i. Indictment - & acquittal -
[action for malicious prosecution.]—In
an action for malicious prosecution,
the indictment, with an indorsement
thereon of the acquittal of plff. of the
criminal charge on which he had been
prosecuted, was produced by the clerk
of the ct., having been sent to him by
the registrar of the Q. B. Div., to whom
the indictment had been returned,
& which he had been subpoenaed by
plff. to produce, the ct. being informed
that the A.-G. had refused his *fiat*
to enable a record of acquittal to be
made up. Deft.'s counsel objected to
the admission of the indictment, & its
admission was refused:—*Held*: the
indictment so indorsed & produced
was not, in the circumstances, sufficient
evidence of the termination of the
prosecution, but the formal record of
acquittal should have been produced.—
HEWITT v. CANE (1894), 26 Q. B. 133.—
CAN.

SA. — *Conviction on one charge—Acquittal on another.*—In an action for money had & received:—*Held*: an indictment upon which deft. had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact.—*MACDONALD v. KEITCHEN* (1858), 7 C. P. 484.—**CAN.**

2952 1. *Action between different parties.*—B. sued his wife for divorce on the ground of her adultery with M. M.'s wife had previously obtained a J.—VOL. XXII.

ct. or *fiat* of the A.-G. allowing pltf. a copy of such record.—**LEGATT v. TOLLERVEY** (1811), 14 East, 302; 104 E. R. 617.

Annotations:—Consd. Doe d. Egremont v. Date (1842), 3 Q. B. 609. **Refd.** R. v. Kinglake (1870), 18 W. R. 805.

2950. ——— No finding thereon.]—LANCUM v.
LOVELL, No. 3710, *post*.

2951. Record roll of presentments—Before justices in eyre.]—LANCUM v. LOVELL, No. 3710, *post*.

2952. Action between different parties.]—DAVIS v. BURRELL & LANE, No. 2978, *post*.

Bankruptcy appeals.—See BANKRUPTCY, Vol. IV., p. 536, Nos. 4921-4923.

County court proceedings.] — See COUNTY COURTS, Vol. XIII., p. 501, Nos. 543-545.

Prosecution for perjury.]—See CRIMINAL LAW,
Vol. XV., pp. 680-682, Nos. 7358-7380.

B. How Proved.

2953. Copies--Exemplifications.] — LEYFIELD'S CASE, No. 1849, *ante*.

2954. ———.]—LEIGHTON v. LEIGHTON (1719),
1 Stra. 210 ; 93 E. R. 476.

2955. ——— Examined copy.] — THOMPSON v.
FINDEN (1829), 4 O. & P. 158.

2956. ———.]—The minute book of a ct. of quarter session is not evidence of its proceedings. The record should be made up on parchment, & an examined copy produced by a witness who examined it.—*R. v. THURING* (1832), 5 C. & P. 507; 1 Nev. & M. C. 356.

— See, further, Sect. 9, ante.

2957. Certificate of proper officer.—Clerk of sessions—Action for malicious prosecution.]—What shall be the proper evidence of the trial & acquittal of pltf. in support of a count for a

26 Sc. Jur. 368. SCOT.

PART IV. SECT. 11, SUB-SECT. 10.
-B.

2954 i. Copies.—Proceedings in N.Z. before magistrates sitting merely to commit for trial & not to hear & determine, acting ministerially & not judicially, are within Evidence Act, No. 100, s. 37, & may be proved in Victorian Cts. by copies of them authenticated in the way pointed out by that Act.—**KASTWOOD v BULLOCK** (1861), 1 W. W. & A.B. 92.—**AUS.**

2354 ii.—[—]—A copy of the minutes of the Supreme Ct., stating the reversal of the judgment of a Justice of the peace on *certiorari*, is not evidence of such reversal, it being of itself a judgment, which should be made up of record & proved accordingly.—**Douglas v. Hinkley** (1828), N. B. Dig. 33.—**CAN.**

2954 iii. ——.]—*Held*: the existence of a record as alleged was sufficiently proved by the production of a transcript filed in the Ct. of Q. B.—*BURRIDGE v. EMES* (1885), 2 Man. L. R. 232.—*CAN.*

2955 I. — *Examined copy.* — Action for malicious prosecution & slander. The malicious prosecution arose out of a charge before a magistrate & a subsequent indictment preferred at the quarter sessions. In proof of the termination of the criminal proceedings, plff. produced in evidence, which, was admitted subject to objection, an original indictment, indorsed "no bill" & a record which was not sufficient, but that a record should have been regularly drawn up & an examined copy produced. — **MCCANN v. PHENEVEAU** (1885), 10 O. L. 573. — **CAN.**

2957 I. Certificate of proper officer -
Action for malicious prosecution.] -
BAECHLER v. ANDREWS, 15 C. L. T.
(1905), 15 C. L. T. 518. -CAN.

2957 II. ————.)—In an action for

deceit of divorce against him, on the ground of his adultery with deft. Deft. had written letters to B. admitting adultery with M.;—*Held*:—this admission justified the et. in admitting as evidence the record of the suit of *M. v. M.*, although deft. was not a co-deft. in that suit.—*BROOKFIELD v. BROOKFIELD* (1895), 5 C. T. R. 282.—**S. AF.**

1. *Effect of delay in filing.*—Where deft. offered in evidence a record roll, in a previous action between the same parties, which had been handed to the prothonotary in ct., & marked filed, only half an hour before it was so tendered in evidence:—*Held*: the judge was right in rejecting it.—MURDOCK v. GRANT (1811), 2 Thom. 100.—**CAN.**

m. ---.]—A record was made up in the first suit setting out an agreement & award, & was not filed until some time after the bringing of this suit:—*Held*: the record was inadmissible. —HALIFAX BANKING Co. v. WORRAIL (1883), 16 N. S. R. (4 R. & G.) 482.—**CAN.**

n. Verdict indorsed on record.]—Pltf. offered in evidence the original record in the suit of def. against him, with the verdict of the jury in his, pltf.'s, favour indorsed thereon:—*Held*: inadmissible.—*DALY v. LEAMY* (1856), 5 C. P. 375.—*CAN.*

c. *Records of probate court.*] -- An old book from the records of the ct. purporting to be the record of probate was considered authentic & received as primary evidence of a will, & the party was not required to account for the document itself. - *DOE v. BURTON v. PARKER & GLESON* (1852), 3 Nfld. L. R. 310. - **NFLD.**

p. *Record of interdict.*] -- The record issues and verdict in an interdict:--*Held*: admissible as evidence in a reduction.—*FRASER v. HILL* (1854), 16 *Dunl. (Ct. of Sess.)* 789;

11.—Judicial proceedings: Sub-sect. 10, B. & C.]

malicious prosecution on a charge of felony: a mere certificate of the facts, under the hand of the clerk of the peace for the county at the sessions for which pltf. was tried & acquitted, is insufficient.

I am of opinion that this is not receivable in evidence in support of the allegations set forth, namely, of pltf.'s trial & acquittal at the general quarter sessions, both of which it is absolutely necessary for him to make out in order to sustain that count. The question is whether this instrument is or is not a record of the proceedings at the trial. I do not think it is. It only amounts to a memorandum or certificate of the facts which would have been found on a record, but it is only a statement of the officer of the ct. & is not, as such, any legal proof or record of the trial, such as pltf. ought to produce, or an examined copy (BOSANQUET, J.).—JENNINGS v. WALKER & HAWES (1839), 3 J. P. 504.

2958. — Application in civil & criminal proceedings—Evidence Act, 1851 (c. 99), s. 13.]—RICHARDSON v. WILLIS, No. 2437, *ante*.

2959. Certificate of judge.]—R. v. MOTTERSELL (1718), 1 Stra. 93; 93 E. R. 405.

2960. Parol evidence—By officer having custody.]—LEIGHTON v. LEIGHTON (1719), 1 Stra. 210; 93 E. R. 476.

2961. Sheriff's minutes—Verified by affidavit.]—On a motion to set aside inquisition on the ground of inadmissible evidence having been received & allowed to go to the jury, the ct. considered themselves bound by the sheriff's minutes, verified by his affidavit, of the evidence which had been offered.—ELLIOTT v. NICKLIN (1818), 5 Price, 641; 146 E. R. 719.

2962. Minute book of court—Quarter sessions.]—R. v. THIRING, No. 2956, *ante*.

2963. Shorthand notes—Judge's summing up.]—The ct. refused to take the summing up of a judge at *Nisi Prius* from a shorthand writer's notes.—SERJEANT v. CHAFY (1836), 5 Ad. & El. 354; 6 Nev. & M. K. B. 819; 2 Har. & W. 273; 5 L. J. K. B. 227; 111 E. R. 1109.

malicious prosecution, pltf. sought but was not permitted to prove his acquittal before the county judge's criminal ct. of a charge of misdemeanour, by means of the production of the original record, signed by the county judge, under Speedy Trials Act, c. 175, & produced & verified by the clerk of the peace in whose custody it was, or else by being allowed to put in a copy thereof, certified by that officer.—*Held*: the evidence should have been admitted in either of the above two forms.—O'HARA v. DOUGHERTY (1894), 25 O. R. 347.—CAN.

2957 iii. — — —.]—In an action for damages for malicious prosecution pltf. tendered as evidence of the termination of the proceedings the original information with the following words written immediately after the form of charge in the information: "Charge read, information withdrawn." This was signed by deft.—*Held*: this constituted sufficient evidence of the termination of the proceedings in favour of accused, it not being absolutely necessary to prove the termination of proceedings by the formal record or certificate of acquittal.—TAMBLIN v. WESTCOTT (1914), 30 W. L. R. 542; 7 W. W. R. 1037; 20 D. L. R. 131; 23 Can. Crim. Cas. 391. CAN.

2959 I. Certificate of judge.]—No certificate by a judicial officer of proceedings before him can properly be

settled where it is intended to be used as evidence, unless in the presence of, or at least on notice to, all the parties concerned.—*Re RYAN v. SIMONTON* (1889), 13 P. R. 299.—CAN.

2959 ii. — — —.]—*Held*: there was sufficient evidence of the favourable termination of the proceedings against pltf., in the record of the justice showing that the charge was dismissed.—WOOD v. NEWBY (1912), 21 W. L. R. 438; 5 D. L. R. 486; 4 Alta. L. R. 330.—CAN.

q. Shorthand notes.]—The notes of the shorthand writer are the proper evidence of what passed at a trial.—FORTLEITH v. FIFE (EARL) (1821), 2 Murr. 463.—SCOT.

2967 I. Judge's notes.]—The judge's notes of the testimony of a witness since deceased are evidence in a subsequent trial of the same cause to prove that witness' testimony, though the second trial is before a different judge.—DOE d. LONCHESTER v. MURRAY (1848), 1 All. 216.—CAN.

2967 ii. — — —.]—Pltf. cannot object to the notes of the judge who tried the cause being referred to, for the purposes of his application.—HIGSON v. PHILAN (1850), 1 P. R. 21.—CAN.

2967 iii. — — —.]—The testimony of a witness, since deceased, given on a former trial between the same parties, may be received in evidence from the judge's notes, though the suits are different, provided the question in issue in each is substantially the same.

2964. — — —.]—RENSHAW v. DIXON, W. N. 40.

2965. — Counsel's statement—As to effect of deed put in evidence.]—DOE d. GILBERT v. ROSS, No. 1846, *ante*.

2966. — Proceedings before justices.]—The ct. refused to look at shorthand notes of proceedings before justices annexed to a special case stated by them, although the case contained a paragraph stating that the shorthand notes were to be deemed part of the case.—NEEDHAM & Co. v. WORCESTERSHIRE COUNTY COUNCIL (1909), as reported in 7 L. G. R. 595, D. C. Annotation:—*Mentd.* Kyle v. Jewers (1914), 84 L. J. K. B. 255.

2967. Judge's notes.]—*Re* WALKER, *Ex p.* LEARMOUTH (1821), 6 Madd. 113; 56 E. R. 1035.

2968. — As to matters transpiring at trial.]—(1) Affidavit of jurymen is not admissible to show what was said by a judge at the trial of a cause where the judge's notes are before the ct.

(2) Affidavit of a jurymen as to what passed in ct. is not admissible where the notes of counsel are produced, except at most to supply deficiencies occasioned by their absence.—EVERETT v. YOEULLS (1833), 4 B. & Ad. 681; 1 Nev. & M. K. B. 530; 110 E. R. 612.

2969. Counsel's notes.]—EVERETT v. YOEULLS, No. 2968, *ante*.

2970. Affidavits of jurymen.]—EVERETT v. YOEULLS, No. 2968, *ante*.

2971. Notes of registrar or master—On appeal from order of registrar or master.]—On an appeal from an order of a registrar or master the ct. will only recognise a note of the registrar or master as evidence of what took place before him, an affidavit by either party being inadmissible.—SYKES v. SYKES, [1897] P. 306; 66 L. J. P. 162; 77 L. T. 150; 13 T. L. R. 579; 41 Sol. Jo. 713, C. A.

Annotations:—*Mentd.* Kettlewell v. Kettlewell, [1898] P. 138; Dean v. Dean, [1923] P. 172.

2972. County court proceedings—Inquiry of person present.]—The mode of proving what occurred on a trial in a county ct. is to ask this of some one who was present, as the county ct. is a

—BENNETT v. JONES (1862), 5 All. 342.—CAN.

2967 iv. — — —.]—Evidence was given on a material point in a previous action between the same parties by a witness since deceased. In a subsequent action a witness stated that he had been in ct. during the hearing of the previous action, & had read the judge's notes of the evidence given by deceased person, & that the evidence so noted agreed with his recollection of the evidence given:—*Held*: the judge's notes were admissible in proof of the evidence of deceased.—FEDERATION CO., LTD. v. BEZUIDENHOUT (1912), T. P. D. 337.—S. AF.

2968 i. — — —.]—*As to matters transpiring at trial.*—The ct. has no power over the judge's notes of the trial, & cannot alter or interfere with them in any way. It must be assumed that they are correct as reported by him.—CORP v. READ (1879), 19 N. B. R. 455.—CAN.

2968 ii. — — —.]—The judge's minutes are conclusive as to what took place at the trial.—HALIFAX BANKING CO. v. WORRALL (1883), 16 N. S. R. (4 R. & G.) 482.—CAN.

2968 iii. — — —.]—MCDUGALL v. MCLEAN (1893), 1 Terr. L. R. 450.—CAN.

r. Production through registrar.]—Contents of records of the High Ct. are properly proved by production through the registrar or acting registrar.—It. v. ROSS (1910), T. L. 50.—S. AF.

ct. of record without records.—*HARMER v. BEAN* (1853), 3 Car. & Kir. 307.

Annotations.—*Mentd.* Wordsley Brewery Co. v. Halford (1903), 90 L. T. 89; *Horn v. Beard*, [1912] 3 K. B. 181; *Dale v. Hatfield Chase Corp.*, [1922] 2 K. B. 282.

—*See, further*, COUNTY COURTS, Vol. XIII., p. 504, Nos. 543–545.

Bankruptcy appeals.—*See* BANKRUPTCY, Vol. IV., p. 536, Nos. 4921–4923.

Prosecutions for perjury.—*See* CRIMINAL LAW, Vol. XV., pp. 680–682, Nos. 7358–7380.

On removal of proceedings by certiorari.—*See* CROWN PRACTICE, Vol. XVI., p. 470, Nos. 3498–3503.

C. For What Purposes Admitted.

2973. Execution of release.—*ANON.* (1638), Clay. 62.

2974. Failure to take oaths—On assumption of office.—Record of sessions was given in evidence to prove pltf. had not taken the oaths, & so his office was void.—*THURSTON v. SLATFORD* (1700), 1 Salk. 284; 91 E. R. 251.

Annotations.—*Mentd.* R. v. Preston upon Hill in Cheshire (1735), Sess. Cas. K. B. 197; *Savage v. Field* (1735), *Lee temp. Hard.* 186.

2975. Trial of cause.—*PITTON v. WALTER*, No. 3023, *post*.

2976. — But not giving of verdict.—The *Nisi Prius* record & the *postea* indorsed are evidence to prove that the cause was tried, but not to prove that a verdict was given.—*FISHER v. KITCHINGMAN* (1742), Willes, 367; Barnes, 449; 7 Mod. Rep. 451; 125 E. R. 1218.

2977. ——To prove an allegation that a cause was carried down to trial, it is necessary to produce the *Nisi Prius* record, though it is not alleged that the cause was in fact tried.—*PARRY v. COLLIS* (1795), 1 Esp. 398; Peake, Add. Cas. 47.

2978. ——The *Nisi Prius* record of an action in ejectment, with the *postea* indorsed, is evidence to show that the trial took place, but not to show that the lessor of pltf. was not entitled to the premises.

Qu.: whether an action in ejectment between *Doe d. A. v. B.* is admissible in an action by *B. v. A. & C.*—*DAVIS v. BURRELL & LANE* (1851), 17 L. T. O. S. 50, N. P.

2979. Evidence of custom—To grind corn.—*CORT v. BIRKBECK* (1779), 1 Doug. K. B. 218; 99 E. R. 143.

Annotations.—*Refd.* *Froeman v. Phillips* (1816), 4 M. & S. 486. *Mentd.* *Richardson v. Walker* (1824), 2 B. & C. 827.

2980. Evidence of facts stated therein—Conclusive & final.—A record evidence only of what is in issue, & appears on the record, ought to be conclusive of the matter.

In order to make a record evidence to conclude

record itself; nor should evidence be admitted that under such a record any particular matter came in question (LORD KENYON, C.J.).—*SINTZENICK v. LUCAS* (1793), 1 Esp. 43, N. P.

2981. Acquittal of co-conspirator—Trial for high treason.—*R. v. HORNE TOOKE* (1791), 25 State Tr. 1.

Annotations.—*Distd.* *R. v. Smith* (1828), 8 B. & C. 341. *Apld.* *It. v. Parry* (1837), 7 C. & P. 836. *Mentd.* *It. v.*

Stone (1796), 25 State Tr. 1155; *Eagleton & Coventry v. Kingston* (1803), 8 Ves. 438; *It. v. Lambert* (1810), 31 State Tr. 335; *R. v. Watson* (1817), 32 State Tr. 1; *Redford v. Birley* (1822), 3 Stark. 76; *R. v. Frost* (1830), 4 State Tr. N. S. 85; *It. v. Zulneta* (1843), 1 Car. & Kir. 215; *It. v. Grant, Ranken & Hamilton* (1848), 7 State Tr. N. S. 507; *Mansell v. It.* (1857), 8 E. & B. 54; *It. v. Meany* (1867), 15 W. R. 1082.

2982. Commencement of action—Prima facie evidence.—In an action on an attorney's bill the *Nisi Prius* roll is good *prima facie* evidence that the action was not commenced till the expiration of a month after delivery of the bill.—*WEBB v. PRITCHETT* (1798), 1 Bos. & P. 263; 126 E. R. 895.

Annotation.—*Mentd.* *Parkinson v. Whitehead* (1842), 11 L. J. C. P. 241.

2983. — Information—Memorandum record.—The suing out of the process is to be considered the commencement of an information within Stat. Limitations. *Semble*: the memorandum on the record is not decisive evidence of the time when the information was commenced.—*A.-G. v. BROWN* (1801), For. 110; 145 E. R. 1129.

2984. ——*PRITCHARD v. BAGSHAW*, No. 1891, *ante*.

2985. Proof of malice—Indictment preferred.—*TATE v. HUMPHREY* (1808), 2 Camp. 73, n.

Annotation.—*Consd.* *Flinerty v. Tipper* (1809), 2 Camp. 72.

2986. Payment of money—Under foreign attachment—Proceedings in Mayor's Court.—To prove that debt. under process of a foreign attachment has paid a sum of money to a creditor of pltf., the record of the cause in the Mayor's Ct. with an entry of satisfaction, is conclusive evidence. The record is only *prima facie* evidence that the debt, for which the account was brought in the Mayor's Ct., arose within the limits of the city.—*HUXHAM v. SMITH* (1809), 2 Camp. 19.

Annotations.—*Refd.* *Magrath v. Hardy* (1838), 4 Bing. N. C. 782. *Mentd.* *Crosby v. Hetherington* (1842), 4 Man. & G. 933; *Westoby v. Day* (1853), 2 E. & B. 605; *Borthwick v. Walton* (1855), 15 C. B. 501; *Cooke v. Gill* (1873), 42 L. J. C. P. 98.

2987. Withdrawal of action—Entry in minute book—Sheriff's court.—The usual course of the sheriff's ct. in London, upon the abandonment of a suit by pltf., being to make an entry in the minute book of "withdrawn" by pltf.'s order, opposite to the entry of the plaint:—*Held*: proof of such entry in the minute book was sufficient to prove an allegation that the former suit was "wholly ended & determined."—*ARUNDELL v. WHITE* (1811), 14 East, 216; 101 E. R. 583.

Annotations.—*Refd.* *Pierce v. Street* (1832), 3 B. & Ad. 397. *Mentd.* *Sharpe v. Abbey* (1828), 5 Bing. 193.

2988. Adulteration of rum—Record of condemnation.—*HART v. MCNAMARA* (1817), 4 Price, 154, n.; 146 E. R. 424.

Annotation.—*Refd.* *De Mora v. Concha* (1885), 20 Ch. D. 268.

2989. by one debt. in *assumpsit* against a co-debt., the *postea* is evidence to prove the amount of the damages. (2) *Semble*: the indorsement of the costs, with the master's *allocatur* on the *postea*, is not sufficient to entitle pltf. to recover half of the costs, without producing the judgment.—*FOSTER v. COMPTON* (1818), 2 Stark. 364.

2990. ——*It.*—In an action on an indemnity bond:—*Held*: the *postea* was sufficient evidence

PART IV. SECT. 11. SUB-SECT. 10. —C.

2982 i. Commencement of action—Prima facie evidence.—In an action against a justice pltf. gave no evidence that the action was not commenced till the expiration of a month after the notice; whereupon the judge

directed a nonsuit, to which pltf. did not submit, & obtained a verdict. On motion for a new trial, it appeared by the *nisi prius* record that the declaration was entitled more than a month after the notice:—*Held*: this was *prima facie* evidence of the time of commencing the action.—*BAXTER v. HALLETT* (1863), 5 All. 544.—*CAN.*

2982 ii. ——*It.*—In an action against a justice of the peace:—*Held*: the statement of the time of issuing the summons contained in the *nisi prius* record was sufficient proof of the commencement of the action.—*LYON v. BARNES* (1882), 22 N. B. R. 55.—*CAN.*

Sect. 11.—Judicial proceedings: Sub-sect. 10, C.; sub-sects. 11, 12 & 13, A.]

in proof of an allegation in a replication, that pltf. was obliged to & did pay a sum of money, as & for the damages & costs recovered by the person against whose claims the obligor had become bound to protect pltf., where, in consequence of an arrangement between the parties, no judgment was ever entered up.—**HARRAP v. BRADSHAW** (1821), 9 Price, 359; 147 E. R. 118.

2991. Amount of costs.]—FOSTER v. COMPTON, No. 2989, *ante*.

2992. —.]—HARRAP v. BRADSHAW, No. 2990, *ante*.

2993. Customary payment of tithes.]—An account of tithes in kind was decreed, notwithstanding evidence of payment of certain customary payments for upwards of a century, & evidence that numerous tiths had been filed by vicars, but had been subsequently abandoned; it appearing from the depositions & proceedings in an old cause, rather more than a century back, that the customary payments did not then exist, but that the then vicar had endeavoured to set them up.—**JACKSON v. MORRIS** (1827), 1 Y. & J. 275; 148 E. R. 675, Ex. Ch.

2994. Admission of liability.]—A landlord was sued for repairs done upon his estate; pltf. failed in endeavouring to prove that deft. had given orders for the repairs. He then offered evidence of an agreement, made after the action was brought, between pltf., deft., & the landlord's tenant, by which the tenant was to pay to pltf. £100 out of the rent which he would have to pay deft., & that deft. should pay two-thirds of pltf.'s costs. The tenant paid pltf. the £100, but deft. did not pay the two-thirds of the costs. Pltf. then carried down the record of trial, & now contended that he was entitled upon this evidence to a verdict, with nominal damages:—**Held**: (1) (**LITTLEDALE & HOLROYD, JJ.**) even if the evidence were admissible in an action upon the agreement, it was not evidence in the present action to charge deft. with a nominal verdict; (2) (**BAILEY, J.**) it was evidence to go to the jury in this action, upon the question whether deft. had admitted a general liability.—**LOFTS v. HUDSON** (1828), 2 Man. & Ry. K. B. 481; 7 L. J. O. S. K. B. 242.

2995. — Bridge—Presentment.]—(1) On an indictment for the non-repair of a bridge *ratione tenuræ*:—**Held**: a record of 1314, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge, & his acquittal by the jury, which was shortly after followed by a grant of pontage, from the Crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible in evidence to negative any immemorial liability *ratione tenuræ*.

(2) The jury, after finding a verdict of acquittal, also found that the bridge had been recently built, & that no one was liable to repair it. **Seemle**: such finding by a jury in ancient times is admissible as reputation, on a question as to the liability to repair *ratione tenuræ*.—**R. v. SUTTON (LADY)** (1838), 8 Ad. & El. 516; 3 Nev.

& P. K. B. 569; 1 Will. Woll. & H. 525; 7 L. J. Q. B. 205; 112 E. R. 934.

Annotations:—As to (2) **Consd. R. v. Bedfordshire** (1855), 4 E. & B. 535. **Generally, Mentd. R. v. Stainforth** (1848), 12 J. P. 105.

2996. Liability for repair—Highway.]—On the trial of an indictment against a parish for non-repair of a road, evidence of an indictment against an adjoining parish for non-repair of a continuation of the same road, & a conviction thereupon, is admissible to prove that the road is a highway, & that the parish is liable to repair it.—**R. v. BRIGHTSIDE BIERLOW (INHABITANTS)** (1849), 13 Q. B. 933; 3 New Mag. Cas. 230; 4 New Sess. Cas. 47; 19 L. J. M. C. 50; 14 L. T. O. S. 103; 13 J. P. 716; 14 Jur. 174; 110 E. R. 1520.

Annotation:—Mentd. Macclesfield Corpn. v. G. C. Ry., [1911] 2 K. B. 528.

2997. Joint trespass—Action of ejectment—Against one only.]—DOE v. HARLOW (1841), 12 Ad. & El. 42, n.; 113 E. R. 727.

2998. Conclusion of action—Not unsealed issue roll—Nolle prosequi indorsed thereon.]—An unsealed issue roll is not a record of the ct.; & therefore the entry of a *nolle prosequi* thereon against one of two defts., is not the proper evidence of such *nolle prosequi*, to show that as against such deft. the action is at an end.—**FAGAN v. DAWSON** (1842), 4 Man. & G. 711; 11 L. J. C. P. 319; 134 E. R. 293.

2999. To prove particular allegation pleaded.]—Action of contract for breach of agreement to enter into a partnership. A plea of fraud was pleaded, but subsequently withdrawn. Declaration alleged that before entering on the agreement pltf. incurred expenses in journeys at the request of deft. on the intended partnership business:—**Held**: upon the assessment of damages, the *Nisi Prius* record was not admissible to show that the plea of fraud had been pleaded.—**HERRING v. TOMLIN** (1854), 23 L. T. O. S. 92; 2 W. R. 470.

3000. Evidence of title—Action of ejectment—Right of lessor of plaintiff.]—DAVIS v. BURRELL & JANE, No. 2978, *ante*.

3001. — Right to fisheries.]—W. sued M. for an injury to her reversionary interest in a several fishery in an arm of the sea, alleging her right to the soil between high & low water mark, & that the soil & fishery were in the possession of F., as her tenant under a lease granted in 1845. M. held a neighbouring property under G., & W., in order to prove her title, gave in evidence the proceedings in an action brought by F. against G. in 1851 for a similar injury to his possessory right, which was referred to arbitration & an award was made in favour of G.:—**Held**: the proceedings & award in the former action were not admissible as proof of so much of the allegations of ownership of W. as were in question in both actions, because W. would not have been bound by the finding of the arbitrator, or by any admissions by F. in that action, it not having been brought by her direction & authority.—**WENMAN (LADY) v. MACKENZIE** (1855), 5 E. & B. 417; 3 C. L. R. 1307; 25 L. J. Q. B. 41; 25 L. T. O. S. 267; 1 Jur. N. S. 1015; 3 W. R. 626; 119 E. R. 517.

3000 i. Evidence of title—Action of ejectment.]—Held: in ejectment, a record in ejectment in a former trial substantially between the same parties, was properly admitted as evidence, & all that could be inferred against pltf.'s right to recover at that time, & deft.'s right to possession, were proper inferences from the production of the record.—**OSBER v. VERNON** (1864), 14 C. P. 573.—**CAN.**

s. —.]—A judgment had been entered up on verdict, but there was nothing to show that a record had been filed excepting the fact that an execution had been issued. More than thirty years afterwards a rule nisi was obtained for leave to file a record therein *nunc pro tunc*, in order that it might be produced as evidence in a pending action between the sons of the original parties, the title to land being

in question. The rule was discharged on the ground of the application being made too late, & by a party in another suit.—**REID v. SMITH (REUT)**, 7 N. S. R. 20.—**CAN.**

t Evidence of bona fides.]—A. & B., two undivided Hindu brothers, conveyed to their mother, C., one-third share in the ancestral property of the family by a deed of sale, dated

3002. ———.]—The corpn. of O. claiming the exclusive right of fishery in O. haven, their lessees brought an action against two fishermen for an invasion of that right. The evidence offered on the part of plffs. included the record in an action brought by the corpn. in 1792 against a fisherman for dredging for oysters in their water, in which the corpn. succeeded in establishing their right to the oysters:—*Held*: the jury were warranted in finding upon this & the other evidence that the corpn. had the right claimed.—*MANNALL v. FISHER* (1859), 5 C. B. N. S. 856; 23 J. P. 375; 5 Jur. N. S. 389; 141 E. R. 313.

3003. Value of property—Presentment of grand jury—At quarter sessions.]—Pursuant to the Liverpool Sanitary Amendment Act, 1861, the grand jury of the ct. of quarter sessions presented that certain houses belonging to claimant & others were unfit for human habitation & ought to be demolished. The parties could not agree as to the amount of compensation to which the owners were entitled, & an arbitrator was appointed by the Local Govt. Board to inquire & assess. A provisional order provided that the estimate of value should be based on the fair market value, due regard being had to the nature & condition of the property & the probable duration of the buildings in their existing state, & to their state of repair, without any additional allowance in respect of the compulsory purchase of such premises:—*Semble*: the presentment of the grand jury was inadmissible as evidence in this inquiry as to the value of the property.—*GOUGH v. LIVERPOOL CORPN.* (1891), 65 L. T. 512; 55 J. P. 789; 7 T. L. R. 581, C. A.

SUB-SECT. 11.—REPORTS.

See Sect. 12, sub-sect. 17, post.

SUB-SECT. 12.—RULES AND ORDERS OF COURT.

3004. How proved—Production by proper officer—Sufficient.]—*SERBY v. HARRIS* (1698), 1 Ld. Raym. 745; 91 E. R. 1399.

3005. Admissibility—As evidence of facts alleged.]—*WOODROFFE v. WILLIAMS* (1815), 6 Taunt. 19; 1 Marsh. 419; 128 E. R. 939.
Annotation:—*Distd.* *Bernde v. Read* (1845), 14 L. J. Q. B. 247.

3006. ———.]—An agreement of reference to which plff. was a party was attested by two subscribing witnesses. Upon an issue joined in which plff. denied the agreement of reference:—*Held*: the rule of ct. by which, pursuant to the agreement, it was made a rule of ct., & which recited and incorporated it was not the proper evidence of it, but it should have been proved by one of the subscribing witnesses.—*BERNEY v. READ* (1845), 7 Q. B. 79; 1 New Pract. Cas. 251; 14 L. J. Q. B. 247; 5 L. T. O. S. 191; 9 Jur. 620.

3007. ———.]—*In action for malicious detention.*—In an action on the case against deft., for mali-

ciously lodging a detainer against plff., the declaration averred that the suit, in which the detainer was lodged, was determined by a rule of ct. by which it was ordered that plff. should be discharged out of custody, & the proceedings stayed:—*Held*: the rule was sufficient evidence to support the allegation although it was objected that it was obtained merely on the oath of plff., who would, by its admission, be, in effect, giving evidence in her own cause.—*BROOK v. CARPENTER* (1825), 3 Bing. 297; 11 Moore, C. P. 59; 4 L. J. O. S. C. P. 70; 130 E. R. 530.

SUB-SECT. 13.—VERDICTS.

A. Admissibility.

3008. Only where parties the same.]—On a plea of usury transaction on a bond a verdict of acquittal in an action for the usury penalties on the same bond, between the same parties, is admissible for plff. —*CLEVE v. POWEL* (1832), 1 Mood. & R. 228, N. P.

3009. ———.]—*CLARGES v. SHERWIN* (1699), 12 Mod. Rep. 313; 88 E. R. 1367.
Annotation:—*Folld.* *R. v. Warden of the Fleet* (1699), 12 Mod. Rep. 337.

3010. ——— *Privies to the parties.*]—Verdict shall only be given in evidence amongst privies.—*LOCK v. NORBORNE* (1687), 3 Mod. Rep. 141; 87 E. R. 91.

3011. ——— *Other parties added—Claiming under original parties.*]—*STRUTT v. BOVINGDON* (1803), 5 Esp. 56, N. P.

Annotations:—*Refd.* *Wenman v. Mackenzie* (1855), 25 L. J. Q. B. 44; *Morgan v. Nicholl* (1866), 36 L. J. C. P. 86.

3012. ——— *Verdict by default—Divorce proceedings.*]—*BEST v. BEST* (1823), 1 Add. 411.

Annotations:—*Mentd.* *Eldred v. Eldred* (1840), 2 Curt. 376; *Cloves v. Clowes* (1843), 3 Curt. 194; *Seaver v. Seaver* (1816), 2 Sw. & Tr. 665; *Dysart v. Dysart* (1847), 1 Rob. Echl. 479; *Gells v. Gells* (1852), 20 L. T. O. S. 145; *Anon.* (1857), *Dea. & Sw.* 295, 333.

3013. ———.]—*DOE d. BACON v. BRYDGES (LADY)*, No. 3037, *post*.

3014. ———.]—*Semble*: on an issue whether the occupier of close T. had, as appurtenant to it, of common in a tract called M., the party asserting such right cannot give in evidence the verdict in an action between strangers to the depending suit, where the issue was, whether the occupier of B., another close belonging to the owner of T., had a right of common in M., & the jury found for the commoner.—*WILLIAMS v. MORGAN* (1850), 15 Q. B. 782; 117 E. R. 651.

3015. Subject-matter the same—Different defendants—Recovery of malt dues.]—*LONDON CITY v. CLERKE* (1691), *Carth.* 181; *Holt, K. B.* 283; 90 E. R. 710.

Annotations:—*Refd.* *R. v. Brightside Bierlow* (1849), 13 Q. B. 933; *Wenman v. Mackenzie* (1855), 25 L. J. Q. B. 44.

3016. No judgment entered—Verdict inadmissible.]—*FITCH v. SMALBROOK* (1691), *T. Raym.* 2; 83 E. R. 18; *sub nom.* *FITZ v. SMALBROOK*,

PART IV. SECT. 11, SUB-SECT. 13.
—A.

3008 l. Only where parties the same.]—A verdict in one case may be referred to in explanation, but not as evidence in another, where the parties are different.—*DALZIEL v. QUEENBERRY'S (DUKE) EXECUTORS* (1825), 41 Murr. 19.—*SCOT*.

3016 l. No judgment entered—Verdict inadmissible.]—A verdict recovered

Aug. 29, 1851. Subsequently A. sold his one-third share in the joint ancestral property to B. by a deed dated Aug. 4, 1852. In a suit brought by a judgment-creditor of A. in 1868 to recover A.'s half share in the joint property from B. & C., plff. gave in evidence proceedings taken by A. jointly with his brother B. in 1856 against a third person, relating to the joint property with a view to show that the two documents were illusory, & intended

to screen A.'s share from execution by his creditors:—*Held*: such proceedings were important & relevant evidence, in order to test the *bona fides* with which A. executed the two documents, as it was important to ascertain how A. subsequently demeaned himself with regard to the property, his share or interest in which he purported to convey by those documents.—*GIRDHAR NAGJISHET v. GANPAT MAROBA* (1874), 11 Bom. 129.—*IND*.

Sect. 11.—Judicial proceedings: Sub-sect. 13, A., B. & C.; sub-sect. 14.]

1 Keb. 134; *sub nom.* WICKS v. SMALBROOKE, 1 Sid. 51.

—**Consd.** R. v. Hinks (1845), 10 J. P. 690; R. v. Williams (1845), 1 Cox. C. C. 289. **Refd.** Doe d. Mudd v. Suckernore (1837), Will. Woll. & Dav. 405.

3017. Verdict in one ejectment—Inadmissible in another.]—A verdict in one ejectment cannot be given in evidence on the trial of another.—CLERKE v. ROWELL (1669), 1 Mod. Rep. 10; 86 E. R. 690; *sub nom.* CLERK v. PYWELL & PHILIPS, 2 Keb. 555; 1 Vent. 42; 1 Saund. 319.

Annotations:—Mentd. Doe d. Jones v. Williams (1833), 2 Nev. & M. K. B. 602; Doe d. Blight v. Pett (1840), 11 Ad. & El. 842.

3018. Admissibility on new trial.]—A former verdict cannot be read in evidence on a new trial.—ROGERS v. GODDARD (1682), 2 Show. 255; 89 E. R. 925.

3019. —.]—Where a ct. of equity directs that a new trial of an issue should be had, neither party ought to be allowed to give the verdict on the first trial in evidence of the second trial.—O'CONNOR v. MALONE (1839), 6 Cl. & Fin. 572; MacL. & Rob. 468; 3 Jur. 522; 7 E. R. 814, 11 L.

Annotation:—Consd. Butler v. Butler (1894), P. 25.

3020. Admissibility under private Act—Compulsory purchase of land—Verdict of jury as to compensation.]—A railway Act empowered the owners & occupiers of lands through which the railway & other works were intended to be made to agree to accept satisfaction or recompense for the value of such lands, & also compensation for any damage by them sustained by reason of the severing or dividing of such lands, & for any damage, loss, or inconvenience sustained by them by reason of the taking thereof, etc.; & in case the co. & such parties should not agree as to the amount of compensation, etc., the same should be ascertained by the verdict of the jury if required. Sect. 29, for settling all differences between the co. & the owners & occupiers of any lands taken & damaged, or injuriously affected by the execution of any of the powers granted by the Act, provided for the summoning of a jury by the sheriff, to inquire of, assess, & give a verdict for the money to be paid for the purchase of such lands, or by way of compensation, *inter alia*, for the severing & dividing the same from other lands. Sect. 31 directed that such verdicts & the judgments thereon, being first signed by the person presiding, should be deposited with, & kept by the clerk of the peace for the county, among the records of the quarter sessions, & should be deemed records to all intents & purposes, & that such records & true copies of them should be evidence. Sect. 111 enacted that, in every case in which the owners, etc., of any lands should, in their arrangements with the co., have agreed to receive compensation for gates, etc., or passages, instead of the same being erected by the co. for the purpose of facilitating the passage to & from either side of the lands severed or divided by the railway, it should not be lawful for such owners, etc., to pass or cross the railway from one part to the other of the lands so severed & divided, otherwise than by a bridge, etc., to be erected at the

charge of such owners. Sect. 216 authorised the owners, etc., of lands, through which the railway shall be made (except in cases where the co. should have made proper communication), to pass & repass directly over the part of the railway made upon their lands, for the purpose of occupying them; which right, by sect. 217, was to cease as soon as the co. should have constructed proper bridges, etc.

An owner of land severed by the railway claimed compensation from the co.; the question was submitted to a jury, who awarded to him compensation, on the footing that there was to be a total separation of his land without any communication being made, & he received the payment as such compensation:—**Held:** this was an arrangement with the co. under sect. 111; & the owner of the land, afterwards crossing the railway for the purpose of the occupation of his land, was a trespasser within Railway Regulation Act, 1840 (c. 97), s. 16; & as it was proved that the verdict of the jury had never been recorded under sect. 31, parol evidence of it, & of the grounds on which it proceeded, was admissible.—MANNING v. EASTERN COUNTIES RY. CO. (1843), 12 M. & W. 237; 3 Ry. & Can. Cas. 637; 13 L. J. Ex. 265; 2 L. T. O. S. 152; 8 J. P. 107; 152 E. R. 1185.

Annotation:—Refd. Williams v. Eyton (1858), 27 L. J. Ex. 176.

3021. Where evidence on which founded inadmissible.]—A verdict obtained upon the evidence of the parties to a suit, & the decree founded thereon, are not admissible, as evidence of the facts thereby established, in another suit between the same parties in which their evidence is inadmissible.

In a suit by the wife for judicial separation, on the ground of cruelty & desertion, a jury having upon the evidence of the parties & others found the charges proved, the ct. decreed a judicial separation. In a suit by the husband for dissolution of marriage on the ground of the wife's adultery:—**Held:** the verdict & decree in the suit for judicial separation were not admissible in evidence to prove charges of cruelty & desertion set up by the wife in her answer, because to admit them would be in effect to make use of the evidence of the parties in a suit in which their evidence was inadmissible.—STOATE v. STOATE (1861), 2 Sw. & Tr. 223; 30 L. J. P. M. & A. 102; 3 L. T. 756; 164 E. R. 980.

Annotation:—Fold. Bancroft v. Bancroft & Rutney (1864), 3 Sw. & Tr. 597.

3022. Civil verdict admissible in criminal cause—Not vice versa.]—RICHARDSON v. WILLIAMS (1699), 12 Mod. Rep. 319; 88 E. R. 1349.

Verdict of coroner's jury—Admissibility of rider to verdict.]—See CORONERS, Vol. XIII., p. 250, No. 243.

B. How Proved.

3023. Whether postea sufficient—Without proof of final judgment.]—(1) Herald's books are evidence of pedigree.

(2) The bare producing the *postea* is no evidence of the verdict without showing a copy of the final judgment, because it may happen the judgment was arrested or a new trial granted. But it is

affd., 35 S. C. R. 282.—CAN.

PART IV. SECT. 11, SUB-SECT. 13. —B.

3023i. Whether postea sufficient—Without proof of final judgment.]—A verdict in a civil action cannot be given in evidence by the mere produc-

without judgment signed cannot be pleaded in bar to an action between the same parties.—GILBERT v. GRAHAM (1873), N. B. Dig. 680.—CAN.

a. Appeal in civil suit—Trial for perjury before appeal heard—Verdict of jury.]—For perjury alleged to

have been committed at the trial by deft., he was tried & acquitted before the hearing of the appeal, & on the appeal his counsel moved the full ct. to be allowed to read the verdict of the jury in the criminal trial. The ct. dismissed the motion.—BORLAND v. COOTE (1904), 10 B. C. R. 493;

good evidence that a trial was had between the same parties, so as to introduce an account of what a witness swore at that trial who is since dead (PRATT, C.J.).—PITTON v. WALTER (1719), 1 Stra. 162; 93 E. R. 448.

Annotation :—As to (2) *Consd.* R. v. Browne (1829), Mood. & M. 315.

3024. —.—[The *postea* is evidence of a verdict for the sum indorsed, & is good evidence of a set-off to the extent of it.—GARLAND v. SCOONES (1798), 2 Esp. 647, N. P.]

3025. By parole evidence—Where no record—Compulsory purchase of land.—MANNING v. EASTERN COUNTIES RY. CO., No. 3020, *ante*.

C. For What Purposes Admitted.

3026. To contradict previous statement of witness.—CLARGES v. SHERWIN (1699), 12 Mod. Rep. 343; 88 E. R. 1367.

Annotation :—*Refd.* R. v. Warden of the Fleet (1699), 12 Mod. Rep. 337.

3027. Possession of goods.—ANON. (1702), Bull. N. P. 243; *sub nom.* TILEY v. COWLING, 1 Ld. Raym. 744, N. P.

Annotation :—*Distd.* Tomlinson v. Wilkes (1821), 2 Brod. & Bing. 397.

3028. Negligence.—In an action against a master for the negligence of a servant, the latter is not a competent witness to disprove the negligence, without a release.

The verdict in this case may be given in evidence in an action by defts. against the witness, & therefore he is an incompetent witness without a release (*per* CUR.).—GREEN v. NEW RIVER CO. (1792), 4 Term Rep. 589; 100 E. R. 1192.

Annotations :—*Distd.* Thomas v. Pearse (1818), 5 Price, 517. *Refd.* Morish v. Foote (1818), 2 Moore, C. P. 508.

3029. Partnership.—To establish a partnership between two defts., a verdict on an issue directed out of a ct. of equity, to try whether defts. were partners, & for what time on a bill filed by one of them against the other, is admissible evidence to establish a partnership, the verdict having found them to be so.—WHATELY v. MENHEIM (1797), 2 Esp. 607, N. P.

3030. Amount of set-off.—GARLAND v. SCOONES, No. 3024, *ante*.

3031. Validity of will—Action of ejectment.—An allegation, pleading a verdict in ejectment [in an action to try the validity of a will] & the remarks of the judge thereon & the names of the witnesses examined, was rejected.

Verdicts may possibly have been admitted in some instances, not as evidence on the main question, but as affecting costs where there has been an appearance of delay & the suit was vexatious & litigious (SIR JOHN NICOLL).—GRINDALL v. GRINDALL (1830), 3 Hag. Rec. 259; 162 E. R. 1150.

Annotation :—*Consd.* The Clarence (1853), 1 Ecc. & Ad. 206.

3032. Amount of costs.—GRINDALL v. GRINDALL, No. 3031, *ante*.

3033. ——— Validity of patent.—An action was brought for infringing a patent, & a verdict passed for pltf. affirming the patent :—*Held* : after such verdict the record of a former trial, in which the patent was affirmed, was admissible under 5 & 6 Will. 4, c. 83, s. 3, in order to entitle

pltf. to treble costs.—NEWHALL v. WILKINS (1851), 17 L. T. O. S. 20.

3034. Reputation—As to liability to repair *ratione tenuræ*.—R. v. SUTTON (LADY), No. 2995, *ante*.

3035. Adultery—Action against husband—For goods for wife.—If a husband has put away his wife for adultery he is not liable even for necessities supplied to her, if it be proved on the trial of an action for the price of such necessities that she has been guilty of adultery; but a verdict in an action of criminal conversation is not receivable in evidence in such action, as it is *res inter alios partes*.—HARDIE v. GRANT (1838), 8 C. & P. 512, N. P.

3036. ————In an action for necessities supplied by pltf. to deft.'s wife whilst living apart from him, deft., in order to establish his wife's adultery, produced in evidence the record in the Divorce Ct., in a suit by him against his wife for dissolution of marriage on the ground of adultery, in which it was found that his wife had been guilty of adultery, but as the husband was found to have been also guilty of adultery, the Judge Ordinary had dismissed the suit :—*Held* : such evidence was admissible under the plea of never indebted; but as the judgment in the Divorce Ct. had not altered the status of the wife, it was not conclusive evidence of the adultery in the action between pltf. & deft.—NEEDHAM v. BREMNER (1866), L. R. 1 C. P. 583; Har. & Ruth. 731; 35 L. J. C. P. 313; 14 L. T. 137; 12 Jur. N. S. 434; 14 W. R. 604.

Annotation :—*Refd.* R. v. Kenny (1877), 46 L. J. M. C. 156.

3037. Terms of lost private Act—Special verdict.—In ejectment for lands in Kent, pltf.'s case depended upon showing that the lands in question had been disavowed by a private Act, which was alleged to have been passed in 1518. The Act, after proper search, could not be found. As secondary evidence of its contents, there was produced an office copy of a special verdict returned upon the trial of a feigned issue in 1662, wherein the jury found that at a parliament, etc., holden, etc., it was enacted, etc., in these words following, to wit, etc.; the Act was then set out, whereby certain lands in Kent, including some held by one W., were disavowed. There was evidence to identify the lands in question with those held by a person of that name at the time the Act was stated to have passed :—*Held* : the special verdict, being *res inter alios acta*, was not admissible *per se*, & it was not receivable as containing an authenticated copy of the Act, inasmuch as it was strictly the finding of a matter of fact, not professing to set forth a copy of the Act according to its tenor, nor stating the title of the Act, so as to identify it with the lost Act.—DOE d. BACON v. BRYDGES (LADY) (1813), 6 Mun. & G. 282; 7 Scott, N. R. 333; 13 L. J. C. P. 209; 1 L. T. O. S. 338; 7 J. P. 724; 131 E. R. 900.

Evidence of boundaries.—See BOUNDARIES, Vol. VII., p. 317, No. 376.

SUB-SECT. 14.—WARRANTS.

3038. Admissibility—In action for false imprisonment.—WENPENY'S CASE (1636), Clay. 54.

PART IV. SECT. 11, SUB-SECT. 14.

3038 i. Admissibility—In action for false imprisonment.—WARD v. OCTHOUSE (1882), 22 N. B. R. 229.—CAN.

3038 ii. ————A warrant issued on an information not disclosing a

tion of the *postea*, but the judgment must be produced.—GILLESPIE v. CUMMING (1841), Long. & T. 181.—IR.

PART IV. SECT. 11, SUB-SECT. 13.

—C.

b. Evidence of amount—For pur-

poses of costs.—The amount of the verdict is *prima facie* the amount of the demand for which the action was brought; & when the amount recovered was under £5 pltf. was deprived of costs.—DICKINSON v. BALLOCH (1835), 2 N. B. R. (Ber.) 37.—CAN.

Sect. 11.—*Judicial proceedings: Sub-sects. 14 & 15, A. & B.*

3039. How proved—Not by copy.—*R. v. SMITH* (1718), 1 Stra. 126; 93 E. R. 420.

3040. Not evidence of facts stated therein—Action for trespass—Warrant of commitment.—(1) The recitals of a warrant of distress, put in evidence by plff. to connect deft. with a trespass, are not evidence for deft. of the facts recited.

(2) The circumstances which are necessary to make a document evidence must be proved *alunde*, & cannot be gathered from the document itself. —*DAVIES v. MORGAN* (1831), 1 Cr. & J. 587; 1 Tyr. 457; 9 L. J. O. S. Ex. 153; 148 R. 1557.

3041. — Action for false imprisonment—Warrant of distress.—In an action of trespass for false imprisonment a warrant of commitment is not evidence of the facts which it recites.—(1812), Car. & M. 509; 9

Mood. & R. 435, N.

Annotation:—Mentd. R. v. Hughes (1879), 4 Q. B. D. 614.

SUB-SECT. 15.—WRITS.

A. Admissibility and Proof.

3042. Admissibility—Whether return must first be filed—Proceedings in same & in different courts.—The issuing of a writ is matter of record in the ct. from which it issued.

The issuing of a writ from another ct. is never a matter of record in this ct. until the return thereto is filed; but the issuing of a writ from this ct. although no return thereto be filed is always a matter of record in this ct. (*DENISON, J.*)—*WHITMORE v. ROOKE* (1756), Say. 299; 1 Keny. 345; 96 E. R. 887.

3043. — After Statute of Limitations commences to run—Proof of resealing after teste.—*Assumpsit* for goods sold & delivered. Plea: Stat. Limitations. A writ of summons tested within six years from the accruing of the cause of action was put in by plff. It had been twice resealed, & was not served until after the six years had expired. No evidence was given by deft. when either resealing took place: *Held*: the resealing gave effect to the original writ without amounting to a reissuing of it, & without making it necessary for plff. to prove the date of the resealing, or more than the teste of the writ.—*BRAITHWAITE v. MONTFORD (LORD)* (1834), 2 Cr. & M. 408; 4 Tyr. 276; 3 L. J. Ex. 91; 149 E. R. 818.

Annotations:—Distd. Wippell v. Manley (1836), Tyr. & Gr. 672. *Mentd. Gibson v. Varley* (1856), 7 E. & B. 49.

3044. — Roll of continuances—Conclusiveness.—*DICKENSON v. TEAGUE*, No. *post*.

criminal offence is illegal, & may afford evidence to a jury of legal malice or want of probable cause for an arrest.—*MOHAN v. BLOOMFIELD* (1861), 13 Ir. Jur. 101.—*IR.*

a. Prima facie evidence of order under which issued—Order recited in warrant.—Plff. produced a warrant issued for his arrest for not finding sureties for the peace, in pursuance of an order to that effect recited in the warrant:—*Held*: such warrant was *prima facie* evidence of the order.—*SPRUNG v. ANDERSON* (1873), 23 C. P. 152.—*CAN.*

PART IV. SECT. 11, SUB-SECT. 15.

A.

3042 I. Admissibility—Whether return must first be filed.—In an action against

a magistrate it is not necessary to prove that the writ was personally served on deft. An attested copy of a writ which has been filed, but not returned, is sufficient evidence of the writ.—*MULHALL v. PALMER* (1823), 2 Fox & S. Ir. 67.—*IR.*

d. — Action for false imprisonment.—Upon the general issue, in an action for a malicious arrest, the writ is not admitted.—*JAMES v. MILLS* (1848), 4 U. C. R. 366.—*CAN.*

e. — Whether writ must first be enrolled.—It is not necessary that a writ of *fi. fa.*, which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence, & if lost & unenrolled, evidence may be given of it.—*SOULES*

3045. Proof—Filing officer's book—Search for original—Notice to produce.—To prove that a writ issued in a particular cause, it is not sufficient to prove the *precipe* by the filazer's book, & to give notice to the party to produce it; it should be shown that, after the return, the Treasury was searched, & no such writ found, & that it was in the party's hands, who had notice to produce it.—*EDMONSTONE v. PLAISTED* (1803), 4 Esp. 160, N. P.

3046. — Sheriff's warrant to officer—Reciting issue of writ.—*BESSEY v. WINDHAM*, No. 3060, *post*.

3047. — Of time of issue of writ—Record.—The record is conclusive evidence of the time of the issuing of the writ; but if a wrong date has been inserted, the trial may be set aside, & the record altered.—*WHIPPLE v. MANLEY* (1836), 1 M. & W. 432; 5 Dowl. 100; 2 Gale, 56;

r. MANLEY, Tyr. & Gr. 672.

B. For What Purposes Admitted.

3048. Evidence of commitment—Action for escape.—In an action against the marshall for an escape on *mesne process*, plff. declared on a commitment on *habeas corpus* by a judge at chambers, with a *proud palet per recordum*, & on the trial produced no record in evidence, but the writ from the office of the clerk of the papers of the K. B. prison:—*Held*: this was only *quasi* a record, but good evidence, there being no mode of recording such a commitment in practice, & the *proud palet* was surplusage. *Aliter* in the case of a commitment in execution.—*WIGLEY v. JONES* (1804), 5 East, 440; 1 Smith, K. B. 457; 102 E. R. 1138.

Annotations:—Refd. Cooper v. Jones (1813), 2 M. & S. 202. *Mentd. Gadd v. Bennett* (1818), 5 Price, 540.

3049. Issue of commission of bankruptcy.—A writ of *supersedeas*, reciting that a commission of bkpcy. issued on a day certain, is evidence to show that such a commission issued on that day.—*GERVIS v. GRAND WESTERN CANAL CO.* (1816), 5 M. & S. 76; 105 E. R. 979.

Annotations:—Refd. Ledbetter v. Salt (1828), 4 Bing. 623; *Wright v. Colls* (1849), 8 C. B. 150.

3050. Evidence of indorsement thereon—Facts as to sale by sheriff.—In case against a judgment creditor for maliciously suing out an *alias fi. fa.* after a sufficient execution levied upon plff.'s goods under the first *fi. fa.*:—*Held*: the sheriff's returns indorsed upon the two writs, which writs had been produced in evidence by plff. as part of his case, wherein the sheriff stated that he had forborne to sell under the first, & had sold under the second writ, by the request & with the consent of the now plff., were *prima facie* evidence of the facts so returned, credence being due to th

e. DONOVAN (1864), 15 C. P. 121.—*CAN.*

PART IV. SECT. 11, SUB-SECT. 15.

B.

f. Evidence of indorsement thereon.—*Held*: that the writ of summons in a previous action, being specially indorsed, was proper evidence for the ct. that the previous judgment embraced the same claim as that now sued for.—*MUMFORD v. ARCADIA POWDER CO.* (1905), 37 N. S. R. 375.—*CAN.*

g. Commencement of action.—The commencement of an action may be proved by the writ of *ca. re.*—*UPPER v. McFARLAND* (1848), 5 U. C. R. 101.—*CAN.*

h. Writ of execution—Not returned

official acts of the sheriff between third persons.—**GYFFORD v. WOODGATE** (1809), 11 East, 297; 2 Camp. 117; 103 E. R. 1018.

Annotations:—*Refd.* **Cator v. Stokes** (1813), 1 M. & S. 599; **Avril v. Warwick, Sheriff** (1834), 3 Nev. & M. K. B. 871. **Mentd.** **Jackson v. Hill** (1839), 2 Per. & Dav. 455.

3051. — Specific sum.—A. being arrested & in custody of the sheriff at the suit of B., upon a writ indorsed "oath for £76"; C., in consideration of discharging A., undertook to give his promissory note at six months, "for 10s. in the pound for the debt," on the arrival of the discharge:—**Held**: the sum indorsed on the writ was sufficient evidence of the amount for which A. had been arrested, & no demand of the note was necessary to enable pltf. to commence this action.—**BROWN v. DEAN** (1833), 5 B. & Ad. 848; 2 Nev. & M. K. B. 316; 110 E. R. 1001.

3052. — Whether made in due time—To prevent Statute of Limitations running.—**PRITCHARD v. BAGSHAW**, No. 1891, *ante*.

3053. — Roll of continuances.—**PRITCHARD v. BAGSHAW**, No. 1891, *ante*.

3054. Commencement of action—To rebut plea of Statute of Limitations.—A plea of Stat. Limitations stated that the cause of action did not accrue within six years next before the commencement of the suit. Pltf. replied, that the cause of action did accrue within the six years, etc.:—**Held**: without specially replying process issued, pltf. might on the above replication prove a *quo minus* to have issued within the six years, etc., & produce the roll to show the continuance regularly entered up accordingly.

If continuances are regularly entered upon the roll, the ct. will not look at anything in order to contradict the roll, *e.g.* a writ produced to show that a second writ, an *alias*, was tested on a day subsequent to the return day of the first.—**DICKENSON v. TEAGUE** (1834), 1 Cr. M. & R. 241; 4 Tyr. 450; 3 L. J. Ex. 266; 119 E. R. 1070.

3055. To prove malice—Writ of inquiry—In former suit.—In an action for slander, a writ of inquiry issued in a former suit against deft. for speaking similar slanderous words, may be received in evidence to prove malice.—**JACKSON v. ADAMS** (1835), 1 Hodg. 78; 2 Scott, 599; 4 L. J. C. P. 194; *subsequent proceedings*, 2 Bing. N. C. 402.

Annotation:—*Mentd.* **Heming v. Power** (1842), 10 M. & W. 564.

3056. Writ of execution—When evidence of judgment—Indictment for murder of officers executing process.—If a *capias*, *fi. fa.* or other writ of like kind issue to the sheriff & he or any of his officers be killed in executing it, it is sufficient on an indictment for murder to produce the writ & warrant without showing the judgment or decree.—**R. v. ROGERS** (1735), Post. 311.

Annotation:—*Refd.* **It. v. Davies** (1861), 8 Cox, C. C. 486.

3057. ——In ejectment by the vendee of a term sold under a *fi. fa.* against deft. in execution, it is sufficient to produce the *fi. fa.* without proving a copy of the judgment.—**DOE d. BATTEN v. MURLESS** (1817), 6 M. & S. 110; 105 E. R. 1184.

Annotations:—*Mentd.* **Doe d. Morris v. Williams** (1826), 6 B. & C. 41; **Magdalen Hospital v. Knotts** (1878), 8 Ch. D. 709.

—*Admissible to prove title.*—In making title to land under a sheriff's deed, the original execution under which the land was sold, when not returned & filed in ct., is admissible in evidence.—**LINTON v. WILSON** (1841), 1 Kerr, 223.—**CAN.**

k. To connect defendant with writ.—To connect a deft., sued for malicious arrest, with the writ, the writ itself should be produced, or to let in secondary evidence, its loss must be shown or notice to produce it, unless deft. has adopted the arrest,

3058. ——*]*—A lessor in ejectment, who claims title as a purchaser from the sheriff, who sells by virtue of a *fi. fa.*, at the suit of such lessor, must prove the judgment as well as the writ.—**DOE d. BLAND v. SMITH** (1817), 2 Stark. 199; Holt, N. P. 589.

3059. ——*]*—In an action against a landlord, for an excessive distress, it appeared that two several distresses for rent, & an intervening execution for a debt, were levied; a sale was afterwards effected, when deft., having retained what was due for rent, paid the remainder to the execution creditor:—**Held**: the production of the writ & warrant, without proof of the judgment, was sufficient.—**TAYLOR v. HARRISON** (1832), 1 L. J. K. B. 155.

3060. ——*]*—An assignment of goods in fraud of creditors is valid as between parties to the deed, & as between either party & a stranger. A sheriff claiming to seize the goods on behalf of a judgment creditor is a stranger within this rule, if he does not prove the legal authority under which he seized on behalf of such creditor. For this purpose it is sufficient, in trespass for the seizure, if he prove the writ; & there is some evidence of the writ, if pltf. puts in the sheriff's warrant to his officer, & that recites a writ at the suit of the judgment creditor.—**BESSEY v. WINDHAM** (1844), 6 Q. B. 166; 14 L. J. Q. B. 7; 8 Jur. 824; 115 E. R. 61.

Annotations:—*N.F.* **White v. Morris** (1852), 11 C. B. 1015. *Refd.* **Haylock v. Sparke** (1853), 1 E. & B. 471. *Mentd.* **Phillipps v. Phillipps** (1850), 10 C. B. 85; **Bowes v. Foster** (1858), 27 L. J. Ex. 262.

3061. ——*]*—In trespass against an execution creditor & a bailiff of a county ct., for seizing goods, pltf. put in the warrant of execution, with the indorsement thereon by the officer that he had taken the goods under it:—**Held**: the bailiff, as well as the execution creditor, was bound to prove the judgment; & the warrant, reciting the judgment, though put in by pltf., was no evidence of such judgment.—**WHITE v. MORRIS** (1852), 11 C. B. 1015; 21 L. J. C. P. 185; 18 L. T. O. S. 256; 16 Jur. 500; 138 E. R. 778.

Annotations:—*Refd.* **Haylock v. Sparke** (1853), 1 E. & B. 471. *Mentd.* **Bowes v. Foster** (1858), 2 H. & N. 779; **Burling v. Harley** (1858), 3 H. & N. 271; **McMahon v. Lemard** (1858), 6 H. L. Cas. 970; **Barker v. Furlong**, [1891] 2 Ch. 172.

3062. — Evidence of proveable debt.—The ct. will not order the comrs. to enter a proof for a particular sum, admitted by bkpt., who was a trustee & exor., to be due from him to his testator's estate, in his answer to a bill filed by a legatee against him prior to his bkpy., although the original writ of execution issuing out of the Ct. of Chancery was produced, commanding deft. to pay those particular sums into ct. within one week; but will only make the common order for petitioner to make such proof as he may be advised, the writ of execution not being satisfactory evidence of the existence of such a proveable debt, it being in its nature more an order *pendente lite*.—*Re* **STANDLEY, Ex p. LAWREN** (1841), 1 Mont. D. & De G. 583; 10 L. J. Bey. 37; 5 Jur. 295. Ct. of R.

Annotation:—*Mentd.* **It. Fenwick, Ex p. Brown** (1849), 13 L. T. O. S. 468.

as by filing affidavits in justification.—**THORNE v. MASON** (1850), 8 U. C. R. 236.—**CAN.**

l. To prove loan.—**HOPE v. DERWENT ROLLING MILLS CO., LTD.** (1905), 7 F. (Ct. of Sess.) 837; 42 Sc. L. R. 794; 13 S. L. T. 364.—**SCOT.**

Sect. 11.—Judicial proceedings: Sub-sect. 16. Sect. 12: Sub-sects. 1 & 2.]

SUB-SECT. 16.—OTHER CASES

3063. Answer to Interrogatories—How proved—Examined copy.—In an action by the administratrix of a wife it appeared that deft. had written letters to the wife promising to hold at her disposal a sum of money which he had received from a third person. The husband did not interfere either to allow her to have the control of the money or to prevent her from dealing with it. He survived her, & then died. To prove the amount pltf. offered in evidence an examined copy of deft.'s answers to interrogatories in a previous action in which pltf. had sued the representative of the husband, but which was discontinued:—*Held*: (1) the answers were admissible without proof of the interrogatories; (2) an examined copy of the answers was admissible without proof of deft.'s handwriting to the original answers.—*FLEET v. PERRINS* (1868), 1 L. R. 3 Q. B. 536; 9 B. & S. 575; 37 L. J. Q. B. 233; 19 L. T. 147; *affd.* on other grounds (1869), L. R. 4 Q. B. 500, Ex. Ch.

Annotations:—As to (1) Reid, British Thomson-Houston Co. v. British Insulated & Helsby Cables, [1924] 2 Ch. 160. Generally, Mentd. Lloyd v. Pugh (1872), 8 Ch. App. 88; Jones v. Cuthbertson (1873), L. R. 8 Q. B. 504; British Telescope & Biograph Co. v. Homer, [1901] 1 Ch. 671.

3064. ——— Admissibility—In subsequent proceedings.—*NIGHTINGALE v. DODD* (1729), 1 Barn. K. B. 257; Mos. 228; 94 E. R. 176, L. C.

3065. ——— In same proceedings—Answers of opposite party.—Pltf. may use as his evidence, answers given to interrogatories exhibited by deft. in the cause; but if he does so, cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers.—*MINTYRE v. LAYARD* (1825), 1 C. & P. 606; Ry. & M. 203, N. P.

3066. ——— Without proof of Interrogatories.—*FLEET v. PERRINS*, No. 3063, *ante*.

3067. Minutes taken before under-sheriff—Inquisition for damages—Admissibility—Application to set aside inquisition.—The ct. will not allow minutes taken before the under-sheriff, on a writ of inquiry for an assault, to be admitted on application to set aside the inquisition for exces-

sive damages, & an application for such a purpose cannot be supported on affidavits by defts., parties themselves.—*LATHBURY v. BROWN* (1825), 10 Moore, C. P. 106; 3 L. J. O. S. C. P. 81.

3068. Fiat superseded—Admissibility—Must first be enrolled.—A fiat that has been superseded will be directed to be enrolled to enable a party to use it as evidence in a ct. of law.—*Re MAY, Ex p. MAY* (1839), 9 L. J. Bcy. 3; 3 Jur. 1035, Ct. of R.

3069. Attorney's retainer—In bankruptcy proceedings—How proved—Copy.—In an action by an attorney for his fees for passing deft. through the Insolvent Ct., the retainer was proved by a copy bearing the seal of the Insolvent Ct., & given by the officer of the ct. under Judgments Act, 1838 (c. 110), s. 105:—*Held*: the retainer which was filed in the ct. was such a "proceeding" as was contemplated by that sect., & therefore the copy was properly admitted in evidence.—*BOWEN v. HODGES* (1846), 7 L. T. O. S. 91.

3070. Notices—To execution creditor—Admissibility—In interpleader proceedings.—Notices in a suit in which execution has been levied, sent by pltf. & his solr. to the execution creditor, claiming the goods seized under the *fi. fa.* & to try the validity of which an interpleader issue has been directed, are admissible in such issue.—*BENNETT v. HARTHILL* (1847), 8 L. T. O. S. 451.

3071. Summons at chambers—Admissibility.—*TAYLOR v. PARROTT* (1847), 8 L. T. O. S. 479.

SECT. 12.—PUBLIC DOCUMENTS.

SUB-SECT. 1.—WHAT ARE PUBLIC DOCUMENTS.

3072. General rule.—(1) The report of a committee appointed by a public department in a foreign state, though addressed to that department & acted on by the Govt., is not necessarily admissible in the cts. here, as evidence of all the facts stated therein.

(2) An entry in the books of a manor is public in the sense that it concerns all the people interested in the manor; & an entry probably in a corp'n. book concerning a corporate matter, or something in which all the corp'n. is concerned, would be "public" within that sense. But it must be a public document, & it must be made

PART IV. SECT. 11, SUB-SECT. 16.

m. Charge sheet signed by defendant.—In action for false imprisonment.—*Held*: the fact that deft. signed the charge sheet as prosecutor was not a circumstance in the case which the jury were entitled to consider, & the charge sheet was wrongly admitted in evidence.—*LLOYD v. OSBORNE* (1899), 20 N. S. W. L. R. 127; 15 N. S. W. N. 309. **AUS.**

n. Judge's summons—Admissibility of copy.—An order may be made on a verified copy of a judge's summons, where the original is served by mistake.—*TIPT v. WALLACE* (1839), 3 Ont. Dig. 5463. **CAN.**

o. Consent rule—Admissibility.—Rules from the office of the clerk of the office of the pleas should be signed by the officer himself, & not by his clerk; though a consent rule in the handwriting of such clerk is admissible in evidence before a sheriff's jury on a writ of inquiry.—*JARVIS v. EDGERTT* (1848), 1 All. 264. **CAN.**

p. Minute of adjudication.—An interpleader summons was produced, with a minute indorsed by the Judge, adjudging that the goods were the property of the execution creditor:—*Held*: the minute of adjudication & order were conclusive.—*OLIPHANT v.*

LESLIE (1865), 21 U. C. R. 398. **CAN.**

q. Recognition for prosecution of election petition.—A recognition entered into for the prosecution of an election petition before the House of Assembly, under R. S. c. 98, & certified to the Supreme Ct. by the Speaker as forfeited, is not a record; & in *sci. fu.* on such a recognition with an averment *probat per recordum*, to which deft. pleaded *null tiel record* the production of the recognition so certified from the files of the ct. does not prove the issue.—*R. v. SPARROW* (1868), 1 Han. 237. **CAN.**

r. Certificate of previous conviction—Admissibility—As evidence of identity.—*Qu.*: whether a certificate of a previous conviction is sufficient *prima facie* evidence of the identity of accused with the person of the same name so previously convicted.—*R. v. EDGAR* (1888), 15 O. R. 142. **CAN.**

s. Deed of referee in equity—Admissibility.—*LOUIE v. MONTGOMERY* (1906), 26 C. L. T. 465; 3 N. B. Eq. Rep. 238. **CAN.**

t. Petition—Admissibility.—A. the son of a deceased zamindar, sued B. & C. his widow & brother, for possession of the zamindari, which was impartible. In order to prove that A. was illegitimate, C. filed two petitions purporting to have been signed & sent to the

collector of the district by C. in 1871, referring to A.'s mother as a concubine. C. was not examined as a witness:—*Held*: their contents were not evidence, but the petitions were themselves evidence to show that a complaint was made as mentioned therein.—*PARVATHI v. THIRUMALAI* (1887), 1 L. R. 10 Mad. 331. **IND.**

u. d. Written statement—Admissibility.—Where pltf. & some of defts. were co-owners of certain properties, the question at issue being whether there was a partition between them & whether under that partition defts. came to be in possession of a specific property in lieu of their shares in all the properties, a petition & a written statement filed by defts. in certain previous suits admitting the partition & exclusive acquisition of the specific property were put in, but objected to as inadmissible in evidence:—*Held*: the documents were admissible against those defts.—*GYANNESSA v. MOBARAKANNESSA* (1897), 1 L. R. 25 Calc. 210; 2 C. W. N. 91. **IND.**

PART IV. SECT. 12, SUB-SECT. 1.

b. Medical history sheet.—A medical history sheet, the result of an examination of pltf. by a properly constituted medical board, was properly admitted in evidence, it being a

by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, & being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards (LORD BLACKBURN).

(3) In many cases, entries in the parish register, of births, marriages, & deaths, & other entries of that kind, before there were any statutes relating to them, were admissible, & they were "public" then, because the common law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, & so made it admissible (LORD BLACKBURN).

(4) Supposing this inquiry had been carried on under the authority of the English Crown, & the English Crown had required of a magistrate that some confidential report should be made, I am not aware of any decision which says that, in such a case as I have supposed, the document would be received (LORD BLACKBURN). —*STURIA v. FRECCIA* (1880), 5 App. Cas. 623; 50 L. J. Ch. 86; 43 L. T. 209; 41 J. P. 812; 29 W. R. 217, H. L.; *affg. S. C. sub nom. POLINI v. GRAY, STURIA v. FRECCIA* (1879), 12 Ch. D. 411, G. A.

Annotations.—As to (2) *Appld.* Evans v. Merthyr Tydfil U. C., [1899] 1 Ch. 241. *Consd.* Mercer v. Denno, [1905] 2 Ch. 538. *Refd.* Heyne v. Fischel (1913), 110 L. T. 261; Bird v. Keep, [1918] 2 K. B. 692; Collis v. Amphlett, [1918] 1 Ch. 232; Finn v. Shelton Iron Steel & Coal Co. (1924), 131 L. T. 213. As to (3) *Refd.* Haines v. Guthrie (1884), 13 Q. B. D. 818; Re Turner, Glenister v. Harding (1885), 29 Ch. D. 985; Re Trufort, Trafford v. Blanc (1887), 36 Ch. D. 600. *Generally, Refd.* Amys v. Barton (1911), 5 B. W. C. 117; Re Djambi (Sumatra) Rubber Estates (1912), 107 L. T. 631; Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130.

3073. Vicar's books—Both public & private.]—*Semble*: vicar's books are of both a public & private nature. —*FIRKINS v. LOWE* (1824), 1 Mcle. 73; 13 Price, 193; 147 E. R. 962.

Annotations.—*Refd.* Tomlinson v. Lynner (1829), 2 Sim. 489; Newton v. Berroford (1831), You. 377. *Mentd.* Hardman v. Ellames (1835), 2 My. & K. 732; Re Reay (1847), 8 L. T. O. S. 476.

3074. Diploma of College of Surgeons.]—*Semble*: a diploma of the College of Surgeons is not a public document. —*R. v. HODGSON* (1856), Dears.

public document. —*CASEY v. KENNEDY* (1920), 52 D. L. R. 326. —**CAN.**

c. Public books.]—*Re JUGUEN LALL* (1880), 7 C. L. R. 356. —**IND.**

d. Anuamatri - putra.] — *KRISHNA KISHORI CHOWDHURANI v. KISHORI LAL ROY* (1887), L. R. 14 Ind. App. 71; L. L. R. 14 Calc. 486. —**IND.**

e. Indian police reports.] — *R. v. ARUMUGAM* (1896), 1 L. R. 20 Mad. 189. —**IND.**

f. Musketry register - Of volunteer corps.]—The musketry register of a volunteer corps, kept by virtue of statutory regulations, is not a public document. — *NORTHERN MOUNTED INFANTRY v. O'CALLAGHAN* (1909), T. S. 171. —**S. AF.**

PART IV. SECT. 12, SUB-SECT. 2.

3078 i. How proved—Certified copy.] — *BESSEY & GHANTHAM MUNICIPAL COUNCIL* (1854), 11 U. C. R. 156. —**CAN.**

3079 i. — Printed copy—Sufficiency of—Local authority.] — *WATERFORD*

& B. 3; 25 L. J. M. C. 78; 27 L. T. O. S. 144; 20 J. P. 309; 2 Jur. N. S. 453; 4 W. R. 509; 7 Cox, C. C. 122, C. C. R.

Annotation.—*Mentd.* R. v. Moah (1858), 7 Cox, C. C. 503.

3075. Bye-laws of railway company.]—Bye-laws duly made by a railway co., pursuant to Railways Clauses Act, 1815 (c. 20), ss. 108-111, & confirmed & allowed as by law required, are "public documents," a certified copy of which is admissible in evidence under Evidence Act, 1851 (c. 99), s. 14. —*MOTTERAM v. EASTERN COUNTIES RY. CO.* (1859), 7 C. B. N. S. 58; 29 L. J. M. C. 57; 1 L. T. 101; 24 J. P. 40; 6 Jur. N. S. 583; 8 W. R. 77; 141 E. R. 735.

Annotations.—*Mentd.* Cox v. Hakes (1890), 15 App. Cas. 506; Robinson v. Gregory (1905), 92 L. T. 171.

3076. Books of manor.]—*STURIA v. FRECCIA*, No. 3072, *ante*.

—*See, further*, Sub-sect. 3, *post*.

3077. Corporation books.]—*STURIA v. FRECCIA*, No. 3072, *ante*.

—*See, further*, Sect. 13, sub-sect. 4, *post*.

ECT. 2.—BYE-LAWS.

3078. How proved—Certified copy—Railway company.]—*MOTTERAM v. EASTERN COUNTIES RY. CO.*, No. 3075, *ante*.

3079. — Printed copy—Sufficiency of—Local authority.]—*DREW v. HARLOW* (1875), 39 J. P. Jo. 420.

3080. — — — — —.]—A copy of the bye-laws of a county council having a copy of the corporate seal of the council printed upon it is not sufficient evidence of the bye-laws, which must be proved by production of a copy sealed with the corporate seal of the council. —*TIMOTHY v. FENN* (1910), 102 L. T. 283; 74 J. P. 123; 8 L. G. R. 156, D. C.

3081. — Sealed copy.]—Upon a proceeding before a ct. of summary jurisdiction to recover a penalty for breach of a bye-law made by the council of a municipal borough under Municipal Corporations Act, 1882 (c. 50), s. 23, the production of a written copy of the bye-law authenticated by the corporate seal is sufficient evidence until the contrary is proved, not merely that the bye-law has been duly made, but also that all conditions precedent to its becoming a valid operative bye-law, such as the fixing of a copy of the bye-law for forty days on the town hall before it can come into force, have been complied with.

COOPER v. MURPHY, [1920] 2 L. R. 165. —**IR.**

3081 i. — Scaled copy.]—Where the seal of the corp'n. was not mentioned in the clerk's certificate, but was on the same page with the certificate, just above it, & opposite to the signatures of the receve & clerk:—*Held*: the bye-law was sufficiently proved. —*BAKER v. PARIS MUNICIPAL COUNCIL* (1853), 10 U. C. R. 621. —**CAN.**

3081 ii. — — — — —.]—The copy of a bye-law filed under the seal of the municipality & sworn to have been received from the clerk, & opposite the seal was the signature, "M. F., City Clerk," with the words "a true copy," above:—*Held*: sufficiently verified. —*KINGHORN & KINGSTON CORP'N.* (1866), 26 U. C. R. 130. —**CAN.**

3081 iii. — — — — —.]—Where the copy of a bye-law deposited for registration has impressed upon it the seal of the municipality, that is sufficient. —*FERNIE CITY v. CROW'S NEST, ETC. CO.* (1907), 13 B. C. R. 12. —**CAN.**

3081 iv. — — — — —.]—The production of a sealed copy of a bye-law which contains a provision that the bye-law shall come into force on a certain day, is receivable as evidence of the time fixed for the coming into force of the bye-law. —*LANE v. DOYLE* (1892), 11 N. Z. L. R. 385. —**N.Z.**

g. — Evidence of cancellation.]—*Defts.* were sued on a bye-law. *Defts.*' book of bye-laws was produced, in which the bye-law was written out, but not sealed, & in the margin was written "expurged," signed with the president's initials:—*Held*: such proof, even without the entry in the margin, would have been insufficient to show a bye-law. —*McDONELL v. ONTARIO, SIMCOE & HURON RY. UNION CO.* (1854), 11 U. C. R. 207. —**CAN.**

h. — By affidavit.]—*Held*: a bye-law was sufficiently authenticated for the purpose of a motion against it by an affidavit of relator that the copy produced was received from the clerk of the council. —*FISHER v. VAUGHAN*

Sect. 12.—Public documents: Sub-sects. 2, 3, 4, 5, 6, 7 & 8.]

—ROBINSON *v.* GREGORY, [1905] 1 K. B. 531; 74 L. J. K. B. 367; 92 L. T. 171; 69 J. P. 161; 3 L. G. R. 308; 20 Cox, C. C. 781, D. C.

3082. ————]—TIMOTHY *v.* FENN, No. 3080, *ante*.

3083. Evidence of validity of bye-law—Fulfillment of conditions precedent to validity.]—ROBINSON *v.* GREGORY, No. 3081, *ante*.

SUB-SECT. 3.—COURT ROLLS AND MANORIAL DOCUMENTS.

3084. Admissibility — Of copy.]—A copy of the register of a will is not evidence. A copy of a church register is, & so is a copy of *ct. rolls*. — DIKE *v.* POLHILL (1701), 1 Ld. Raym. 741; 91 E. R. 1398.

3085. ——— As evidence of quit rents.] —Qu.: whether a book of lord of a manor is evidence of quit rents. —ANON (1719), Bunb. 16; 145 E. R. 590.

*Annotations:—*Reid. Roe *d.* Brune *v.* Rawlings (1806), 7 East, 279; Short *v.* Lee (1821), 2 Jac. & W. 464.

3086. ——— As evidence of acts of ownership — Entries of presentments.]—IRWIN (VISCOUNT) *v.* SIMPSON, No. 2071, *ante*.

3087. ——— Licences of court rolls.]—To prove a prescriptive right of fishery as appurtenant to a manor old licences of the *ct. rolls* granted by the lords of the manor in considerations of certain rents to fish in the *locus in quo* are evidence, without proof of the rents being paid if it appears that such rents have been paid in modern times or that the lords of the manor have exercised other acts of ownership over the fishery. —ROGERS *v.* ALLEN (1808), 1 Camp. 309.

*Annotations:—*Consd. Malcomson *v.* O'Dea (1863), 10 H. L. Cas. 593; Bristow *v.* Corinthead (1878), 3 App. Cas. 641. **Reid.** Blandy-Jenkins *v.* Dunraven (1899), 81 L. T. 209. **Mentd.** Pigott *v.* Bayley (1826), 6 B. & C. 16; Bassett *v.* Mitchell (1831), 2 B. & Ad. 99.

3088. ——— Demise by copy of court roll.]—A demise by copy of *ct. roll* is an assertion of right of ownership; enjoyment under it is evidence of ownership (LORD HELSCHELL). —A-G. *v.* EMERSON, [1891] A. C. 619; 61 L. J. Q. B. 79; 65 L. T. 564; 7 T. L. R. 522; 55 J. P. Jo. 709, H. L.

*Annotations:—***Mentd.** Holywell Union Assmt. Com. & Northop *v.* Halkyn District Mines Drainage Co., Holywell Union Assmt. Com. & Halkyn *v.* Halkyn District Mines Drainage Co. (1894), 71 L. T. 818; Hindson *v.* Ashby, [1896] 2 Ch. 1; Ecroyd *v.* Coulthard, [1897] 2 Ch. 554; Castner Kellner Alkali Co. *v.* Commercial Development Corp. (1899), 68 L. J. Ch. 402; Hanbury *v.* Jenkins, [1901] 2 Ch. 404; Beaufort *v.* Ald (1904), 20 T. L. R. 602; Foster *v.* Warlington U. D. C. (1905), 69 J. P. 42; Fitzhardinge *v.* Purcell, [1908] 2 Ch. 139.

3089. ——— To prove admittance—Court roll in irregular form—Handwriting of entry proved.]—

MUNICIPAL COUNCIL (1855), 10 U. C. R. 492.—**CAN.**

k. ——— Variance in verification of copy.]—The *ct. will* discharge a rule moved on a copy of the bye-law verified in a manner different from that pointed out by the statute, unless the reasons for such variance are satisfactorily explained. —BUCHART *v.* BRANT & CARRICK MUNICIPALITIES (1856), 6 C. P. 130.—**CAN.**

l. ———.]—On application for a *mandamus* two copies of bye-laws put in not being proved could not be read, but the same bye-laws were set out at length in affidavits filed, deponent swearing that a bye-law was passed by the town council "in words following":—**Held:** sufficient for the

purposes of the application.—*Re* SANDWICH SCHOOL TRUSTEES & SANDWICH CORPN. (1864), 23 U. C. R. 639.—**CAN.**

m. ——— Judicial notice.]—The *ct.* does not take judicial notice of bye-laws.—*It. v.* WATT, *Ex p.* WELSH, 3 J. R. N. S. 29.—**N.Z.**

PART IV. SECT. 12, SUB-SECT. 3.

3084 i. Admissibility—Of copy.]—BELL *v.* BALMER (1842), 2 Leg. Rep. 310; *Ir. Cr. Rep.* 583.—**IR.**

3084 ii. ———.]—A copy of the patent of a manor *ct.* which has been acted on for upwards of thirty years need not be proved to be a correct copy.—ANON. (1843), *Ir. Cr. Rep.* 825.—**IR.**

In order to prove an admittance made in 1810, a book was produced by H. the present steward of the manor, as containing the *ct. rolls*. In this book was an entry, though not in form a *ct. roll*, of the admittance of 1810, in the handwriting of the clerk of W., the then steward. The original draft of the same entry in W.'s handwriting had been found & compared by H. with the entry in the book, & corresponded, but the draft was not produced:—**Held:** the entry in the book was good evidence of the admittance, & it was not necessary to produce the original draft.—DOE *d.* GUTTERIDGE *v.* SOWERBY (1860), 7 C. B. N. S. 599; 29 L. J. C. P. 291; 2 L. T. 150; 6 Jur. N. S. 870; 8 W. R. 393; 141 E. R. 950.

3090. ——— As evidence of custom.]—The customs of this manor are to be sought in the first place in the *ct. rolls* (NORTH, J.).—JOHNSTONE *v.* SPENCER (EARL) (1885), 30 Ch. D. 581; 53 L. T. 502; 34 W. R. 10.

3091. ——— To kill rabbits.]—COOTE *v.* FORD (1900), 83 L. T. 482; 17 T. L. R. 58.

See, further, COMMONS, Vol. XI., pp. 36, 44, Nos. 498-500, 620; COPYHOLDS, Vol. XIII., pp. 11, 12, 28, 29, 30, 31, 39-41, 71, 79, 88, 98, 109, 111, 112, 128, 133, 139, 147, 149, Nos. 13, 21-33, 244-251, 270-273, 279, 448-466, 470-484, 897, 1003-1005, 1095-1098, 1216, 1393, 1414, 1420, 1590, 1651-1659, 1755-1759, 1888, 1919.

UB-SECT. 4. —FOREIGN AND COLONIAL, AND JUDICIAL DOCUMENTS.

See Part XI., Sect. 8, *post*.

SUB-SECT. 5.—HERALD OFFICE BOOKS.

3092. Admissibility—County visitation record.]—MATTHEWS *v.* PORT (1688), Comb. 63; 90 E. R. 315.

*Annotation:—*Reid. Sturla *v.* Freccia (1880), 29 W. R. 217.

3093. ———.]—SHREWSBURY PEERAGE No. 2906, *ante*.

3094. ——— Not kept in course of official duty.]—SHREWSBURY PEERAGE, No. 2906, *ante*.

3095. For what purpose evidence—Pedigree.]—KING *v.* FOSTER (1682), T. Jo. 221; 84 E. R. 1228.

3096. ———.]—PITTON *v.* WALTER, No. 3023, *ante*.

3097. ———.]—NORRIS *v.* LE NEVE (1731), 2 Barn. K. B. 26; 94 E. R. 331.

3098. ——— Possessions of a monastery.]—A book found in the Herald's Office, purporting to be an account of the possession of a monastery, is

n. ——— Entries in Close Rolls.]—Two entries were offered in evidence from the Close Rolls of 2 & 8 Hen. 3:—**Held:** not admissible, being mere claims to the possession of lands.—DEVONSHIRE (DUKE) *v.* NEILL (1877), 2 L. R. Ir. 132.—**IR.**

o. Court of Conscience—Evidence of jurisdiction.]—When it appeared that a Ct. of Conscience had been held before the mayors of L. for upwards of thirty years, on Thursdays, & that entries were made of the causes heard, & the adjudications made on those days, in a *ct.-book*:—**Held:** the entries made in the *ct.-books* of the causes heard on Thursdays were admissible in evidence.—HOGAN *v.* MAHON (1827), 1 Hud. & B. 281.—**IR.**

not admissible evidence of that fact.—**LYGON v. STRUTT** (1795), 2 Anst. 601; 145 E. R. 979.
Annotation:—**Reid**. Meath (Bp.) v. Winchester (1836), 3 N. C. 183.

3099. — **Of facts stated therein—Book of funeral certificates.**—(1) The statements of chroniclers or contemporary historians are not admissible as evidence of the creation of a peerage.

(2) A funeral certificate from a manuscript book, entitled, "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of the deceased's family, & of other statements contained in it.—**VAUX PEERAGE** (1837), 5 Cl. & Fin. 526; 7 E. R. 505.

Annotations:—As to (2) **Reid**. Sturla v. Freecia (1880), 50 L. J. Ch. 86. *Generally*, **Mentd.** Bray Peerage Case (1839), 6 Cl. & Fin. 757; Hastings Peerage Case (1841), 8 Cl. & Fin. 144; St. John Peerage Claim, [1915] A. C. 282; Beauchamp Barony (1924), 40 T. L. R. 862.

3100. — **Marriage.**—**BERKELEY PEERAGE CASE** (circa 1811), Hubback's Evidence on Succession, 551.

Annotation:—**Reid**. Shrewsbury Peerage Case (1858), 7 H. L. Cas. 1.

6.—JUDICIAL PROCEEDINGS.

See Sect. 11, ante.

SUB-SECT. 7.—LIGHTHOUSE BOOKS.

3101. Admissibility in Admiralty Court—When produced from Trinity House.—The Ct. of Admty. will admit in evidence a lightship log, on production by the officer of the Trinity House in whose custody such logs are kept, without requiring the evidence of the person who made the entries.—**THE MARIA DAS DORES** (1863), Brown. & Lush. 27; 32 L. J. P. M. & A. 163; 7 L. T. 838; 11 W. R. 500; 1 Mar. L. C. 309; 167 E. R. 282.

3102. — **Lighthouse under Tyne commissioners.**—**THE VIATKA** (1881), cited Pritchard's Admiralty Dig. 454.

3103. — **Of examined copy.**—**THE MARIA DAS DORES** (1863), Brown. & Lush. 27; 32 L. J. P. M. & A. 163; 7 L. T. 838; 11 W. R. 500; 1 Mar. L. C. 309; 167 E. R. 282.

3104. — ———. — **THE VIATKA** (1881), cited Pritchard's Admiralty Dig. 454.

SUB-SECT. 8.—LOG-BOOKS, ETC.

See, generally, SHIPPING.

3105. Admissibility of log-books—Principles of.—We should not have granted the rule nisi if a case had not been cited to show that a log-book is evidence. But in *D'Israeli v. Jovett*, the log-book was brought from the Admty. & was a public document (PARK, J.).—**RUNDLE v. BEAUMONT** (1828), 4 Bing. 537; 1 Moo. & P. 396; 6 L. J. O. S. C. P. 91; 130 E. R. 875.

3106. — ———. — A log-book kept for a particular vessel is not evidence of the facts entered therein, when offered on behalf of that vessel; but the party who made the particular entries in the log-book, which are relied on, when he is, or is made a competent witness, may look at those entries & then speak to the truth of the

particular statement there embodied; the facts so embodied become evidence to statements sworn to by a particular witness, & not as being statements contained in a particular book; if the log-book were proved as a mere exhibit, & it was sought to read extracts from it, as the sole proof of certain facts, I should reject it; but it only comes in aid of the memory of a person who is deposing, as he is entitled to do, to certain facts, & who refers to certain entries in a document to assist his recollection in the detail of those facts, which he may do, inasmuch as he himself at the time of the occurrence made those entries in that document (**DR. LUSHINGTON**).—**THE SOCIEDADE FELIZ** (1843), as reported in 7 Jur. 956; *previous proceedings* (1812), 1 Wm. Rob. 303.

3107. — ———. — It is desirable that it should be borne in mind that the log of the S., *per se*, is not evidence of any fact for the S. The log is a statement made by the master of the S. at a time being contemporaneous with the event, & therefore more likely to be correct, & it is used for the purpose only of correcting a statement made at a subsequent time (*per Cur.*).—**THE SINGAPORE & THE HEBE** (1866), L. R. 1 P. C. 378; 4 Moo. P. C. C. N. S. 271; Holt, Adm. 124; 16 E. R. 319, P. C.

3108. — **To prove time of sailing.**—To prove the time of the sailing of a ship under convoy the log-book of the man-of-war which convoyed the fleet is evidence.—**D'ISRAELI v. JOWETT** (1795), 1 Esp. 427, N. P.

Annotation:—**Distd.** Rundle v. Beaumont (1828), 4 Bing. 537.

3109. — **To prove presence of an officer—At particular place.**—The log & muster-books of a ship, returned every quarter to the Admty., mentioned the name of an officer as with the ship at a certain place for a given period of time:—*Held*: this was not sufficient evidence of his having actually been there for the time specified.—**HEATHCOTE'S DIVORCE BILL** (1851), 1 Macq. 277, H. L.

3110. — **To prove desertion—When entry is unsigned.**—To bring a case within 5 & 6 Will. 4, c. 19, ss. 7, 9, there must be an entry in the log-book in conformity with the provisions of those sections.—**THE TWO SISTERS** (1813), 2 Wm. Rob. 125; 2 Notes of Cases, 420; 10 L. T. 913; 7 Jur. 861; 166 E. R. 702.

Annotation:—**Mentd.** The Roebuck (1874), 31 L. T. 274.

3111. — **To prove unseaworthiness—Action against underwriters.**—In an action against the underwriters by the owner of a ship to recover freight, the defence being that the ship was unseaworthy, letters from the captain to plff. are not admissible against plff., without proof of his acquiescence in the correctness of the statements contained therein. Nor are entries in the log-book admissible for the same purpose, nor protests made by the captain as to the state of the ship, unless it can be shown that plff. has previously used these documents upon which to found a claim in respect of the ship.—**PARFETT v. RAYDEN** (1846), 7 L. T. O. S. 452, N. P.

3112. — **Against the master—To prove knowledge—Of existence of blockade.**—**THE UNION** (1855), 2 Ecc. & Ad. 161; Spinks, 161; 3 L. T. 514; 161 E. R. 365.

Annotation:—**Mentd.** The Franciska (1855), Spinks, 111.

3113. — ———. — **To prove port of destination.**—The place of capture was in the course to R. as

PART IV. SECT. 12, SUB-SECT. 8.

3105.1. Admissibility of log books—Principles of.—**WIGHT v. LIDDEL** (1881), 5 Murr. 35.—**SCOT.**

p. — **To prove position of ship—Action against underwriters.**—**TAYLOR v. MORAN** (1885), 11 S. C. R. 347.—**CAN.**

q. — **To prove statements of ship's officers.**—The log-book of a vessel may be produced as a document to prove the statements of the master

Sect. 12.—Public documents: Sub-sects. 8, 9 & 10, A. (a), (b), (c) & (d).]

well as to S. Comparison of the master's evidence with the log proves the vessel to have been sailing for R. The master is discredited by his own log.—**THE STEEN BILLE** (1855), 2 Ecc. & Ad. 159; Spinks, 161; 164 E. R. 364.

3114. — To prove position of ship—Superiority of oral evidence.]—Oral testimony as to the position of a ship at a given time, is better evidence than the production of the log-book.—**R. v. ALLEN** (1860), 10 Cox. C. C. 405.

3115. — To prove ship was in real danger—In action of salvage.]—Defts. to an action of salvage by their defence admitted that all pliffs. had rendered salvage services & that the allegations of the facts of such services set out in the respective statements of claim were in substance correct, but they denied that the various interferences sought to be drawn from those facts were accurate or well founded, & that their vessel was ever in any real danger.—**Held:** pliffs. were entitled to put in the logs of deft. vessel with a view to proving that the ship was in real danger, also a graphic representation of the soundings based on sketches in the defts.' log.—**THE WOODARRA** (1921), 38 T. L. R. 160; *sub nom.* **THE WOODARRA v. ADMIRALTY**, 66 Sol. Jo. 183.

3116. Admissibility of official letter—From commander of man-of-war—To prove facts therein stated.]—The official letter of the commander of a convoy, to the Admty., at the end of the voyage, seems good evidence of the facts therein stated respecting the ships under convoy.—**WATSON v. KING** (1815), as reported in 4 Camp. 272, N. P.

Annotations:—**Refd.** Rundle v. Beaumont (1828), 1 Moo. & P. 396. **Mentd.** Gausson v. Morton (1830), 5 Man. & Ry. K. B. 613; Doo d. Knight v. Nepean (1833), 5 B. & Ad. 86; Gillett v. Abbott (1838), 7 Ad. & El. 783; Smart v. Sanders (1848), 5 C. B. 895; Carter v. White (1882), 20 Ch. D. 225.

3117. Admissibility of ship's articles—To prove ports of call.]—It is not competent to plff. to prove the deviation by the log-book or the endorsements of the consuls on the ship's articles at the various ports.—**BORRETT v. JOHNSON** (1848), 10 L. T. O. S. 465, N. P.

See, further, ADMIRALTY, Vol. I., pp. 198, 199.

SUB-SECT. 9.—MAPS AND PLANS.

See Sect. 15, *post*.

SUB-SECT. 10.—OFFICIAL CERTIFICATES.

A. At Common Law.

(a) *Of the Sovereign and Secretaries of State.*

3118. The Sovereign—Not admissible—On question of fact.]—**OMYCHUND v. BARKER**, No. 2048, *ante*.

3119. Secretary at War—Admissible.]—Certificate of the Secretary at War, read as evidence.—**LLOYD v. WOODDALL** (1748), 1 Wm. Bl. 29; 96 E. R. 15.

3120. — To prove death of officer.]—**FRASER v. BISHOP** (1839), 3 Jur. 309.

3121. India Office—To prove status of foreign overreign.]—A certificate from the India Office

was accepted as evidence of the status of the person in question, following the principle laid down in **Mighell v. Sultan of Johore**, No. 3122, *post*.—**STATHAM v. STATHAM & GAEKWAR of BARODA**, [1912] P. 92; 81 L. J. P. 33; 105 L. T. 991; 28 T. L. R. 180.

3122. Colonial Office—To prove status of foreign sovereign.]—A certificate from the Foreign or Colonial Office is conclusive as to the status of a foreign sovereign.—**MIGHELL v. JOHORE (SULTAN)**, [1894] 1 Q. B. 149; 63 L. J. Q. B. 593; 70 L. T. 64; 58 J. P. 244; 10 T. L. R. 115; 9 R. 447, C. A. **Annotations:—****Apld.** Duff Development Co. v. Kelantan Government, [1924] A. C. 797. **Refd.** Foster v. Globe Venture Syndicate, [1900] 1 Ch. 811; *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176; Aksionairnoye Obchestvo A. M. Luther v. Sagor, [1921] 3 K. B. 532. **Mentd.** *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139; *The Gagara*, [1919] P. 95; *The Porto Alexandre*, [1920] P. 30; *Compania Mercantil Argentina v. United States Shipping Board* (1924), 93 L. J. K. B. 816.

3123. — To prove date of declaration of war.]

—The certificate of a Secretary of State as to the date when war broke out between this country & another is evidence of that fact.—**DRIEFONTEIN CONSOLIDATED GOLD MINES, LTD. v. JANSON**, [1901] 2 K. B. 419; 70 L. J. K. B. 881; 85 L. T. 104; 49 W. R. 660; 17 T. L. R. 604; 6 Com. Cas. 198, C. A.; *affd. sub nom.* **JANSON v. DRIEFONTEIN CONSOLIDATED GOLD MINES, LTD.**, [1902] A. C. 484, H. L.

Annotations:—**Mentd.** Robinson Gold Mining Co. v. Alliance Insee., [1901] 2 K. B. 919; Amorduct Manufacturing Co. v. Defries (1914), 84 L. J. K. B. 586; *Re* Smith, Johnson v. Bright-Smith, [1914] 1 Ch. 937; *Ingie v. Mannheim Insee.*, [1915] 1 K. B. 227; *Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld, Re Merten's Patents*, [1915] 1 K. B. 857; *Robinson v. Continental Insee. of Mannheim*, [1915] 1 K. B. 155; *Re Sutherland, Bechoff v. Bubna* (1915), 31 T. L. R. 248; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A. C. 307; *Horwood v. Millar's Timber & Trading Co.*, [1916] 2 K. B. 44; *Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsum*, [1916] 1 K. B. 495; *Zinc Corp'n. v. Hirsch*, [1916] 1 K. B. 541; *Stevenson v. Akt. Fur Cartonnagen-Industrie*, [1917] 1 K. B. 842; *Tingley v. Müller*, [1917] 2 Ch. 144; *Ertel Dieber v. Rio Tinto Co. etc.*, [1918] A. C. 260; *Montellere v. Menday Motor Components Co.*, [1918] 2 K. B. 241; *Naylor, Benzon v. Kralinsche Industrie Gesellschaft* (1918), 87 L. J. K. B. 1060; *Orcanera Iron Ore Co. v. Fried Krupp Akt.* (1918), 87 L. J. Ch. 313; *Rodriguez v. Speyer*, [1919] A. C. 59; *Central India Mining Co. v. Soc. Coloniale Anversoise*, [1920] 1 K. B. 753; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

sovereign.]—MIGHELL v. JOHORE (SULTAN), No. 3122, *ante*.

3125. — To prove removal of foreign minister

—From diplomatic list.]—A letter from the Foreign Office under the hand of an Assistant Secretary of State stating that a foreign minister's name has been removed from the diplomatic list is sufficient evidence that the minister has ceased to hold diplomatic office at the date of the letter.—*Re* SUAREZ, **SUAREZ v. SUAREZ**, [1918] 1 Ch. 176; 87 L. J. Ch. 173; 118 L. T. 279; 34 T. L. R. 127; 62 Sol. Jo. 158, C. A.

Annotations:—**Refd.** Duff Development Co. v. Kelantan Government, [1923] 1 Ch. 385. **Mentd.** *Re* Jubilee Cotton Mills, [1922] 1 Ch. 100.

3126. Admiralty—To prove authority for abandonment of voyage.]—Pliffs. chartered a steamship from defts. to make certain voyages between America & Europe. She started from America for R. Having arrived in the English Channel, she was diverted to F. because of advice given by the Admty., & the rest of the voyage to R. was abandoned. The Admty. gave a certificate that

& mate, but not as evidence of the facts stated.—**CAIRNS v. KIPPEN** (1820), 2 Murr. 250.—**SCOT.**

PART IV. SECT. 12, SUB-SECT. 10.—
A. (a).
r. Governor in Council—To prove

appointments.]—A recommendation of the appointment of certain named persons made by a Cabinet Minister,

the advice was given with the object of preventing transactions which might be contrary to the national interests. In an action for breach of the charterparty debts. pleaded the certificate & produced it at the trial, but they had not disclosed it:—*Held*: as debts. had acted in accordance with the advice of the Admty. & their breach of contract was due to their having done so, the certificate was a good defence to the action, & it ought to have been disclosed.—*GANS S.S. LINE v. CELTIC SHIPPING CO., LTD.* (1918), 34 T. L. R. 282.

(b) *Of Ambassadors and Consuls.*

3127. Ambassadors—Evidence of date of declaration of war.—To ascertain the date of a declaration of war, the declaration from the ambassador of the ct. abroad, transmitted by him to the Secretary of State's Office, is evidence.—*THELLUSON v. COSLING* (1803), 4 Esp. 266, N. P.

3128. — Evidence of foreign law—Validity of testamentary paper.—The certificate of the Hanoverian ambassador, under the seal of the legation, was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.—*In the Goods of KLINGEMANN* (1862), 3 Sw. & Tr. 18; 32 L. J. P. M. & A. 16; 8 L. T. 172; 27 J. P. 263; 11 W. R. 218; 164 E. R. 1178.

3129. — — ——The law of a foreign country is sufficiently proved by the certificate of the ambassador for that country.—*In the Goods of OLDENBURG (PRINCE PETER)* (1884), 9 P. D. 234; 53 L. J. P. 46; 49 J. P. 104; 32 W. R. 724.

3130. British vice-consul abroad—Certificate of proceeds of sale of goods—Not admissible.—The certificate of a British vice-consul at the Brazils, of the amount of the proceeds of damaged goods, which by the law of that country are compelled to be sold under his inspection, is not evidence.—*WALDRON v. COOMBE* (1810), 3 Taunt. 162; 128 E. R. 65.

(c) *Of Notaries Public.*

3131. Admissible.—*HURD v. FOY* (1620), 2 Roll. Rep. 346; 81 E. R. 813.

3132. — — ——(1) A notary public has credit everywhere. (2) The certificate of a magistrate of a colony abroad requires evidence to his character.—*HUTCHEON v. MANNINGTON* (1802), 6 Ves. 823; 31 E. R. 1327, L. C.

Annotation:—*As to (1)* *Reffd.* *Cole v. Sherard* (1855), 11 Exch. 482.

3133. Of condemnation of ship—Evidence only of condemnation—Not of grounds therefor.—A notarial copy of the condemnation of a ship as not being worth repairing, is only evidence of the fact of her having been condemned, not of the

particular defects on which the condemnation was grounded.—*WRIGHT v. BARNARD* (1798), 2 Esp. 699, N. P.

3134. Of protest before payment of bill of exchange—Evidence of payment supra protest.—Where a bill had been duly paid *supra* protest, & a formal protest transmitted abroad to the party for whose honour the payment was made:—*Held*: a formal protest extended by the notary from his book, after the commencement of the action, but bearing date the day of actual protest, was primary evidence of the payment *supra* protest.—*GERALOPULO v. WIELER* (1851), 10 C. B. 690; 20 L. J. C. P. 105; 17 L. T. O. S. 17; 15 Jur. 316; 138 E. R. 272.

(d) *Other Cases.*

3135. Certificate under seal of town.—A certificate under the seal of the town is no evidence of prisoner's being abroad, except it be proved, & prisoner identified.—*BURGESS'S CASE* (1631), Cro. Car. 365; 79 E. R. 918.

Annotation:—*Mentd.* *Omyehund v. Barker* (1744), 1 Atk. 21.

3136. Justices' certificate—As to encroachment on highway.—*R. v. RANDALL* (1662), 1 Keb. 256; 83 E. R. 932.

Annotation:—*Reffd.* *R. v. Mawbey* (1796), 6 Term Rep. 619.

3137. — As to repair of highway.—A certificate by justices of the peace that a highway is in repair is a legal instrument recognised by the cts. of law, & admissible in evidence after conviction when the ct. are about to impose a fine.—*R. v. MAWBEY* (1796), 6 Term Rep. 619; 101 E. R. 736.

Annotations:—*Reffd.* *Omealey v. Newell* (1807), 8 East. 364. *Mentd.* *Price v. Harris* (1833), 10 Bing. 331; *It. v. Lea* (1837), 2 Mood. C. C. 9; *R. v. Gompertz* (1846), 9 Q. B. 824; *It. v. Gamble* (1847), 8 L. T. O. S. 391; *King v. R.* (1849), 14 Q. B. 31; *Wright v. R.* (1849), 14 Q. B. 148; *Hilton v. Eckersley* (1855), 6 E. & B. 47; *Walsby v. Anley* (1861), 3 E. & E. 516; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Quinn v. Leathem*, [1901] A. C. 495; *Gozney v. Bristol Trade & Provident Soc.*, [1909] 1 K. B. 901.

3138. — As to poor law settlement.—*R. v. HIPPERHOLM (INHABITANTS)* (1745), Sess. Cas. K. B. 236; 93 E. R. 238.

3139. Commissioners' certificate—Whether conclusive.—Comr.'s certificate to be confirmed as a report.—*KEELING v. CARTWRIGHT* (1768), 1 Dick. 401; 21 E. R. 325.

3140. — Evidence of redemption of land tax.—The proper evidence that the land tax has been redeemed is the certificate of the comrs. or a copy of the register.—*POPPELTON v. BUCHANAN*, *BUCHANAN v. POPPELTON* (1858), 4 C. B. N. S. 20; 27 L. J. C. P. 210; 31 L. T. O. S. 83; 22 J. P. 546; 4 Jur. N. S. 414; 6 W. R. 372; 140 E. R. 986.

3141. Colonial magistrate—Not admissible—

PART IV. SECT. 12, SUB-SECT. 10.—
A. (d).

b. *Registrar's certificate*—*Of discharge of mortgage.*—*Scmble*: a certificate of a registrar of the discharge of a mtge. indorsed on the mtge. is sufficient evidence of a reconveyance, without proof of the execution of the discharge itself.—*DOED. COOKSHANK v. HUMBERTSTONE* (1811), 6 O. S. 103.—*CAN.*

c. *Certificate of town clerk*—*Under corporate seal.*—*ROLPH v. CAHOON* (1851), 2 Gr. 623.—*CAN.*

d. *Certificate from custom house*—*Evidence of ownership.*—A certificate was produced signed by the collector of customs stating the names of the registered owners of a ship, & the number of their shares:—*Held*: insufficient.—*LYNCH v. SHAW* (1859), 17 U. C. R. 241.—*CAN.*

e. — *Not sufficient.*—A certificate of entries in excise books, without

addressed to the Governor, referred by him to the Executive Council, & formally approved by it, is a proper appointment of those persons by the Governor in Council.—*R. v. A.-G., Ex p. GILLICK*, *It. v. A.-G., Ex p. ANKETELL* (1895), 11 V. L. R. 508.—*AUS.*

PART IV. SECT. 12, SUB-SECT. 10.—
A. (e).

3131 i. *Admissible.*—*McFARLANE v. LINDSAY* (1830), Dra. 131.—*CAN.*

3131 ii. —.—The certificate of a notary in Lower Canada, at the foot of the protest, that he had put a notice into the post addressed to the indorser, is evidence of that fact.—*SMITH v. HALL* (1847), 3 U. C. R. 315.—*CAN.*

3131 iii. —.—The certificate of a notary, on the adjoining half sheet of the protest, that he had served on indorser a notice of non-payment of

the note protested upon is sufficient evidence of notice to the indorser of non-payment thereof.—*RUSSELL v. CROFTON* (1852), 1 C. P. 428.—*CAN.*

s. — *Of certified copy.*—A notarial protest from Lower Canada, certified by the notary as a true copy from his notarial book, is sufficient without any notarial seal.—*ROSS v. MCKINDRAY* (1845), 1 U. C. R. 507.—*CAN.*

t. — *Of deed acknowledged.*—*TORRENS v. CURRY* (1882), 22 N. B. R. 345.—*CAN.*

u. — *Of certificate of the acknowledgment of a deed taken before a notary public* *prima facie* evidence that the person who took the acknowledgment was a notary public at the time.—*DOED. SEELY v. HERRINGTON* (1888), 27 N. B. R. 525.—*CAN.*

Sect. 12.—Public documents: Sub-sect. 10, A. (d) & B. (a).]

**Without evidence of status.]—HUTCHEON v. MAN-
NINGTON, No. 3132, ante.**

**3142. Secretary of Board of Excise—As to
accuracy & effect of accounts—In excise books.]—**

(1) The certificate of the Secretary of the Board of Excise, as to the accuracy & effect of accounts in the books of the excise, ought not to be received in evidence.

(2) *Qu.*: whether accounts of stock kept in the excise books are evidence between third parties, as to the delivery of goods.

(3) Copies of such accounts may be given in evidence. *Semble*: on the ground that the original are public books; but in such case, the copies produced must be proved by a witness, who has examined them with the originals, & can swear to their accuracy.—**DUNBAR v. HARVIE** (1820), 2 Bli. 351; 4 E. R. 356.

3143. Lloyds' agent—As to damage at foreign port.]—In an action against an underwriter upon goods which sustained sea-damage:—*Held*: although deft. was a subscriber to Lloyd's, a certificate granted by their agent, resident abroad, was not admissible to prove the amount of the damage.—**DRAKE v. MAHUYAT** (1823), 1 B. & C. 473; 2 Dow. & Ry. K. B. 696; 1 L. J. O. S. K. B. 161; 107 E. R. 175.

3144. Ministers & elders of Scottish Church.]—On an indictment against accessories before the fact to the forgery of an administration bond on administration granted of the effects of J. S.:—*Held*: (1) a session-clerk from Scotland had no right to look at a kirk session book to learn the writing of a clergyman to enable him to swear to the writing of a certificate found, on the death of J. S., among his papers; (2) such book was not evidence itself, & not being so, could not be looked at for any purpose whatever; (3) the certificate in question, which was a certificate purporting to have been given by the minister & elders to J. S. on leaving the kirk, would not be evidence, even if the minister's writing were proved.—**R. v. BARBER** (1841), 1 Car. & Kir. 431; 8 J. P. 614; *sub nom.* **R. v. RICHARDS, BARBER, DOREY**, 3 L. T. O. S. 142; 1 Cox, C. C. 62. *Annotation: Generally, Mentd.* **It. v. Rowlands** (1851), 5 Cox, C. C. 436.

3145. Certificate from custom house—Evidence of burthen of ship.]—(1) The master of a foreign vessel arriving in the port of London delivered to the custom house officers a report of the burthen of his ship, & the number of his crew; & it was filed at the custom house:—*Held*: 8 & 9 Viet. c. 86, ss. 2, 7, 18, did not give this the character of a public document so as to make it evidence of the burthen of the ship. (2) A certificate was produced from the custom house, where it had been filed, signed by a party who certified that he had measured the vessel, & stated the amount of the tonnage:—*Held*: it not being shown that this was an act prescribed by statute the certificate could not be received in evidence as a public

document to prove the burthen of the ship.—**HUNTLEY v. DONOVAN** (1850), 15 Q. B. 96; 117 E. R. 304.

3146. Chairman of committees of House of Lords—Not admissible—Without proof of signature.]—ANON. (1851), 2 W. R. 614.

3147. Certificate of degree or diploma—University degree—Proof of title to degree.]—To prove that a party had received the degree of Doctor of Medicine in the University of St. A., a sealed instrument & a written paper were produced; the sealed instrument purported to be a diploma of that degree conferred by the university, & it was proved that a person at St. A. calling himself the university librarian, had shown, as the university seal, in a room which he stated to be the university library, a seal corresponding to that on the instrument produced. The written paper was, on the face of it, an act of the university conferring the degree, & it was proved that, in the same room, the same person, & other persons calling themselves professors of the university, had shown, as the book of acts of the university, a book containing an entry agreeing with the written paper:—*Held*: sufficient proof.—**COLLINS v. CARNEGIE** (1834), 1 Ad. & El. 695; 3 Nev. & M. K. B. 703; 3 L. J. K. B. 196; 110 E. R. 1373.

Annotation:—Distd. **McGahey v. Alston** (1836), Tyr. & Gr. 981.

3148. — Of Apothecaries' Company—Proof of—Authentication of seal.]—In an action for an apothecary's bill, it is necessary, since 6 Geo. 4, c. 1, s. 3, to prove that the seal affixed to a certificate to practise as an apothecary is the common seal of the Apothecaries' Company.—**CHADWICK v. BUNNING** (1825), 2 C. & P. 106; Ry. & M. 306, N. P. *Annotations:—Mentd.* **Jenkinson v. Morton** (1836), 1 M. & W. 300; **Heath v. Leager** (1840), 4 Jur. 991; **Stillwell v. Bracher** (1843), 7 Jur. 882.

3149. — — — — —.]—A certificate of the Apothecaries' Company, purporting to bear the seal of that corp., is a document which proves itself, & requires no authentication of the seal attached to it.—**BAILEY v. LANGLEY** (1816), 1 New Pract. Cas. 506; 7 L. T. O. S. 387, N. P.

3150. — — — — — Evidence of right to practise.]—By Apothecaries' Act, 1815 (c. 194), s. 14, it is provided that no person shall be admitted to an examination for a certificate to practise unless he shall have served an apprenticeship, & shall produce testimonials of a sufficient medical education to the satisfaction of the et. of examiners:—*Held*: a certificate duly issued by that et. is conclusive evidence of those facts.—**SHERWIN v. SMITH** (1823), 1 Bing. 204; 8 Moore, C. P. 30; 1 L. J. O. S. C. P. 63; 130 E. R. 83.

B. Under Statute.

(a) In General.

3151. Bankruptcy—Certificate under Bankrupts Act, 1825 (c. 16)—Evidence of valid bankruptcy.]—A certificate under the above Act is evidence, as against the bkpt., of a valid bkpcy., without proof of the petitioning creditor's debt, etc.—**FYSON v.**

32 I. L. T. 48.—**IR.**

1. Board of Trade certificate.]—A certificate granted by the Board of Trade is not a "public document" within Evidence Act, s. 74.—*Re AYA & BRENHILDA COLLISION* (1879), 1 L. R. 5 Calc. 568.—**IND.**

PART IV. SECT. 12, SUB-SECT. 10.— B. (a).

m. Certificates under Commonwealth Conciliation & Arbitration Act, 1904—09.]—**FEDERATED ENGINE DRIVERS & FIRMEN'S ASSOCN. OF AUSTRALASIA**

production of the books
not good evidence.—**DUNBAR v. HARVIE** (1820), 2 Bli. 351.—**SCOT.**

f. — — — — —.]—An extract from the custom house books cannot be received as evidence.—**PARIS v. SMITH** 3 Murr. 332.—**SCOT.**

g. Certificate of deputy clerk of Crown.]—A certificate of a deputy clerk of the Crown in the shape of a postal card is no evidence.—**JOHN-
v. LONEY** (1873), 6 P. R. 70.—**CAN.**

h. Certificate of municipal official —Is to redemption from sale for taxes.]—A certificate of the municipal treasurer that land was not redeemed from sale for taxes is sufficient.—*Re MORTON & COUNTY OF YORK* (1884), 7 O. R. 59.—**CAN.**

k. Land commission certificate—Admissible as proof of title composition.]—A copy of the certificate of composition of title rentcharge, certified by the Irish Land Commission, is admissible in evidence.—**"COMMONS FUND"** **v. DROGHEDA (LORD)** (1897),

CHAMBERS (1842), 9 M. & W. 460; 11 L. J. Ex.

Annotations:—*Mentd.* Herbert v. Sayer (1844), 5 Q. B. 965; Welchman v. Sturgis (1849), 13 Q. B. 552; Newnham v. Stevenson (1851), 10 C. B. 713; Morgan v. Knight (1864), 15 C. B. N. S. 669; Bourne v. Fosbrooke (1865), 18 C. B. N. S. 515; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393.

3152. — Certificate of registration of trust deed—*Prima facie* evidence of delivery of affidavit.]—A certificate of the registration of a trust deed under the hand of the chief registrar of the Ct. of Bkpcy. & the seal of the ct. is *prima facie* evidence that the affidavit required by Bkpcy. Act, 1861 (c. 134), s. 192 (5), has been duly delivered to the registrar.—*Waddington v. Roberts* (1868), L. R. 3 Q. B. 579; 9 B. & S. 697; 37 L. J. Q. B. 253; 18 L. T. 855; 16 W. R. 1040.

Annotations:—*Consd.* Phillips v. Furber (1870), 22 L. T. 288. *Distd.* Mason v. Wood (1875), 1 C. P. D. 63. *Refd.* Beddall v. King (1869), L. R. 4 C. P. 549.

BANKRUPTCY, Vol. V,

p. 1075, Nos. 8800, 8801.

— **Certificate of appointment of assignee.]—***See* BANKRUPTCY, Vol. IV., p. 211, No. 1957.

— **Certificate of bankrupt's discharge.]—***See* BANKRUPTCY, Vol. IV., p. 580, No. 5823.

— **Bills of sale—Certificate of registration.]—***See* BILLS OF SALE, Vol. VII., pp. 83, 84, Nos. 481–483.

— **Building contracts—Surveyor's or engineer's certificate.]—***See* BUILDING CONTRACTS, Vol. VII., pp. 356–361, Nos. 94–112.

— **Building societies—Certificate as to rules.]—***See* BUILDING SOCIETIES, Vol. VII., p. 457, No. 17; p. 458, Nos. 25–27.

— **Births.]—***See* Sub-sect. 10, B. (b) i., *post*.

3153. Companies—Certificate of execution of works—*Prima facie* evidence of facts certified.]—A statutory certificate under seal of execution of works given by directors of a co. for the purpose of entitling the co. to a charge:—*Held: prima facie* evidence only in favour of the co. of the facts certified.—*Landowners West of England & South Wales Land Drainage & Inclosure Co. v. Ashford* (1880), 16 Ch. D. 411; 50 L. J. Ch. 276; 41 L. T. 20.

Annotations:—*Refd.* *Re* Rounford Canal Co., *Pocock's Claim*, *Trickett's Claim*, *Carew's Claim* (1883), 24 Ch. D. 85; *Re* Mersey Ry. (1895), 64 L. J. Ch. 625. *Mentd.* *Re* Patent Ivory Manufacturing Co., *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156.

3154. — Certificate of registrar—Whether evidence of complete registration—Certificate of annual return.]—The certificate of the annual return of the name & business of a joint stock co., signed & sealed by the registrar of joint stock cos., pursuant to 7 & 8 Vict. c. 110, ss. 14, 15, is evidence that the co. was a completely registered co. at the time such return was made.—*Baker v. Cave* (1857), 1 H. & N. 674; 26 L. J. Ex. 190; 28 L. T. O. S. 293; 5 W. R. 345.

Annotation:—*Refd.* *Reed v. Lamb* (1860), 6 H. & N. 75.

3155. — *Refd.* **Whether conclusive of right to**

be registered—Statutory banking company.]—A banking co. constituted under Country Bankers Act, 1826 (c. 43), stopped payment, having lost all its capital. Subsequently it passed a resolution that the co. should be registered under 20 & 21 Vict. c. 49, which was done. The co. was afterwards dissolved by a resolution of the majority of shareholders who appointed voluntary liquidators under the Act:—*Held:* the registrar's certificate was not conclusive as to a co.'s right to be registered.—*Re Northumberland & Durham District Banking Co.* (1858), 2 De. G. & J. 357; 27 L. J. Ch. 356; 31 L. T. O. S. 107; 4 Jur. N. S. 419; 6 W. R. 527; 44 E. R. 1028, L. J.

Annotations:—*Consd.* *Re* Nassau Phosphate Co. (1876), 2 Ch. D. 610; *Avenlock v. River Dee Co.* (1887), 36 Ch. D. 674; *Re* National Debenture & Assots. Corp., [1891] 2 Ch. 505. *Refd.* *Hill v. Hill* (1886), 55 L. T. 769; *Young v. South African & Australian Exploration & Development Syndicate*, [1896] 2 Ch. 268.

— **Registration of order for reduction of capital.]—***See* COMPANIES, Vol. IX., p. 168, Nos. 1029, 1030.

— **Registration of debentures.]—***See* COMPANIES, Vol. X., p. 788, Nos. 4932, 4933.

3156. — Certificate of incorporation.]—In order to satisfy the allegation in an indictment laying the property in a limited co., it is not necessary to prove the incorporation of the co. by the certificate of incorporation.—*R. v. Langton* (1876), 2 Q. B. D. 296; 46 L. J. M. C. 136; 35 L. T. 527; 41 J. P. 131; 13 Cox, C. C. 345, C. C. R. — *See, further*, COMPANIES, Vol. IX., pp. 80, 81, Nos. 300–312.

— **Declaration of chairman as to resolutions passed.]—***See* COMPANIES, Vol. IX., p. 571, Nos. 3792–3797.

— **Compulsory acquisition of land—Certificate of magistrate—Under Lands Clauses Consolidation Act, 1845 (c. 18).]**—*See* COMPULSORY PURCHASE OF LAND, Vol. XI., p. 169, No. 473.

— **Criminal law—Certificate of conviction.]—***See* CRIMINAL LAW, Vol. XIV., pp. 498–500, Nos. 5183–5510.

— **Certificate of judicial proceedings in perjury.]—***See* CRIMINAL LAW, Vol. XV., p. 680, No. 7362.

— **Deaths.]—***See* Sub-sect. 10, B. (b) iii., *post*.

— **Defence of the realm—Certificate of competent military authority.]—***See* CONSTITUTIONAL LAW, Vol. XI., p. 555, No. 556.

— **Food & drugs—Certificate of analyst.]—***See* FOOD & DRUGS.

— **Friendly societies—Certificate as to rules.]—***See* FRIENDLY SOCIETIES.

— **Highways—Certificate of superintending architect.]—***See* HIGHWAYS.

— **Income tax—Certificate of commissioners as to overpayment.]—***See* INCOME TAX.

— **Marriages.]—***See* Sub-sect. 10, B. (b) ii., *post*.

— **Master of ship.]—***See* SHIPPING.

— **ASSOCN. v. DUPUIS** (1903), 2 Can. Com. Cas. 593.—**CAN.**

a. Certificate of grain inspector—Whether admissible.]—*Quintal v. Chalmers* (1898), 12 Man. L. R. 231.—**CAN.**

t. Mines—Certificate of work—Under Mineral Act.]—*Peters v. Sampson* (1898), 6 B. C. R. 405; 1 M. M. Cas. 217.—**CAN.**

a. — — — — —.]—The production of a certificate of work under the above Act is conclusive against all the world, except the Crown itself, in a suit to set it aside for fraud.—*Manley v. Colloom* (1900), 1 M. M. Cas. 487; 8 B. C. R. 153.—**CAN.**

— **— — — — —.]—***Gelin v.*

Y

F. BROKEN HILL PROPRIETARY CO., LTD. (1911), 12 C. L. R. 398.—**AUS.**

n. Certificate under Local Government Act, 1915, s. 341 (2).]—*Braybrook Shire (President) v. Robinson*, [1920] V. L. R. 552.—**AUS.**

o. Certificate of registration—Not admissible—To show incumbrance on land.]—A certificate purporting to show the registered conveyances of land, from the county registrar's office, under the hand of the deputy registrar:—*Held:* not admissible evidence of the title, under 13 & 14 Vict. c. 19, s. 4, so as to show an incumbrance on the land.—*Gamble v. McKay* (1898), 7 C. P. 319.—**CAN.**

p. — — — — —.]—*Unless signed by proper officer.]—*In an action for breach J.—**VOL. XXII.**

of covenant for title contained in a deed plff. put in evidence a mtge. on which was indorsed what purported to be a certificate of registration:—*Held:* in order to prove such registration it was necessary to show that the certificate had been signed by the proper officer, the mere production of a paper purporting to be a certificate not being sufficient.—*Gould v. McGregor* (1880), 1 R. & G. 339.—**CAN.**

q. — — — — —.]—*To and prior registered owner.]—**Johnson v. Kirk* (1900), 30 S. C. R. 344.—**CAN.**

r. — — — — —.]—*Under Copyright Act.]—*Certificate of registration is *prima facie* evidence of due compliance with the requirements of the above Act.—**ANGLO CANADIAN MUSIC PUBLISHERS'**

Sect. 12.—*Public documents: Sub-sect. 10, B. (a) & (b) i., ii. & iii.; sub-sect. 11.]*

Medicine & pharmacy—Apothecaries' certificate.]—See MEDICINE & PHARMACY.

Police pension—Certificate of "approved service."—See POLICE.

Poor law—Certificate of auditor as to amount due.]—See POOR LAW.

Rates—Certificate of exemption.]—See RATES & RATING.

Public health—Certificate of surveyor as to dangerous buildings.]—See PUBLIC HEALTH.

—Certificate as to vaccination.]—See PUBLIC HEALTH.

Royal forces—Attestation paper of soldier.]—See ROYAL FORCES.

Trade marks—Certificate of registration.]—See TRADE MARKS.

Trade unions—Certificate as to rules.]—See TRADE & TRADE UNIONS.

Workmen's compensation—Certificate of medical referee.]—See MASTER & SERVANT.

Distressed seaman—Certificate of authority as to expenses incurred.]—See SHIPPING.

(b) Births, Marriages, and Deaths.

i. Birth Certificates.

See Births & Deaths Registration Act, 1836 (c. 86), ss. 20, 21, 25, 26, 27, 38, scheds. A, B, C; Births & Deaths Registration Act, 1837 (c. 22), s. 8; Births & Deaths Registration Act, 1874 (c. 88), ss. 38; Evidence Act, 1851 (c. 99), s. 14; Notification of Births Act, 1907 (c. 40); British Nationality & Status of Aliens Act, 1914 (c. 17), ss. 19 (1) (c), 22.

3157. Admissibility—Extract from register—Certified by person having custody thereof.]—An extract from a register of births purporting to be signed & certified by a deputy superintendent registrar, as the person in whose custody the register book is, is admissible in evidence on its mere production.—R. v. WEAVER (1873), L. R. 2 C. C. R. 85; 43 L. J. M. C. 13; 29 L. T. 544; 38 J. P. 102; 22 W. R. 190; 12 Cox, C. C. 527, C. C. R.

Refd. In the Estate of Goodrich, Payne v. Bennett, [1904] P. 138; R. v. Rogers (1914), 111 L. T. 1115; Bird v. Keep, [1918] 2 K. B. 692; Brierley v. Brierley & Williams, [1918] P. 257.

3158. What the certificate proves—Fact of birth.]—The entry in a register of births under Births & Deaths Registration Act, 1836 (c. 86), is evidence of the birth having taken place before the date of registration, but not of the exact date of birth.—Re WINTLE (1870), L. R. 9 Eq. 373; 21 L. T. 781; 34 J. P. 372; 18 W. R. 394.

Annotations:—Dtd. In the Estate of Goodrich, Payne v. Bennett, [1904] P. 138; Brierley v. Brierley & Williams, [1918] P. 257. Consd. Bird v. Keep, [1918] 2 K. B. 692.

3159. —.]—An entry in a register of births, deaths, & marriages is by statute *prima facie*, but not conclusive, evidence of all the facts required by statute to be entered therein.—v. BRIERLEY & WILLIAMS, [1918] P.

257; 87 L. J. P. 153; 119 L. T. 343; 34 T. L. R. 458; 62 Sol. Jo. 704.

Annotations:—Apld. Best v. McKinley, [1920] P. 75. Refd. Bird v. Keep, [1918] 2 K. B. 692.

3160. —.]—Whether conclusive—In divorce proceedings.]—The fact that resp. to a petition for divorce has given birth to a child may be proved by production of a certified copy of the register, with evidence that the signature of the informant in the original register is in the handwriting of resp.—BEST v. BEST & MCKINLEY, [1920] P. 75; 89 L. J. P. 93; 122 L. T. 802; 36 T. L. R. 243; 64 Sol. Jo. 258.

3161. —.]—Date of birth.]—Re WINTLE, No. 3158, *ante*.

3162. —.]—R. v. BUCKINGHAMSHIRE J.J. (1899), 47 W. R. 315; 15 T. L. R. 200; 43 Sol. Jo. 262.

3163. —.]—A certified copy of an entry in the register of births, pursuant to Births & Deaths Registration Act, 1836 (c. 86), s. 38, is evidence of all the contents of the entry, including the date of birth.—In the Estate of GOODRICH, PAYNE v. BENNETT, [1904] P. 138; 90 L. T. 170; *sub nom.* PAYNE v. BENNETT, 73 L. J. P. 33; 20 T. L. R. 203.

Annotations:—Consd. Bird v. Keep, [1918] 2 K. B. 692. Fldd. Brierley v. Brierley & Williams, [1918] P. 257.

3164. —.]—Necessity for proof of identity.]—A certified extract from the register of births is sufficient, with proof of identification, to prove the date of birth.—WILTON & Co. v. PHILLIPS (1903), 19 T. L. R. 390.

Annotations:—Consd. Bird v. Keep, [1918] 2 K. B. 692; Brierley v. Brierley & Williams, [1918] P. 257.

3165. —.]—A certificate of birth put in, coupled with proof that a certain person had always been treated as the person mentioned therein, may be sufficient evidence for a jury of that person's age.—R. v. BELLIS (1911), 6 Cr. App. Rep. 283, C. C. A.

Annotation:—Refd. R. v. Rogers (1914), 111 L. T. 1115.

3166. —.]—All contents of the entry.]—In the Estate of GOODRICH, PAYNE v. BENNETT, No. 3163, *ante*.

3167. —.]—Required to be entered by statute.]—BRIERLEY v. BRIERLEY & WILLIAMS, No. 3159, *ante*.

3168. How proved—By examined copy.]—BURNABY v. BAILLIE, No. 1904, *ante*.

ii. Marriage Certificates.

See Marriage Act, 1836 (c. 85); Marriage Act, 1898 (c. 58), ss. 4, 7, 11; Births & Deaths Registration Act, 1836 (c. 86); Evidence Act, 1851 (c. 99), s. 14.

3169. Admissibility—Without calling expert witness.]—A certified copy of entry in the marriage register may be accepted as evidence, without calling an expert witness.—BURY v. BURY (1919), 35 T. L. R. 220; 63 Sol. Jo. 228.

3170. What the certificate proves—Fact of marriage—Necessity for identification.]—CRIPPS v. CRIPPS (1842), 1 Notes of Cases, 530.

CLARK (1901), 8 B. C. R. 42; 1 M. M. Cas. 428.—CAN.

c. —.]—Not admissible when issued day before trial.]—RAMMELMEYER v. CURTIS (1900), 8 B. C. R. 383; 1 M. M. Cas. 401.—CAN.

d. —.]—Evidence of payment of rent.]—CLEARY v. BOWGOWITZ (1902), 32 S. C. R. 417.—CAN.

e. Certificate of payment—Statutory title.]—R. v. SULLIVAN (1876), 3 Png. 465.—CAN.

f. Weights—Certificate of weighmaster—When admissible.]—The certifi-

cate of the weighmaster is not admissible when it has neither the signature nor the seal of the weighmaster as required by statute.—SEELY v. IMPERIAL ELEVATOR CO. (1905), 2 W. L. R. 273.—CAN.

PART IV. SECT. 12. SUB-SECT. 10.—B. (b) (ii).

g. Admissibility—Without calling subscribing witness.]—The original certificate of marriage filed with the clerk of the peace, as directed by the Act 52 Geo. 11, may be given in evidence, without calling the subscribing wit-

ness.—MONTGOMERY v. MCLEOD (1836), 1 Ser. 564.—CAN.

h. —.]—As proof of legitimacy—Certificate of deceased clergyman.]—Upon a question of legitimacy, the certificate of a clergyman, deceased, as to the marriage of the parents, cannot be received in evidence.—FARRELL v. MAGUIRE (1841), 2 Jebb & S. 539.—IR.

k. —.]—Proof of handwriting.]—A certificate of marriage proved by a witness to be under the hand of an officiating clergyman:—Held: suffi-

3171. ————.]—In an indictment for bigamy, where the first marriage was solemnised under Marriage Act, 1836 (c. 85), the certificate authorised by that Act, & Births & Deaths Registration Act, 1836 (c. 86), s. 38, coupled with the identity of the parties, is sufficient *prima facie* evidence of such marriage.—*R. v. HAWES* (1847), 1 Den. 270; 2 Cox, C. C. 432, C. C. R.

3172. ———— All contents of entry.]—*BRIERLEY v. BRIERLEY & WILLIAMS*, No. 3159, ante.

iii. Death Certificates.

See Births & Deaths Registration Act, 1836 (c. 86), ss. 20, 21, 25, 26, 27, 38, scheds. A, B, C; Births & Deaths Registration Act, 1837 (c. 22), s. 8; Births & Deaths Registration Act, 1874 (c. 88), s. 38; Evidence Act, 1851 (c. 99), s. 14; British Nationality & Status of Aliens Act, 1914 (c. 17), ss. 10 (1) (c), 22.

3173. What the certificate proves—Fact of death—Certificate of superintendent registrar.]—A certified copy of the entry of the death of A., in the books of a superintendent registrar, with the usual affidavit of identity:—*Held*: not sufficient evidence of the death of A., on a petition for the payment to the administrator of A. of a sum found due to A.—*LEACH v. LEACH* (1814), 13 L. J. Ch. 128; 2 L. T. O. S. 457; 8 Jur. 211.

3174. ———— Certificate of district registrar.]—The certificate of the district registrar is sufficient evidence of a person's death.—*TRAILL v. KIBBLEWHITE* (1846), 10 Jur. 107.

3175. ———— Certificate under seal of general registry office—Necessity for identification.]—A certified copy of the register of a death, under the seal of the general registry office, accompanied by an affidavit of identity, is sufficient evidence of the death.—*PARKINSON v. FRANCIS* (1816), 15 Sim. 160; 60 E. R. 578.

3176. ———— Whether certificate of burial required—Or affidavit.]—The proper way to prove the death of a party is by a certified copy of the entry in the register of deaths, but such evidence ought in general to be supported by an affidavit as to the fact of the burial.

I should like the certificate of the burial to be produced (LORD SELBORNE, C.).—*RISELEY v. SHEPHERD* (1873), 21 W. R. 783.

3177. ————.]—*Re VALTER'S TRUST*, [1887] W. N. 128.

3178. ———— All contents of the entry.]—*BRIERLEY v. BRIERLEY & WILLIAMS*, No. 3159, ante.

3179. ———— Not cause of death.]—A porter employed by a varnish merchant was sent on a message to a warehouse in the City of London. Whilst he was there the premises, which contained highly inflammable materials, were struck by a bomb dropped from hostile aircraft & took fire &

collapsed. The body of the porter was subsequently found on the premises, & bore no outward mark of violence. The county ct. judge rejected as inadmissible the coroner's inquisition & finding of his jury, & a certified copy of the certificate in the register of deaths as to the cause of the man's death:—*Held*: even if the certified copy of the entry in the register of deaths were evidence of the exact date of the death, as to which the ct. expressed no opinion, it was not evidence of the cause of death.—*BIRD v. KEEP*, [1918] 2 K. B. 692; 87 L. J. K. B. 1199; 118 L. T. 633; 34 T. L. R. 513; 62 Sol. Jo. 666; 11 B. W. C. C. 133, C. A.

Annotations:—*Reid, Barnett v. Cohen*, [1921] 2 K. B. 461. *Mentd. Munro, Brice v. Marten, Same v. R.*, [1920] 3 K. B. 94; *Smith v. G. W. Ry.*, [1921] 2 K. B. 237.

Certificates of burial.—See BURIAL, Vol. VII., p. 562, Nos. 371–373, 376.

SUB-SECT. 11.—OFFICIAL GAZETTES.

3180. Of what they are evidence—All acts of state.]—A *Gazette* is evidence of all acts of state; & therefore a *Gazette*, in which it was stated that certain addresses had been presented to the King from different bodies of subjects, expressing their loyalty, etc., was admitted in evidence to prove an averment in an information for a libel, "that divers addresses, etc., had been presented to His Majesty by divers of his loving subjects, etc."—*R. v. HOLT* (1793), 5 Term Rep. 436; 2 Leach, 593; 22 State Tr. 1189; 101 E. R. 245.

Annotations:—*Mentd. R. v. Teal* (1809), 11 East, 307; *Anon.* (1832), 1 L. J. Ex. 116; *Weston v. Foster* (1836), 5 L. J. C. P. 242; *Thomas v. Jones* (1838), 1 Horn & H. 204; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *Pritchard v. Pritchard* (1884), 14 Q. B. D. 55.

3181. ———— Presentation of addresses to Sovereign.]—*R. v. HOLT*, No. 3180, ante.

3182. ———— Notices—Not unless directed to be so By Act of Parliament.]—A notice in the *Gazette* of the dissolution of a partnership is sufficient notice to the world, at least as against those who have had no previous dealings with the firm.

The *Gazette* is not evidence of notice any more than any other newspaper, unless in the cases where, by Act of Parliament, it was directed to be conclusive (LORD KENYON, C.J.).—*GODFREY v. MACAULEY* (1795), Peake, 209; *sub nom. GODFREY v. TURNBULL*, 1 Esp. 371, N. P.

3183. ———— Dissolution of partnership.]—When partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the *Gazette* is not sufficient to discharge them as against those persons who have not seen it.—*GRAHAM v. HOPE* (1792), Peake, 208, N. P.

cient evidence of marriage.—(*ROESER v. CROESER* (1830), 1 Men. 267.—S. AF.

1. ————.]—In an undefended action by a wife for restitution of conjugal rights, the production by plt. of her marriage certificate, & her unsupported identification of the signatures of the parties, & of the marriage officer:—*Held*: sufficient *prima facie* evidence of the marriage.—*LEE v. LEE* (1895), 7 H. C. 238.—S. AF.

PART IV. SECT. 12, SUB-SECT. 10.—B. (b) (iii).

m. What the certificate proves—Date of birth.]—The certificates of death & burial, containing the age of a deceased person are *prima facie* evidence of the date of birth.—*Re OSMAND, BENNETT v. BOOTY*, [1906] V. L. R. 455; [1907] V. L. R. 67.—AUS.

n. ———— Certificate of deputy registrar.]—Under Registration of Births & Deaths Act, 1875, s. 41, a certificate of death certified to by a deputy registrar is sufficiently attested.—*HUGHES v. BOAKES* (1898), 17 N. Z. L. R. 113.—N.Z.

PART IV. SECT. 12, SUB-SECT. 11.

3180 i. Of what they are evidence—All Acts of state.]—*Seem*: the mere production of a paper which purports to be a Govt. *Gazette* of any state & which contains any proclamation of an Order in Council or regulation issued by the Govt. of such state, is evidence of the facts therein contained.—*FALLSHAW BROTHERS v. RYAN* (1902), 28 V. L. R. 279.—AUS.

3180 ii. ————.]—*DAMODAR GORDHAN v. GANESH DEVRAM* (1873), 10 Bom. 37.—IND.

o. ———— Notices—Of winding up of company.]—A copy of a record in writing of a resolution to voluntarily wind up a co. signed by the chairman of the meeting at which it was passed & published in the Govt. *Gazette* is *prima facie* evidence that all that took place at that meeting was done lawfully.—*MCLAREN BROTHERS & RYAN, LTD. v. GRICE* (1906), 4 C. L. R. 835.—AUS.

p. Ultra vires proclamation in *Gazette*.]—*GUNDAGAL, MUNICIPAL DISTRICT v. NORTON* (1894), 15 N. S. W. L. R. 365.—AUS.

q. Valuation under Land Tax Act, 1899, s. 34.]—The Govt. *Gazette* is not conclusive evidence of a valuation under the above act.—*R. v. GIDNEY* (1899), 24 V. L. R. 795.—AUS.

r. What is an official *Gazette*.]—Certain Acts of Parliament made

Sect. 12.—Public documents: Sub-sects. 11, 12, 13 & 14.]

3184. — — — — —.]—Where there is a partnership constituted by deed, a notice that it is dissolved signed by the parties, for the purpose of being inserted in the *Gazette*, is sufficient evidence of the dissolution for all purposes against the parties signing it.—*Doe d. WATHMAN v. MILES* (1816), 1 Stark. 181; 4 Camp. 373, N. P.

Annotation:—Mentd. Pocock v. Carter, [1912] 1 Ch. 663.

3185. — — — — —.]—*GODFREY v. MACAULEY*, No. 3182, *ante*.

3186. — — — — — **Abandonment of tramway undertaking.]**—Promoters of a tramway applied for return of Parliamentary deposit on ground that undertaking had been abandoned & the powers to make the tramway had determined:—*Held*: the proper evidence of the abandonment & cesser of powers was a notice published in the *London Gazette* pursuant to Tramways Act, 1870 (c. 78), s. 18, & that other evidence thereof could not be accepted.—*Re DUDLEY & KINGSWINFORD TRAMWAYS CO.* (1893), 63 L. J. Ch. 108; 63 L. T. 711; 42 W. R. 126; 8 R. 6.

Annotation:—Overd. A-G. v. Bournemouth Corp., [1902] 2 Ch. 714.

3187. — — — — — **By Board of Trade—As to non-commencement of work.]**—A notice purporting to be published by the Board of Trade in the *London Gazette* to the effect that the works of a tramway have not been substantially commenced, though made conclusive evidence of such non-commencement by Tramways Act, 1870 (c. 78), s. 18, is not the only admissible evidence of such non-commencement.—*A-G. v. BOURNEMOUTH CORPN.*, [1902] 2 Ch. 714; 71 L. J. Ch. 730; 87 L. T. 252; 51 W. R. 129; 18 T. L. R. 744; 46 Sol. Jo. 648, C. A.

3188. — — — — — **Status of enemy country.]**—In proof of the former allegation [that St. D. is not to be considered as a French colony] an attempt was made to introduce extracts from the common English newspapers, which the ct. would not permit to be read; the *Gazette* is the only authority of this species admitted & respected by the ct. for reasons too obvious to require a particular notice (*SIR W. SCOTT*).—*THE IMMANUEL* (1799), 2 Ch. Rob. 186; 1 Eng. Pr. Cas. 217; 105 E. R. 284.

Annotation:—Mentd. The Juliana (1803), 4 Ch. Rob. 328.

Compare No. 3123, *ante*.

3189. — — — — — **Appointment to commission in army.]**—The *Gazette* alone is not evidence of the appointment of an officer to a commission in the army.—*KIRWAN v. COCKBURN* (1805), 5 Esp. 233, N. P.

3190. — — — — —.]—The *London Gazette* is not evidence of the military appointments therein notified.—*R. v. GARDNER* (1810), 2 Camp. 513, N. P.

See, now, Army Act, 1881 (c. 58), s. 163 (1) (d).

3191. — — — — — **Of existence of blockade—Prima facie evidence only.]**—The *Gazette* is only *prima facie* evidence of the blockade, & not conclusive (*DR. LUSHINGTON*).—*THE ELIZE* (OTHERWISE *ELISE WILHELMINE*) (1854), 2 Ecc. & Ad. 31; Spinks, 88; 2 Eng. Pr. Cas. 327; 21 L. T. O. S. 170; 1 Jur. N. S. 95; 104 E. R. 290.

Annotations:—Mentd. The Caroline (1855), Spinks, 252; The Leucade (1855), 2 Ecc. & Ad. 228; The Ostsee (1855), 2 Ecc. & Ad. 170; The Edna, [1921] 1 A. C. 735.

copies of the Dublin *Gazette* purporting to be printed & published by the [] authority, conclusive evidence in certain cases under these Acts. On the trial of prisoner, a copy of the Dublin *Gazette* was given in evidence. It purported to be printed & published

at the Dublin *Gazette* office, No. 87A Street by A. T. of, etc. It also contained under the title, the words "published by authority":—*Held*: the document was not evidence within the Acts of Parliament.—*R. v. WALLACE* (1866), 17 L. C. L. R. 206.—*IR.*

3192. — — — — — **Adjudication in bankruptcy.]**—5 & 6 Vict. c. 122, s. 24, whereby the *London Gazette*, containing the advertisement of the adjudication of bkpcy., is made, in certain cases, conclusive evidence of the bkpcy., does not apply to adjudications made before Nov. 11, 1842, on which day the Act came into operation.—*EDWARDS v. SHERRIN* (1843), 11 M. & W. 595; 1 Dow. & L. 338; 12 L. J. Ex. 441; 1 L. T. O. S. 258; 7 Jur. 954; 152 E. R. 943.

3193. — — — — —.]—5 & 6 Vict. c. 122, s. 24, applies to criminal as well as to civil cases, & renders the advertisement of such adjudication in the *London Gazette* sufficient evidence of debt, having been adjudged bkpt.—*R. v. HILTON* (1847), 2 Cox, C. C. 318.

Annotations:—Consd. R. v. Levi (1865), Lc. & Ca. 597. *Mentd.* R. v. Gordon (1855), 7 Cox, C. C. 19.

3194. — — — — —.]—On an indictment for destroying books, etc., the *Gazette* containing the advertisement of bkpcy. is, under 12 & 13 Vict. c. 106, s. 233, evidence of the facts recited in that advertisement.—*R. v. SWAN* (1819), 14 J. P. 161; 4 Cox, C. C. 108.

Annotation:—Mentd. R. v. Smith (1862), Lc. & Ca. 131.

3195. — — — — —.]—5 & 6 Vict. c. 122, s. 24, re-enacted by 12 & 13 Vict. c. 106, s. 233, makes the advertisement in the *London Gazette* conclusive evidence of the bkpcy.—*R. v. HARRIS* (1849), 4 Cox, C. C. 140.

Annotation:—Refd. R. v. Levi (1865), 6 New Rep. 131.

3196. — — — — —.]—A copy of the *Gazette* containing the order of adjudication is conclusive against the execution creditor, on interpleader proceedings, of the validity of the adjudication.—*REVELL v. BLAKE* (1872), L. R. 7 C. P. 300; 41 L. J. C. P. 129; 26 L. T. 578; 20 W. R. 675; *affd.* (1873), L. R. 8 C. P. 533, Ex. Ch.

Annotations:—Refd. Re Trim, Ex p. French (1882), 52 L. J. Ch. 48. *Mentd.* Re Buckland (1873), L. R. 15 221; Re Foulds, Ex p. Learoyd (1878), 10 Ch. D. 3; Hawkins & Sunderland v. Duché (1921), 90 L. J. K. B. 913.

— — — — —.]—*See, further*, BANKRUPTCY, Vol. IV., p. 174, Nos. 1618–1620; p. 509, Nos. 4608–4611.

3197. — — — — — **State of war.]**—That declaration in that state of war was announced in the *London Gazette* of Aug. 5, that is the evidence of the existence of war (*LORD READING, C.J.*).—*R. v. AILERS*, [1915] 1 K. B. 616; 84 L. J. K. B. 901; 112 L. T. 558; 79 J. P. 255; 31 T. L. R. 141; 24 Cox, C. C. 623; 11 Cr. App. Rep. 63, C. G. A.

3198. Unofficial advertisement in Gazette—Evidence of limitation of responsibility.]—In an action against a carrier for negligence, debt. cannot read in evidence an advertisement in a newspaper by which he limits his responsibility, unless he first prove that pltf. was in the habit of reading that paper.

Semble: an advertisement in the *Gazette* may be read without such preparatory proof, but without it, the evidence is weak.—*LEESON v. HOLT* (1816), 1 Stark. 186, N. P.

Annotation:—Refd. Wade v. L. & N. W. Ry., [1921] 1 K. B. 582.

As proof of order in council.]—*See* Nos. 3214, 3215, *post*.

3. Proclamation in Gazette—Judicial notice.]—A judge or other judicial officer is entitled to take judicial cognisance of a proclamation in the *Gazette* promulgating a law of the land.—*BROWN v. R.* (1909), T. S. 1014.—*S. AF.*

SUB-SECT. 12.—PARLIAMENTARY JOURNALS.

See Evidence Act, 1845 (c. 113), s. 3.

3199. Journals of House of Lords—Admissible—To prove address to Sovereign—and answer thereto.]

—R. v. FRANKLIN (1731), 17 State Tr. 625.

Annotations:—Mentd. A.-G. v. Allgood (1743), Park. 1; R. v. St. Asaph (1784), 21 State Tr. 847; R. v. Perry (1793), 5 Term Rep. 453.

3200. — How proved—By examined copies.]

—MELVILLE'S (VISCOUNT) CASE (1806), 29 State Tr. 549; 3 Car. & Kir. 79, n.; Starkie on Evidence, 4th ed., p. 281.

Annotations:—Consd. Mortimer v. M'Callan (1840), 6 M. & W. 58. *Refd.* Chubb v. Salomons (1852), 3 Car. & Kir. 75. *Mentd.* Adams v. Lloyd (1858), 31 L. T. O. S. 219; Pye v. Butterfield (1864), 5 B. & S. 829.

3201. Journals of House of Commons—Whether admissible—Entry in printed copy of journal—Not without comparison with original.]

—An entry in a printed copy of the Journals of the House of Commons is not receivable in evidence, unless it has been compared with some original at the House, but an examined copy of an entry in the minute book kept by the clerk at the table of the House was received in evidence.—CHUBB v. SALOMONS (1852), 3 Car. & Kir. 75, N. P.

3202. — Entry in minute book kept by clerk—Examined copy of.]—CHUBB v. SALOMONS, No. 3201, *ante*.

3203. — Test roll.]—The test roll of the House of Commons & the official copy of the division lists are admissible in evidence.—FORBES v. SAMUEL, [1913] 3 K. B. 703; 82 L. J. K. B. 1135; 109 L. T. 599; 29 T. L. R. 514.

Annotations:—Mentd. Burnett v. Samuel (1913), 109 L. T. 630; Bird v. Samuel (1914), 30 T. L. R. 323; Tranton v. Astor (1917), 33 T. L. R. 383; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

3204. — Official copy of division lists.] —FORBES v. SAMUEL, No. 3203, *ante*.

3205. — Voting list—To facts therein stated.]

—R. v. OATES (1685), 10 State Tr. 1079.

Annotation:—Refd. Jones v. Randall (1774), 1 Cowp. 17.

3206. — Evidence of reported election cases.]

—Counsel may inform the committee of the existence of cases bearing upon the inquiry, although chronicled only in the Journals of the House.—NOTTINGHAM TOWN CASE (1866), 15 L. T. 93.

3207. — Evidence of member's conduct—Therein reported.]—The Journals of the House of Commons are admissible as evidence for the purpose of showing, from the member's conduct as therein recorded, that owing to his want of religious belief he is by law incapable of taking an oath.—A.-G. v. BRADLAUGH (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205; 52 L. T. 589; 49 J. P. 500; 33 W. R. 673, O. A.

Annotations:—Mentd. Dixon v. Secretary of Board of Trade (1886), 3 T. L. R. 35; R. v. Hausmann (1909), 73 J. P. 516; *Re* Clifford & O'Sullivan, [1921] 2 A. C. 570.

3208. — How proved—Examined copies.]—

MELVILLE'S (VISCOUNT) CASE (1806), 29 State Tr. 549; 3 Car. & Kir. 79, n.; Starkie on Evidence, 4th ed., p. 281.

Annotations:—Consd. Mortimer v. M'Callan (1840), 6 M. & W. 58. *Refd.* Chubb v. Salomons (1852), 3 Car. & Kir. 75. *Mentd.* Adams v. Lloyd (1858), 31 L. T. O. S. 219; Pye v. Butterfield (1864), 5 B. & S. 829.

3209. — Sworn copies.]—R. v. GORDON

(LORD GEORGE) (1781), 2 Doug. K. B. 590; 21 State Tr. 485; 99 E. R. 372.

Annotations:—Consd. Mortimer v. M'Callan (1840), 6 M. & W. 58. *Refd.* Melville's Case (1806), 29 State Tr. 549. *Mentd.* R. v. Peltier (1803), 28 State Tr. 529; Redford v. Birley (1822), 3 Stark. 110, n.; R. v. Frost (1840), 4 State Tr. N. S. 85; R. v. Williams & Jones (1840), 2 Mood. C. C. 143; R. v. Petchelini (1855), 7 Cox, C. C. 79.

SUB-SECT. 13.—PROBATE AND LETTERS OF ADMINISTRATION.

See EXECUTORS.

SUB-SECT. 14.—PROCLAMATIONS, ORDERS, AND REGULATIONS.

See Documentary Evidence Act, 1868 (c. 37), ss. 2, 5; Local Government Board Act, 1871 (c. 70), ss. 5; Public Health Act, 1875 (c. 55), ss. 130, 135, 297 (7); Board of Education Act, 1899 (c. 33); Post Office Act, 1908 (c. 48); Artillery & Rifle Ranges Act, 1885 (c. 36), s. 6; Drill Grounds Act, 1886 (c. 5); Documentary Evidence Act, 1882 (c. 9); Documentary Evidence Act, 1895 (c. 9), s. 1.

3210. Proclamation—How proved—Printed copy.]—DUPAYS v. SHEPHERD, No. 3522, *post*.

3211. — Evidence of facts recited in it.]—R. v. SUTTON, No. 3526, *post*.

3212. Sheriff's precept to returning officer—To prove issue of precept.]—MEAD v. ROBINSON, No. 2419, *ante*.

3213. Order in Council—How proved—Examined copy.]—EYRE v. PALSGRAVE, No. 1975, *ante*.

3214. — Copy of Gazette.]—The *Gazette* is sufficient evidence of a proclamation issued under an Order in Council, because it is a public act, regarding the Crown & Govt., & must pass the Great Seal before it can be admitted into the *Gazette*.—A.-G. v. THEAKSTONE (1820), 8 Price, 89; 146 E. R. 1140.

3215. — — — — — A declaration alleged the division of a parish into several distinct parishes by order of the King in Council, under Church Building Act, 1818 (c. 45):—Held: the allegation could not be proved by production of the *Gazette* containing a copy of such order.—GREENWOOD v. WOODHAM (1841), 2 Mood. & R. 363.

Annotation:—Mentd. Walsh v. Lincoln (Bp.) (1875), L. R. 10 C. P. 518.

3216. — Government printers' copy.]—

By Contagious Diseases (Animals) Act, 1869 (c. 70), s. 75, the Privy Council may from time to time make such orders as they think expedient for (*inter alia*) requiring notice of the appearance of any infectious or contagious disease among animals, & they may impose penalties. By sect. 81 any order of the Privy Council shall be published in the *London Gazette*, & in a local newspaper, by any local authority to whom the order is sent. On an information against applt., alleging that he had five sheep affected with a contagious disease & did not give notice to a constable it was proved that applt. had five sheep so affected:—*Held*: whether publication of the order of the Privy Council was

—DEAN v. ONTARIO COTTON MILLS CO. (1887), 14 O. R. 119.—CAN.

3216 l. Order in Council—How proved—Government printers' copy.]—The ct. will take judicial cognisance, without further proof, of an Imperial Order in council, upon production of a copy purporting to have been printed by the

PART IV. SECT. 12, SUB-SECT. 12.

t. Journals of Parliament—Whether admissible—Copies.]—Certain alleged copies of journals of Parliament were tendered in evidence. It was not proved that originals ever existed. They were, however, shown to have come from the Parliamentary library at Ottawa, & most of them

purported to have been printed by the Queen's printer:—*Held*: in the absence of a statute making them admissible, they could not be received.

—LANGTRY v. DUMOULIN (1884), 7 O. R. 499; *affd.*, 13 S. C. R. 258.—CAN.

PART IV. SECT. 12, SUB-SECT. 14.

a. Proclamation—Admitted on terms.]

Sect. 12.—Public documents: Sub-sects. 14 & 15,

necessary to its validity or not, the production of a copy purporting to be printed by the govt. printers was *prima facie* evidence of the order under Documentary Evidence Act, 1868 (c. 37), s. 2.—*HUGGINS v. WARD* (1873), L. R. 8 Q. B. 521; 29 L. T. 33; 37 J. P. 405; 21 W. R. 914.

3217. Articles of war—How proved—King's printers' copy.—*R. v. WITHERS* (1781), cited 5 Term Rep. at p. 442; 2 Leach, at p. 591; 1 East, P. C. 233; 101 E. R. 219.

Annotation:—*Reid. R. v. Holt* (1793), 5 Term Rep. 436.

3218. Instructions by Lords of Treasury—Whether admissible—Without proof of commission of appointment.—On the trial of an indictment for a fraud against an agent of govt. under the control of the Treasury, a letter of instructions addressed to debt. by the Lords of the Treasury may be read in evidence, without proving the commission by which they were appointed.—*R. v. JONES* (1809), 2 Camp. 131; 31 State Tr. 251.

Annotations:—*Mentid. R. v. Rowton* (1865), L. C. & Ca. 520; *R. v. Roberts* (1878), 38 L. T. 690; *Castro v. R.* (1881), 6 App. Cas. 229; *R. v. Baskerville*, [1916] 2 K. B. 658.

3219. Decree made in pursuance of statute—How proved—Copy annexed to statute—Obtained from King's printer.—Evidence is admissible in an action for tithes on 37 Hen. 8, c. 4, of the fact of some of the parishes in London paying at the rate mentioned in the decree, made by virtue of that statute, in order to raise a presumption that such decree had been enrolled, no entry of such enrolment being to be found, & a copy of the decree annexed to the statute, in a printed copy obtained from the King's printer, being produced.—*M'DOUIGALL v. YOUNG* (1826), 2 C. & P. 278; Ry. & M. 392.

3220. Admiralty regulations—How proved—Copy of Gazette.—By Merchant Shipping Repeal Act, 1854 (c. 120), s. 295, it was provided, that "the Admty. might make" certain regulations, such regulations to be published in the London *Gazette*, & production of the *Gazette* to be "sufficient evidence of the due making & purport thereof"; & by sect. 2, "the Admty." was defined to mean "the Lord High Admiral, or the Comrs. for executing his office":—*Held*: a notice published in the *Gazette* purporting to be given by the Lords Comrs. of the Admty., but signed only "by command of their lordships, W. G. Romaine," was, by production of the *Gazette*, proved to be duly made by the Admty.—*THE OLIVIA* (1862) 1 Lush. 497; 6 L. T. 398.

3221. Order of Ministry of Food—How proved—Stationery Office copy.—Where proceedings are taken before the justices in respect of alleged offences against the Bread Order, 1917, & the

prosecution omits to prove the Order, the justices ought, even after the case for the prosecution has been closed, to allow the prosecution to prove the Order by producing a Stationery Office copy of it.—*DUFFIN v. MARKHAM* (1918), 88 L. J. K. B. 581; 119 L. T. 148; 82 J. P. 281; 16 L. G. R. 807; 26 Cox, C. C. 308.

3222. ——— Manner provided by Documentary Evidence Acts, 1868 (c. 37), & 1882 (c. 9).—On a charge of infringing a direction given by the Minister of Food pursuant to Dried Fruits (Distribution) Order, 1918, the direction must be proved to have been given by the Minister of Food, & it is not sufficient merely to produce a printed piece of paper headed with the title of the Order & purporting to be issued by the Ministry of Food. Such proof may be given in the manner provided by the above Acts.—*TYRRELL v. COLE* (1918), 120 L. T. 156; 83 J. P. 53; 35 T. L. R. 158; 17 L. G. R. 258.

SUB-SECT. 15.—PUBLIC SURVEYS, INQUISTIONS, AND ASSESSMENTS.

A. Surveys.

(a) In General.

3223. Survey temp. James I.—Admitted as record of court.—*WHARTON (LORD) v. SQUIRE* (1703), Colles, 270; 1 E. R. 281.

3224. Parliamentary survey—Admissible.—*UNDERHILL v. DUBHAM*, No. 2080, *ante*.

3225. ——— Evidence of tithe modus.—*ATKINS & HURST v. DRAKE*, No. 3247, *post*.

3226. By officers of Crown—Ground of admissibility—Made in course of public duty.—The ground on which a survey made by officers of the Crown under a commission is received, is, that it is presumed that they acted in accordance with their public duty, & have stated nothing in their inquiry or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation (*PARKE, B.*).—*DANIEL v. WILKIN* (1852), 7 Exch. 429; 21 L. J. Ex. 236.

3227. Relating to Crown lands—Only for private & temporary use—Not admissible.—*MERCER v. DENNE*, No. 3907, *post*.

—*See, further*, CONSTITUTIONAL LAW, Vol. XI., pp. 586, 587, Nos. 877–881.

3228. Private survey—Made by person under no duty to do so.—*DANIEL v. WILKIN*, No. 3226, *ante*.

3229. ——— Evidence of facts stated therein—Physical condition of church.—*FOWKE v. BERTINGTON*, No. 3954, *post*.

3230. Must be made by competent person—Conservant with district—Proof of competency by living

Queen's printer in London.—*THE MINNIE* (1894), 3 B. C. R. 161.—*CAN.*

b. ——— What it is evidence of.—*BROWN v. COCKBURN* (1876), 37 U. C. R. 592.—*CAN.*

c. ————The introductory part of the annual statutes of Canada containing a statement that an Order in Council had been made bringing Canada Temperance Act into force in a county, is not evidence of the making of such order.—*L. p. MERCER* (1886), 25 N. B. R. 517.—*CAN.*

d. Order of Commissioners of Customs & Excise—How proved.—In proceedings in the Ct. of Exch. for the recovery of a statutory penalty in which an order made by the Comrs. of Customs & Excise was founded on, the order, in the absence of challenge, does not require to be produced or

proved to the Ct.—*LORD ADVOCATE v. VAN WEELE* [1917] S. C. 227.—*SCOT.*

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e. By officers of Crown—Ground of admissibility.—A plan was produced from the registry office, sworn to be that furnished by the court of Crown lands. It was headed "Cardiff," the name of the township, & at the bottom was written "Dept. of Crown lands, Ottawa, Nov. 1866. A. I., assistant comr.," whose signature was proved:—*Held*: sufficiently certified & receivable in evidence.—*NICHOLSON v. PAGE* (1868), 27 U. C. R. 318.—*CAN.*

f. Surveyor General's plan—As proof of facts stated therein.—A copy of the original plan of a township certified by the surveyor-general is

admissible to prove an allowance for a road.—*BADGELY v. BENDER* (1833), 1 O. S. 221.—*CAN.*

—*return of* survey of land filed in the Surveyor-General's office, upon which a grant issued, is admissible in evidence to explain an ambiguity in the grant.—*WIGGINS v. McLEAN* (1850), 1 All. 671.—*CAN.*

—*The report & plans of a Crown land survey leading to a grant cannot be used to contradict the terms of the grant, but they can be used for the purpose of ascertaining where the surveyor started & where he established his marks.*—*MILLET v. BEAZANSON* (1910), 9 E. L. R. 16.—*CAN.*

g. Survey—Proof of.—*Seem*: in order to prove a survey which will

witness.]—A manor map, produced from the custody of the lord of the manor, made in 1817, by a surveyor, since deceased, who was proved by a living witness to have been competent & conversant with the district, & used by the parish authorities for rating purposes, is receivable in evidence where a question of general right to the waste of the manor has arisen in which a class of the community, namely, the inhabitants of a township & tenants of the manor, have a common interest.—*SMITH v. LISTER* (1895), 64 L. J. Q. B. 154; 72 L. T. 20; 15 R. 226.

3231. — Right to tolls.]—The trustees under the Carnarvon Harbour Acts, 1793 & 1809, are entitled to levy tolls on vessels loading or unloading within the limits of the port of Carnarvon. Pltf. constructed docks & quays above the old high-water mark & artificially connected with the sea on his own land at Dinorwic, four miles north of Carnarvon, but within the area of the customs or fiscal port of Carnarvon, & at these docks & quays he loaded ships owned or chartered by him with slates from the Dinorwic quarries. These ships generally sailed through the north end of the Menai Straits, & on their return also unloaded goods for pltf.'s use at Dinorwic. In the view of the ct. pltf. participated in the benefit of the works done by the trustees under the Acts for the better navigation of the Straits:—*Held*: the trustees were entitled to levy tolls under the Acts on pltf.'s ships loading or unloading at Dinorwic, & old surveys could not be admitted as evidence of the high-water mark at the time when they were made, either as being made by a deceased person in the course of his duty, or as matter of public reputation.

It has to be proved that the survey was made by competent persons. That cannot be proved from the document itself (*VAUGHAN WILLIAMS, L.J.*).—*ASHETON SMITH v. OWEN*, [1906] 1 Ch. 179; 75 L. J. Ch. 181; 94 L. T. 42; 22 T. L. R. 182; 10 Asp. M. L. C. 161, C. A.; *affd.*, [1907] A. C. 124, H. L.

Evidence of boundaries.]—*See* BOUNDARIES, Vol. VII., pp. 315, 316, 319, Nos. 353–358, 391–397.

Evidence of custom of manor.]—*See* COPYHOLDS, Vol. XIII., p. 29, No. 253.

Ecclesiastical surveys & terriers.]—*See* Sub-sect. 15, A. (b), *post*.

(b) Ecclesiastical Surveys.

3232. Small value as evidence.]—*DRAKE v. SMYTH*, No. 3338, *post*.

3233. Evidence of right to tithes.]—Survey of a religious house taken in 1563, allowed good evidence to prove a vicar's right to small tithes.—*KELINGTON (VICAR) v. TRINITY COLLEGE, CAMBRIDGE* (1747), 1 Wils. 170; 95 E. R. 555.

3234. — Survey in First Fruits Office.]—*FROOME v. RAWLINS* (1776), 3 Wood, 547.

3235. —.]—The ecclesiastical surveys are admissible to prove an ancient endowment, & aided by perception of small tithes, though not of all, will give a vicar a right to tithes of articles of modern introduction against the lessee of the

rector.—*CUNLIFFE v. TAYLOR* (1816), 2 Price, 329; 146 E. R. 113.

Annotation:—*Consd.* *MASTERS v. FLETCHER* (1830), You. 25.

3236. —.]—*BULLEN v. MICHEL*, No. 3606, *post*.

3237. —.]—*MASTERS v. FLETCHER*, No. 1957, *ante*.

3238. —.]—In a suit by the rector for tithes, defts. pleaded a modus as covering their lands, as part of a district or tract of land, called Allesley Park; defts., in support of their defence, proved the boundaries of the district, & proved by terriers, rectors' books, & other documents, & also by parol testimony, the existence of the payment as a modus for the district for upwards of 150 years. The rector gave in evidence Pope Nicholas' Taxation, various inquisitions & surveys, in which the rectory, & the district in respect of which the modus was pleaded, were estimated at values wholly inconsistent & irreconcilable with the existence of the alleged modus:—*Held*: it was for the jury to consider the weight due to the documentary evidence produced by the rector, & whether it ascribed to the rectory & the district their actual value at the time, or whether that evidence bore internal marks of its being erroneous in those respects.—*BREE v. BECK* (1831), You. 211; 159 E. R. 908; *sub nom.* *BECK v. BREE*, 1 Cr. & J. 246; 1 Tyr. 132; 9 L. J. O. S. Ex. 26. *Annotation*:—*Refd.* *Raine v. Cairns* (1841), 4 Hare, 327.

3239. —.]—Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles I. Still more ancient documents relating to the same parish, & among them the Ecclesiastical Survey of Henry VIII., made no mention of such payment:—*Held*: under these circumstances, an allegation that such payment existed before the time of legal memory, was not supported.—*GRAVES (LORD) v. FISHER* (1831), 3 Cl. & Fin. 1; 8 Bl. N. S. 937; 6 E. R. 1338, H. L.; *affg.* *S. C. sub nom.* *FISHER v. GRAVES (LORD)* (1825), McCle. & Yo. 362, Ex. Ch. *Annotation*:—*Refd.* *Raine v. Cairns* (1841), 4 Hare, 327.

As evidence of boundaries.]—*See* BOUNDARIES, Vol. VII., p. 318, No. 382.

3240. Terriers — Value as evidence — In tithe causes.]—*DRAKE v. SMYTH*, No. 3338, *post*.

3241. — How proved — Production from proper custody.]—*BROOKBARD v. WOODLEY*, No. 1697, *ante*.

3242. — — — — College library.]—*ATKINS v. HATTON* (1794), 2 Anst. 386; 2 Eag. & Y. 403; 4 Gwill. 1406; 145 E. R. 911.

Annotations:—*Refd.* *Miller v. Foster* (1794), 2 Anst. 387, n. *Mentd.* *Jesus College v. Gibbs* (1835), 1 Y. & C. Ex. 145.

3243. — — — — Registry of dean & chapter.]—*MILLER v. FOSTER* (1794), 2 Anst. 387, n.; 4 Gwill. 1406, n.; 145 E. R. 911.

Annotation:—*Consd.* *Potts v. Durant* (1796), 3 Anst. 789.

3244. — — — — Archdeacon's registry.]—*POTTS v. DURANT*, No. 3575, *post*.

3245. — — — — Church chest.]—The three legitimate repositories of terriers & vicars' books, to make them evidence are, the church chest, the registry of the bishop & the registry of the archdeacon.—*ARMSTRONG v. HEWITT* (1817), 4 Price, 216; Wils. Ex. 118; 146 E. R. 444.

be conclusive, the application by the county council to the govt. for such survey must be shown.—*BOLEY v. MCLEAN* (1877), 41 U. C. R. 269.—*CAN.*

1. — *Evidence of facts stated therein.]*—The Govt. through its land dept. & Surveyor-General having accepted pltf.'s survey & placed it upon the official map as the land belonging to pltf.'s limits, it gave pltf. at least such a right as he could defend against admitted trespassers.—

LAURSEN v. MCKINNON (1912), 20 W. L. R. 384; 4 D. L. R. 718; 18 B. C. R. 10.—*CAN.*

m. *By public officers — Grounds of admission — Made in public interest.]*—A survey, having been prepared by public officers in reference to a matter affecting the interests of the public, is admissible in evidence.—*DEVONSHIRE (DUKE) v. NEILL* (1877), 2 L. R. Ir. 132.—*IR.*

n. *Ordnance survey maps — Value as*

evidence — Proof of parish boundaries.]—Observations as to the value of ordnance survey maps in proving parish boundaries.—*GIBSON v. BOWNINGTON SUGAR REFINING CO.* (1869), 7 Macph. (Cl. of Sess.) 394.—*SCOT.*

o. — *— — — —.]*—Observations on the evidence required to prove parish boundaries, & on the value of plans & ordnance survey maps evidence.—*MEACHER v. BLAIR PHANT*, [1913] S. C. 417.—*SCOT.*

quisition, *post mortem*, may be read as evidence, without producing the commission upon which it issued; but it is necessary to prove that such a commission did actually issue, which may be done *vid. voce*.—**ANDERTON v. MAGAWLEY** (1726), 3 Bro. Parl. Cas. 588; 1 E. R. 1515, H. L.

3261. Under Exchequer seal—Evidence of title.—Not conclusive.—A commission under the Exchequer seal is admissible, though not conclusive evidence.—**TOOKER v. BEAUFORT (DUKE)** (1757), 1 Burr. 146; Bull. N. P. 233; Say. 297; 97 E. R. 238.

Annotations:—**Refd.** *R. v. Eriswell* (1790), 3 Term Rep. 707; *Hiscoe v. Lomax* (1838), 8 Ad. & El. 198; *Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520; *Neill v. Devonshire* (1882), 8 App. Cas. 135; *Jenkins v. Dunraven* (1898), 62 J. P. 661. **Mentd.** *Norwich v. Berry* (1769), 4 Burr. 2277.

3262. Under order of House of Commons—Evidence of fees—Payable to officers.—The inquisition taken in the year 1730 as to the fees due to different officers is conclusive evidence.—**GREEN v. HEWETT** (1793), Peake, 243, N. P.

3263. Inquisition as to goods taken under fi. fa.—Whether admissible—Action of trover against sheriff.—An inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under *fi. fa.* belongs, though found in favour of A., is not admissible evidence in an action of trover for the goods, brought by A. against the sheriff.—**IATKOW v. RAMER** (1795), 2 Hy. Bl. 437; 126 E. R. 636.

3264. ———— Action against sheriff for false returns.—In case against the sheriff for a false return of *nulla bona*, an inquisition taken by him to ascertain the property of the goods taken under the *fi. fa.* finding them to be the property of a third person, not deft. in the execution, is not admissible evidence for the sheriff.—**GLOSSOP v. POLE** (1814), 3 M. & S. 175; 105 E. R. 576.

3265. On writ ad quod damnum—Temp. Edward III.—Evidence of value of land.—**BULLEN v. MICHEL**, No. 3606, *post*.

3266. Ecclesiastical inquisition—Evidence of title to tithes—Valor beneficiorum temp. Henry VIII.—**AYDE v. FLOWER** (1717), Bunb. 7; 2 Gwill. 613; 145 E. R. 576.

Annotation:—**Mentd.** *Batchellor v. Smallcombe* (1818), 3 Madd. 12.

3267. ———— Inspeximus of inquisition.—In a suit for small tithes:—**Held**: (1) a book was admissible in evidence which was dated 1314, & was in the Archbishop of York's Registry, in the name of the Archbishop, & which contained the *inspeximus* of an inquisition he had directed to be taken by his sequestrator, & stated that the vicar received at that time all the tithes except those specified.

(2) An account by the minister who was in possession, immediately after the dissolution of a monastery, stating tithes which were received from the various farms was also admissible.—**DONNISON v. CURRY** (1816), McCle. & Yo. 11, n.; 148 E. R. 303.

3268. —————Upon a bill for tithes by a vicar against the occupiers of an estate which had belonged to the Knights Hospitallars of St. John of Jerusalem; & after the dissolution of the monasteries, being vested in King Henry VIII., had been granted by him to the Archbishop of York & his successors, under whom defts. occupied; defts. pleaded that the lands were held by the Hospital exempt from tithes, that they were so held & granted by the King; & they proved that

no tithes had within memory been paid for the lands. On the part of the vicar was produced an *inspeximus* of an inquisition made under the authority of the Archbishop of York in 1314; by which it was found, after specifying certain tithes, that the vicar ought to receive all other tithes to the church belonging, except corn & hay, which the master & brethren of the hospital of St. John of Jerusalem received as rectors; but that all the vicars had, ever since the time of the ordination of the vicarage, received all other tithes, & peaceably, & did so at that time, but they were bound to give their tithe of corn & hay:—**Held**: upon the evidence of this document, the vicar was entitled to the tithes claimed by his bill.—**ERISLEY v. DONNISON** (1828), 2 Bl. N. S. 94; 4 E. R. 1066, H. L.; *aff.* S. C. *sub nom.* **DONNISON v. ERISLEY & BARTON** (1821), McCle. & Yo. 1.

Annotations:—**Refd.** *Hall v. Farmer* (1836), 2 Y. & C. Ex. 145. **Mentd.** *Norton v. Hammond* (1820), 1 Y. & J. 94; *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119.

3269. ———— Taxation of Pope Nicholas.—**BULLEN v. MICHEL**, No. 3606, *post*.

3270. —————**BREE v. BECK**, No. 3238, *ante*.

— **Evidence of boundaries.**—*See* **BOUNDARIES**, Vol. VII., p. 318, No. 385.

3271. Inquisition of Duchy of Lancaster—Evidence of manorial rights.—**MANCHESTER CORPN. v. LYONS** (1882), 22 Ch. D. 287; 47 L. T. 677, C. A.

Annotations:—**Mentd.** *Abergavenny Improvement Comrs. v. Straker* (1889), 42 Ch. D. 83; *Birmingham Corpn. v. Foster* (1894), 70 L. T. 371; *New Windsor Corpn. v. Taylor*, [1899] A. C. 41; *A. G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Hailsham Cattle Market Co. v. Tolman*, [1915] 1 Ch. 360.

3272. Under commission of lunacy—Admissible.—Where to an action against exors. on the bond of their testator, they plead *non est factum*, & set up lunacy as a defence at the trial, an inquisition taken under a commission of lunacy against testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible evidence.—**FAULDER v. SILK** (1811), 3 Camp. 126, N. P.

Annotations:—**Refd.** *Hill v. Clifford*, (*Clifford v. Timms* *Clifford v. Phillips*, [1907] 2 Ch. 238; *Bird v. Keep*, [1918] 2 K. B. 692. **Mentd.** *Towart v. Sellers* (1817), 5 Dow. 231.

3273. —————The presumption of law is, that the verdict of a jury under a Commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, & if the commission remained unsuperseded, that the party continued a lunatic at his death. Such presumption, however, may be rebutted & displaced by positive proof of entire recovery, or possession of a lucid interval, when a testamentary instrument was executed.—**PRINSEP & EAST INDIA CO. v. DYCE SOMBRE** (1850), 10 Moo. P. C. C. 232; 14 E. R. 480; *sub nom.* **EAST INDIA CO. & PRINSEP v. DYCE SOMBRE**, 4 W. R. 714, P. C.; *varying* S. C. *sub nom.* **DYCE SOMBRE v. TROUP, SOLAROLI & PRINSEP & EAST INDIA CO.**, Dea. & Sw. 22.

Annotations:—**Refd.** *In the Goods of Crippen* (1911), 80 L. J. P. 47; *Bird v. Keep*, [1918] 2 K. B. 692. **Mentd.** *Swinfen v. Swinfen* (1859), 1 Sw. & Tr. 283; *Hampson v. Guy* (1891), 64 L. T. 778.

Coroner's Inquisitions.—*See* **CORONERS**, Vol. XIII., pp. 247, 250, 260, Nos. 201, 243, 403, 404.

C. Assessments.

3274. Land tax assessment—Evidence of occupation.—(1) On an ejectment for a house, the land

assess of tax.—Road-cess returns rendered though not conclusive:—**Held**: to be admissible in evidence

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—C.

BROOKS v. TOWSE (1885), 24 N. B. R. 387.—**CAN.**

q. *Assessment on land.*—**ESTER-**

r. *Road-cess returns—Evidence of*

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tax assessment of the parish in which the collector of taxes charges himself with the receipt of money from B. as tenant of a particular house, is evidence that B. was tenant at that time.

(2) The books of an insurance co., in which they charge themselves with the receipt of a sum of money, as a premium to insure a particular house, in the occupation of B. from fire, are, also, evidence of his occupation. These entries are evidence, because the party making them charges himself with the receipt of money.—*DOE d. SMITH v.*

(1824), 1 C. & P. 218; Ry. & M. 62,

N. P.

3275. ———.]—*DOE d. STRODE v. SEATON*, No. 3686, *post*.

3276. ———.]—The land tax assessment books are *prima facie* evidence of the occupation of a certain house.—*JOHNSON v. THOMPSON* (1850), 15 L. T. O. S. 437.

3277. ——— **Evidence of seisin.**—Where it appeared that the land tax assessments were irregularly kept; that when the estate remained in the same family the assessments were usually continued in the name of the ancestor, & it was not changed until the estate was sold or went to another family:—*Held*: the land tax assessments were not evidence of seisin of the party assessed.—*DOE d. STANSBURY v. ARKWRIGHT* (1833), 2 Ad. & El. 182, n.; 5 C. & P. 575; 1 Nev. & M. K. B. 731; 2 L. J. K. B. 102; 111 E. R. 71.

Annotations:—*Expld.* *Doe d. Strode v. Seaton* (1834), 2 Ad. & El. 171; *Doe d. Hopley v. Young* (1845), 9 Jur. 941.

Consd. *Smith v. Andrews*, [1891] 2 Ch. 678. *Mentd.* *Re Stepney Election Petn.*, *Isaacson v. Durant* (1886), 34 W. R. 547.

3278. Under Union Assessment Committee Act, 1862 (c. 103)—Evidence of valuation.—An assessment made under above Act is evidence only, not proof, of the accuracy or inaccuracy of a valuation upon which a church rate is made.—*EDWARDS & MANN v. HATTON* (1866), L. R. 1 A. & E. 21; 35 L. J. Eccl. 1; 13 L. T. 689; 30 J. P. 211; 12 Jur. N. S. 144.

Annotation:—*Reid.* *Barnes v. Grant* (1866), L. R. 1 A. & E. 37.

Evidence of boundaries.—*See* BOUNDARIES, Vol. VII., p. 318, No. 381.

SUB-SECT. 16.—RATE BOOKS.

See Poor Rate Assessment & Collection Act, 1869 (c. 41), s. 18.

3279. Admissibility.—In debt on bond against the surety of a deceased collector of taxes, conditioned for the due performance of his duty as such, & for delivering to the obligee all books & accounts entrusted to his care; a collecting book received by him from his predecessor, for the faithful delivery of which to the obligee, deft. became surety; & on the death of the principal it was

basis on which to ascertain the of the *taluk*.—*HEM CHANDRA DHRY v. KALI PRASANNA BHADURI* (1903), 1 L. R. 30 Cal. 1033; L. R. 30 Ind. App. 177.—*IND.*

a. Poor law valuation.—Evidence of value of land.—The poor law valuation is evidence as a public document of the value of the land comprised in it.—*SWIFT v. M'TIERNAN* (1848), 11 L. Eq. R. 602.—*IR.*

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3286 i. Whether conclusive evidence.—Of liability for rates.—To prove the

rates sued, plffs. tendered the rate book. The several entries in the book showing the individual assessments were not sealed with the corpn. seal, but the seal was official at the end of the entries for the year on the final page:—*Held*: the book was admissible, & the entry of defts.' assessment was conclusive evidence of its contents, without proof of the affixing of the seal, except as the property was erroneously or illegally rated.—*BALMAIN BOROUGH v. MORT'S DOCK & CO.* (1902), 2 S. R. N. S. W. 16; 19 N. S. W. N. 117.—*AUS.*

accordingly delivered to such obligee containing the names of the parishioners residing within the parish for which the collector was appointed & the sums at which they were rated, & the usual mark was made by him therein, opposite to some of such names, by which he indicated the receipt of the sums assessed on them; & receipts signed by him for money paid to him in his official capacity, were produced & received in evidence against the surety on the execution of a writ of inquiry. On a motion whether they ought to have been admitted:—*Held*: the entries made in such book were properly received as evidence at the trial, as it might be deemed a public book; but the circumstances of the case did not warrant either an actual or implied authority by the surety, so as to admit the receipts of the principal as evidence against him.—*Goss v. WATLINGTON* (1822), 3 Brod. & Bing. 132; 6 Moore, C. P. 355; 129 E. R. 1233.

Annotations:—*Expld.* *Whitnash v. George* (1828), 8 B. & C. 556. *Consd.* *Middleton v. Melton* (1829), 10 B. & C. 317.

3280. ——— **Books kept under private Act.—By church trustees.**—*R. v. MURPHY*, No. 1878, *ante*.

3281. ——— **To prove ownership.**—*BLOUNT v. LAYARD* (1888), [1891] 2 Ch. 681, n.; 4 T. L. R. 512, C. A.; *subsequent proceedings* (1889), 5 T. L. R. 371, N. P.

Annotations:—*Reid.* *Smith v. Andrews*, [1891] 2 Ch. 678. *Mentd.* *Brinckman v. Matley* (1904), 73 L. J. Ch. 160; *Simpson v. A.-G.*, [1904] A. C. 476; *A.-G. v. Antrobus*; [1905] 2 Ch. 188; *Behrens v. Richards*, [1905] 2 Ch. 614; *Foster v. Warblington U. D. C.* (1905), 3 L. J. R. 605; *Trafford v. St. Faith's R. D. C.* (1910), 74 J. P. 297; *Johnston v. O'Neill*, [1911] A. C. 552; *Kelkstone Corpn. v. Brockman*, [1914] A. C. 338; *Shearburn v. Chertsey R. D. C.* (1914), 12 L. G. R. 622; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

3282. ———.]—In an action for trespass on a several fishery evidence of fishing by the public as of right was admitted in derogation of plff.'s title. Entries of the names of tenants in parish rate books were admitted in proof of ownership of the fishery by the lessors, plff.'s predecessors in title. The books were brought from the union workhouse where they had been kept:—*Held*: the books came from the proper custody.—*SMITH v. ANDREWS*, [1891] 2 Ch. 678; 65 L. T. 175; 7 T. L. R. 527.

Annotations:—*Mentd.* *Hindson v. Ashby*, [1896] 2 Ch. 1; *Johnston v. O'Neill*, [1911] A. C. 552.

3283. How proved.—Verified copy.—*Seemle*: a rate book is "a public document" within Evidence Act, 1851 (c. 99), so as to admit of proof by means of a copy not certificated, but verified by a witness who has made it.—*JUSTICE v. ELSTOB* (1858), 1 F. & F. 256, N. P.

3284. ——— **Production from proper custody.—Clerk of union.**—*DOE d. RICKETTS v. BALLINGER* (1888), 2 L. T. O. S. 102.

3285. ——— **Union workhouse.**—*SMITH v. ANDREWS*, No. 3282, *ante*.

3286. Whether conclusive evidence.—Of liability for rates.—A person summoned before justices to show cause why a warrant of distress should not issue for non-payment of poor rates has a right to

3286 ii. ———.]—The rate book is not conclusive evidence of rateability or occupancy.—*AUCKLAND CORPN. v. SPEIGHT* (1898), 16 N. Z. L. R. 651.—*N.Z.*

3286 iii. ———.]—A municipal valuation roll is conclusive as to the amount of rates payable, but not as to the liability of a person to be rated.—*UMTATA MUNICIPALITY v. UNION GOVERNMENT*, [1913] C. P. D. 540.—*S. AF.*

rate being within requirements of Municipalities Act, 1897, s. 156.—In a suit instituted to

call evidence to show that, though his name appears on the rate book as occupier of the premises rated, he is, in fact, a mere caretaker.—*R. v. SIMMONDS* (1893), 62 L. J. M. C. 106; 5 R. 546; 57 J. P. Jo. 324; 3 Ryde, Rat. App. 316.

Annotation:—*Refd.* *R. v. Bagshawe* (1896), 75 L. T. 513.

3287. — Of gross estimated rental—As against rating authority.—The gross estimated rental of premises as it appears in the rate-book & valuation list is final, & it is not competent to a ct. of quarter sessions upon a ratepayers' appeal from the assessment committee, to admit evidence tendered by the rating authority to show that the gross estimated rental has been understated.—*HORTON & SON v. WALSALL ASSESSMENT COMMITTEE*, [1898] 2 Q. B. 237; 67 L. J. Q. B. 804; 78 L. T. 684; 62 J. P. 437; 46 W. R. 607, D. C.

Annotations:—*Mentd.* *Hendon Paper Works Co. v. Sunderland Assessment Committee*, [1915] 1 K. B. 763; *Fowler (Leeds) v. Hunslet Assessment Committee*, [1917] 1 K. B. 720; *Gateshead Union Assmt. Com. v. Redheugh Colliery Owners* (1924), 88 J. P. Jo. 780.

3288. — — — — ——[On the hearing of an appeal to quarter sessions against a poor rate in which the assessment committee contended that they were entitled to give evidence that the gross estimated rental inserted in the rate-book was too low, they stated as facts which they could prove that in the years 1900 & 1906 by agreement between applt. co. & the assessment committee the net ratable value was fixed at a certain figure, to which 50 per cent. was added, the sum so arrived at to be deemed the gross estimated rental & inserted as such in the rate-book:—*Held*: as a general principle of law, the assessment committee were bound by the amount of the gross estimated rental appearing in the rate-book, & were not entitled to call evidence before quarter sessions to show that the gross estimated rental had been fixed too low. — *HENDON PAPER WORKS CO. v. SUNDERLAND ASSESSMENT COMMITTEE*, [1915] 1 K. B. 763; 81 L. J. K. B. 476; 112 L. T. 146; 79 J. P. 113; 13 L. G. R. 97, C. A.

Annotations:—*Consd.* *Redheugh Colliery v. Gateshead Union Assmt. Com.*, [1924] 1 K. B. 369. *Mentd.* *Davis v. Pontypridd Union Assmt. Com.*, *Rhondda Overseers & Rhondda U. C.* (1916), 85 L. J. K. B. 1545; *Fowler (Leeds) v. Hunslet Assmt. Com.*, [1917] 1 K. B. 720; *Gateshead Union Assmt. Com. v. Redheugh Colliery Owners* (1924), 88 J. P. Jo. 780.

3289. — — — — ——[Applts., owners of certain premises, appealed to special sessions against the amount of the gross estimated rental & of the ratable value at which their premises had been assessed for the poor rate. The special sessions reduced the amount of the gross estimated rental & of the ratable value, but in neither case to so low a figure as had been contended for by applts. Applts. gave notice of appeal to quarter sessions on the ground that both amounts as determined by the special sessions were too high. Before the hearing of the appeal at quarter sessions applts. withdrew their appeal so far as it related to the gross estimated rental. At the hearing resps. who had not given notice of appeal against the decision of the special sessions tendered evidence to prove that the true amount of the gross estimated rental was in excess of the figure arrived at by the special sessions, but the evidence

was rejected:—*Held*: although the decision of the special sessions was partly in favour of applts. they were entitled as persons "impugning" the decision within Parochial Assessments Act, 1836 (c. 96), s. 6, to appeal to quarter sessions; & as resps. had not appealed against the decision of the special sessions the evidence tendered by them at quarter sessions had been rightly rejected.—*FOWLER (JOHN) & CO. (LEEDS), LTD. v. HUNSLET ASSESSMENT COMMITTEE*, [1917] 1 K. B. 720; 86 L. J. K. B. 816; 116 L. T. 562; 81 J. P. 118; 33 T. L. R. 209; 15 L. G. R. 211, D. C.

3290. — Of annual value—For determination of water rate.—Water Rate Definition Act, 1885 (c. 34), applies not only to Waterworks Clauses Act, 1847 (c. 17), s. 68, but also to Southwark & Vauxhall Water Act, 1852, s. 58, & consequently, in order to prove the annual value of a house in the metropolis for the purpose of determining whether the water rate is to be paid by the owner or the occupier, it is sufficient to produce the rate-book showing the ratable value of the house as settled by the local authority.—*METROPOLITAN WATER BOARD v. STREETON* (1910), 102 L. T. 220; 74 J. P. 180; 8 L. G. R. 277, D. C.

3291. — — — — — Liquor licence.—In determining the amount of the licence duties imposed by the Finance (1909–10) Act, 1910 (c. 8), the valuation list for the time being in force under the Valuation (Metropolis) Act, 1869 (c. 67), is not conclusive evidence of the annual value of licensed premises.—*WRIGGLESWORTH v. R.* (1910), 104 L. T. 593; 75 J. P. 118; 27 T. L. R. 154; 9 L. G. R. 329.

Annotations:—*Mentd.* *Jones v. West Derby Union* (1911), 75 J. P. 375; *Truman, Hanbury, Buxton v. I. R. Commr.*, [1912] 3 K. B. 377.

SUB-SECT. 17.—REPORTS.

3292. Report of custom house searcher—Admissible.—A copy from the custom house, of the searcher's report of the cargo, kept there, is evidence.—*JOHNSON v. WARD* (1806), 6 Esp. 47, N. P.

Annotation:—*Distd.* *Huntley v. Donovan* (1850), 15 Q. B. 96.

3293. Judicial report—Prothonotary's report—Before whom interrogatories taken—Not conclusive against parties interrogated.—The prothonotary's report is not conclusive against parties who have been put to answer interrogatories before him, but they may except to the report on any material point.—*Re ISAACSON* (1823), 1 Bing. 272; 8 Moore, C. P. 214; 130 E. R. 109.

3294. — — — — — Master's report—Subsequent proceedings—Between different parties.—A report [of a master] finding a particular fact, will not be ordered to be read as evidence in another suit relating to the same matter, but between different parties, though the evidence, by which that fact was formerly proved, has been since lost.—*MAULE v. BRUCE* (1824), 2 Coop. temp. Coll. 215; 47 E. R. 1133; *sub nom.* *MAULE v. MENCE*, 3 L. J. O. S. Ch. 42.

3295. — — — — — Magistrates' report—Printed by order of House of Commons—Admissible in Admiralty Court.—A copy of the report of the stipendiary

try whether the validity of a rate is within the above sect. entries in the rate books, are not conclusive evidence, that the rate entered in the book was struck in compliance with the requirements of the Act.—*BROKEN HILL PROPRIETARY BLOCK CO. v. BROKEN HILL MUNICIPAL DISTRICT* (1901), 1 S. R. N. S. W. 50; 18 N. S. W. W. N. 9.—*AUS.*

a. — — — — — *Of status.*—The assessment

roll is conclusive as to the status of the persons mentioned in it.—*WARWICK TOWNSHIP v. BROOKE* (1901), 21 C. L. T. 231; 1 O. L. R. 435.—*CAN.*

b. — — — — — *Of posting of notice.*—*R. v. RAFAY* (1902), 5 Terr. L. R. 367.—*CAN.*

c. — — — — — *Of valuation.*—*TURNBULL REAL ESTATE CO. v. R.* (1903), 33 S. C. R. 677.—*CAN.*

PART IV. SECT. 12, SUB-SECT. 17.

d. *Judicial report—Master's report—Prima facie evidence—Of what it contains.*—The master's report is *prima facie* evidence of what it contains, unless appealed from.—*NICHOLS v. McDONALD* (1858), 6 Gr. 594.—*CAN.*

e. *Report of Surveyor General—Evidence of ownership of land.*—*JONES*

ic documents: Sub-sec's. 17 & 18.]

magistrate & assessor, printed by order of the House of Commons, is no evidence in the Ct. of Admty.—*THE MANGERTON* (1856), Sw. 120; 27 L. T. O. S. 207; 2 Jur. N. S. 620.

3296. ——— **Made confidentially to Crown.]**—*STURIA v. FRECCIA*, No. 3072, *ante*.

3297. ——— **Judge's report at election trial.]**—The report of the judge at an election trial is not final & conclusive like his certificate as to the matters contained in it.—*STEVENS v. TILLET* (No. 1), *NORWICH ELECTION PETITION* (1870), 1 R. 6 C. P. 147; 40 L. J. C. P. 58; 23 L. T. 622; 35 J. P. 375; 19 W. R. 182.

*Annotations:—***Refd.** *Aldridge v. Hurst* (1876), 1 C. P. D. 410. **Mentd.** *Beauchamp v. Madresfield Overseers*, *Salisbury v. South Mills Overseers*, *Salisbury v. Bontems*, *Salisbury v. Bulwer* (1872), 2 Hop. & Colt. 41; *Maude v. Lowley* (1874), L. R. 9 C. P. 165; *Clark v. Wallond* (1883), 31 W. R. 551.

3298. ——— **Judge's charge to jury—Inadmissible.]**—An unauthenticated manuscript report of the trial about one hundred & forty years ago of an action of trespass, & of the charge of the Chief Baron, which was received in the ct. below, is a document which ought not to be admitted in evidence.—*BRIDGES v. HIGHTON* (1865), 11 L. T. 653, L. C.

3299. ——— **Report of Irish judge to divisional court—Evidence of judge's decision.]**—A report made by an Irish judge to a divisional ct. in Ireland to be used as an application to set aside the verdict was evidence in an English action between the same parties of what took place at the trial & what the judge decided.—*HOBSTOUN v. SLIGO* (MARQUIS) (1885), 29 Ch. D. 448; 52 L. T. 96; 1 T. L. R. 217.

*Annotation:—***Mentd.** *Caird v. Moss* (1886), 33 Ch. D. 22.

3300. ——— **Metropolitan chief gas examiner.]**—*R. v. LONDON COUNTY COUNCIL, Ex p. COMMERCIAL GAS CO.* (1895), 11 T. L. R. 337.

3301. ——— **Judge's notes of witness' evidence—Not evidence of matters deposed to—After death of witness.]**—A certified copy of the judge's notes of the evidence of a witness called by petitioner at the hearing of a petition for divorce *a mensa et thoro* cannot, in case of the death of the witness, be received as proof of the matters deposed to by him upon the second reading of a bill for divorce presented by petitioner.—*GRIFFIN'S DIVORCE BILL*, [1890] A. C. 133.

3302. ——— **Law reports—Statement of facts of case—Inadmissible as evidence.]**—The directors of a co., issued a prospectus on the faith of which B. applied for & was allotted shares in the co. The co. went into liquidation. B. brought an action under Directors' Liability Act, 1890 (c. 64), s. 3, against three of the directors for compensation on the ground that the prospectus contained an untrue statement. Judgment was given in his favour with costs & an inquiry as to damages directed. Defts. appealed to the Ct. of Appeal, & the House of Lords, but both appeals were dismissed with costs. The case is reported *sub nom. Broome v. Speak*, [1903] 1 Ch. 586. A compromise was arrived at under which the inquiry was dropped & B. was paid compensation at the rate of 15s. per share, his taxed costs of the inquiry & £700 additional costs. Many other shareholders made claims which were also compromised & the three defts., in B.'s action & some of the other directors

paid large sums in this way. They did not take advantage of third party procedure but brought this action against the remaining directors & the exors. of three of them, who had died since the prospectus was issued to enforce under sect. 5 of the Act contribution by them of their share of the compensation which had been paid:—**Held:** the statement of facts in the above report ought not to be treated as evidence but the judgments in that case were an authority for holding on the facts proved in the present action that the prospectus contained an untrue statement.—*SHEPHEARD v. BRAY*, [1906] 2 Ch. 235; 75 L. J. Ch. 633; 95 L. T. 414; 51 W. R. 556; 22 T. L. R. 625; 50 Sol. Jo. 526; 13 Mans. 279; *on appeal*, [1907] 2 Ch. 571, C. A.

*Annotation:—***Mentd.** *Geipel v. Peach*, [1917] 2 Ch. 108.

3303. ——— **Judgments reported—Admissible as foundation for subsequent judgments.]**—*SHEPHEARD v. BRAY*, No. 3302, *ante*.

3304. **Report of pilot committee—Authorised by Act of Parliament—Evidence as to pilot's conduct.]**

—(1) The evidence of a pilot, taken on board the vessel proceeded against in pursuance of the Act, is not admissible against the owner; (2) nor is evidence as to a declaration of a seaman on board that vessel; (3) nor is the result of an investigation into the pilot's conduct by a pilot committee authorised by Act of Parliament.—*THE LORD SEATON* (1845), 2 Wm. Rob. 391; 4 Notes of Cases, 164; 6 L. T. 257; 9 Jur. 603; 166 B. R. 802.

*Annotation:—***As to** (2) **Consd.** *The Europa* (1849), 13 Jur. 856.

3305. **Report of Registrar-General—Evidence of parochial situation of place—Not conclusive.]**—A report of the Registrar-General under Extra-Parochial Places Act, 1857 (c. 19), s. 1, is not conclusive of a place being reputed to be extra-parochial.—*R. v. COUSINS* (1861), 4 B. & S. 849;

3 New Rep. 461; 33 L. J. M. C. 87; 9 L. T. 686; 28 J. P. 278; 10 Jur. N. S. 722; 12 W. R. 374; 122 E. R. 678.

*Annotation:—***Mentd.** *Re Pudding Norton Overseers* (1864), 28 J. P. 454.

3306. **Coastguard report—Evidence of facts stated.]**—In a cause of collision the books containing the entries made by the coastguard, & sent to the coastguard office, are admissible in evidence to prove the state of wind & weather at the time of the collision, without calling the person who made the entries.—*THE CATHERINA MARIA* (1866), L. R. 1 A. & E. 53; 12 Jur. N. S. 380.

3307. **Report by committee of foreign government—Not evidence of facts stated.]**—*STURIA v. FRECCIA*, No. 3072, *ante*.

3308. **Report by Official Receiver—Evidence of facts stated.]**—Where the ct. has jurisdiction to make & has exercised its discretion by making an order for public examination under Cos. (Winding-up) Act, 1890, s. 8, the order will not be discharged on the ground that fraud is not sufficiently shown by the official receiver's report on which the order is based; & where the report is made in good faith the ct. will not allow evidence to be adduced to rebut the charges of fraud therein, & will not take the report off the file, or remit it to the official receiver in order that other facts, on which the person ordered to be examined relies, may be stated in the report.—*Re NEW TRAVELLERS' CHAMBERS, LTD.*, [1895] 1 Ch. 395; 64 L. J. Ch. 317; 72

(5 R. & G.) 538.—**CAN.**

g. **Report of political agent—As public record of public inquiry.]**—On the question of ownership of a certain temple said to be the property of the Ajaigarh State, the report of a *kotwal*,

v. COWDEN (1874), 34 U. C. R. 345; (1875), 36 U. C. R. 435.—**CAN.**

1. **Action for malicious prosecution—Production of police court record—Of discharge of accused—Whether sufficient.]**—In an action for malicious

prosecution the following record of the police ct. was sufficient evidence of the termination of the proceedings: "J. J. B.; charge, stealing two rings (pros. J. Beck), discharged."—*BACKSTROM v. BECK* (1884), 17 N. S. R.

L. T. 89; 43 W. R. 282; 11 T. L. R. 217; 39 Sol. Jo. 247; 2 Mans. 110; 13 R. 296.

Annotation :—**Mentd.** *Re* National Stores, [1899] 2 Ch. 773.

—*See, further*, **BANKRUPTCY**, Vol. IV., pp. 201, 202, Nos. 1855, 1858, 1860–1864.

3309. Report of Board of Trade Inspector—Under Companies Act, 1862 (c. 89), s. 56—Not evidence as to facts stated.—(1) An examination into the affairs of a joint-stock co. by an inspector appointed by the Board of Trade under the above sect. is not a proceeding of such a nature that prohibition can lie in respect of it either to the Board of Trade or to the inspector.

(2) The examination is to be made for the purpose of making a report & that report when made has no legal effect with regard to any one & cannot be used as evidence against any one. The inquiry held by the inspector is not a judicial inquiry & has nothing in the nature of a judicial determination (**LORD ESHER, M.R.**).—*Re* GROSVENOR & WEST-END RAILWAY TERMINUS HOTEL CO., LTD. (1897), 76 L. T. 337; 13 T. L. R. 309; 41 Sol. Jo. 365, C. A.

Annotation :—*As to* (1) **Refd.** *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), [1924] 1 K. B. 171.

3310. Reports to Government departments—Not admissible.—**MERCER v. DENNE**, No. 3907, *post*.

3311. Report by General Medical Council—Evidence of professional misconduct.—Three several articles of partnership for carrying on the business of dentists, entered into by two persons named Clifford with *pltf.* in the first action & debts in the other two actions, all contained a provision that if either partner should be guilty of professional misconduct the other partner should be at liberty to give notice in writing determining the partnership. On May 21, 1906, the General Medical Council, acting under the powers of Dentists Act, 1878 (c. 33), made an order directing the registrar to strike the Cliffords' names off the Register of Dentists, on the ground that they had been guilty of conduct which was infamous or disgraceful in a professional respect within the words of the Act. *Pltf.* in the first action & debts in the other two actions thereupon gave notice determining the partnership. These three actions were brought to determine the validity of the notices. The order of the Medical Council was tendered in evidence :—**Held** : (1) the order was admissible as *prima facie* evidence of the fact that the Cliffords were guilty of acts infamous or disgraceful in a professional sense, & there being no rebutting evidence, that fact was proved; (2) the order was admissible as evidence & conclusive evidence of the fact that debts' names had been erased from the register by order of the council, & might be admissible against debts for some purposes other than the truth of the fact of misconduct to show the grounds upon which it was made.—**HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS**, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 661, C. A.; *on appeal*, [1908] A. C. 12.

Annotations :—*As to* (1) **Refd.** *Bird v. Keep* (1918), 118 L. T. 633. *Generally*, **Mentd.** *Law v. Chartered Institute of Patent Agents*, [1919] 2 Ch. 276.

3312. —Evidence of removal from Medical Register.—**HILL v. CLIFFORD, CLIFFORD v. TIMMS, CLIFFORD v. PHILLIPS**, No. 3311, *ante*.

who in 1840 had made an inquiry into the ownership of the temple at the instance of the political agent, was relevant evidence as being a public record of a public inquiry.—**BALDEO DAS v. GOBIND DAS** (1914), 1 L. R. 36 All. 161.—**IND.**

3313. Report by company agents.—**AMALGAMATED PROPERTIES OF RHODESIA (1913), LTD. v. GLOBE & PHOENIX GOLD MINING CO., LTD.** (1915), 140 L. T. Jo. 8.

Reports of committee of Law Society.—*See* Solicitors Act, 1888 (c. 65), s. 13.

Report of Charity Commissioners.—*See* Charitable Trusts (Recovery) Act, 1891 (c. 17), s. 5 (1).

SUB-SECT. 18.—RECORDS RELATING TO CROWN.

3314. Accounts of Minister of Crown—Evidence of right to tithes.—**TOWRIE v. PEARSON**, No. 3537, *post*.

3315. Auditors' returns of Crown revenue—Evidence as to demise of tithes.—(1) Where in a grant by the Crown of extra-parochial lands, the words "tithes, oblations & obventions" were found to have been introduced amongst the general words :—**Held** : not to pass the tithes of such lands, in a case where it was in evidence that the tithes were in lease at the time of the grant, & the Crown had continued to demise them whenever they had reverted, the ct. determining that the continued exercise of such strong acts of ownership was sufficient to countervail the slight effect of such words even if where so introduced they were of any force at all, & were not rather attributable to mistake.

(2) Returns of any particular subject-matter by the Auditors in their accounts of the Crown revenue, are sufficient proof of its having been kept in charge to protect the claim of the Crown from the operation of Crown Suits Act, 1768 (c. 16) although they have returned "Nil," & the claim has not been put in suit thereon for more than sixty years.—**A.-G. v. EARDLEY (LORD)** (1820), 8 Price, 39; Dan. 271; 146 E. R. 1124.

Annotation :—*As to* (1) **Refd.** *Chapman v. Gatecombe* (1836), 2 Scott, 738.

3316. Of Duchy of Cornwall—Extent of admissibility.—(1) An enrolment of a lease in the Duchy of Cornwall Office is evidence as if it were an enrolment by the Crown, & it is immaterial whether the Duchy is in possession of the Crown or of the Duke.

(2) The estate of the Duchy of Cornwall is one of a very peculiar nature there is nothing like it existing in this country. It is an estate vested in the Duke of Cornwall, when there is a Duke of Cornwall, & when there is no Duke of Cornwall it is vested in the Crown. To say that one rule shall prevail as to the formation of documents or the evidence of these documents, when the Duchy is in the hands of the Duke, & that another rule shall prevail when the Duchy is in the hands of the King, would be accompanied with great confusion & injustice. Whatever is done during the existence of a Duke is to be considered in the same manner as if it was done to the Crown (**LORD TENNENTEN, C.J.**).

(3) On account of the interest of the Crown in the Duchy of Cornwall all acts which affects the revenues of the Duchy are to be considered as public acts, & an instrument affecting such revenues, though not executed by the parties to an action or their privies, is admissible in evidence.—**ROWE v. BRENTON** (1828), 8 B. & C. 737; 2

PART IV. SECT. 12, SUB-SECT. 18.

h. Crown grant—Evidence of ownership.—The production of a Crown grant containing a description exactly coinciding with that inserted in the writ produced, is *prima facie*

evidence that the land granted is the land described in the writ.—**NEWTON v. ILES** (1868), 7 N. S. W. S. C. R. 276.—**AUS.**

k. Letters patent—Admissible—Without proof of the King's letter.—

Sect. 12.—Public documents: Sub-sects. 18 & 19

State Tr. N. S. 251; 3 Man. & Ry. K. B. 133; Concanen's Rep. 1; 108 E. R. 1217.

Annotations :—As to (1) **Consd.** *Evans v. Taylor* (1838), Ad. & El. 617. As to (2) **Reid.** *Anglesey v. Hatherton* (1842), 10 M. & W. 218. As to (3) **Reid.** *Doe d. William IV. v. Roberts* (1844), 13 M. & W. 520; *Mercer v. Denny*, [1905] 2 Ch. 538. **Generally, Mentd.** *Whittingham v. Bloxham* (1831), 4 C. & P. 597; *It. v. Richmond Manor* (1841), 5 Jur. 605; *Doe d. Dand v. Thompson* (1845), 7 Q. B. 897; *Rogers v. Brenton* (1847), 10 Q. B. 26; *Ex p. Exeter* (Rp.) (1850), 10 C. B. 102; *Shaw v. Beck* (1853), 8 Exch. 392; *Jessop v. Jessop* (1861), 30 L. J. P. M. & A. 193; *A.-G. v. Prince of Wales v. Crossman* (1866), L. R. 1 Exch. 381; *Dixon v. Farrer* (1886), 18 Q. B. 1, 43; *Sutton Harbour Improvement Co. v. Plymouth Town Grdms.* (1890), 63 L. T. 772.

3317. Royal charter or grant—Grant of pontage.—*R. v. Sutton (Lady)*, No. 2905, *ante*.

3318. — To port authority—Evidence of pilotage regulations.—In a cause of collision it was proved that the collision was caused by the default of the pilot of deft.'s vessel, who was licensed by the Hull Trinity House; deft. having pleaded that the employment of the pilot was compulsory, the point was argued on the Hull Pilot Act; the ct. pronounced an opinion that the employment of the pilot was not by that Act compulsory, but allowed deft. to give in evidence the royal charters to the Hull Trinity House & other public documents, & to have a further argument, upon terms of paying all further costs in any result.—*THE KILLARNEY* (1862), 1 Lush. 427; 6 L. T. 908; 1 Mar. L. C. 238; 167 E. R. 188.

Annotations :—**Generally, Mentd.** *Tyne Improvement Comrs. v. General Steam Navigation Co.* (1866), 16 L. T. 487; *General Steam Navigation Co. v. British & Colonial Steam Navigation Co.* (1869), L. R. 4 Exch. 238; *The Hankow* (1870), 4 P. D. 197; *The Umsing*, [1912] P. 120.

3319. Reparations estimate by King's engineer—Not for public purpose—Inadmissible.—*MERCER v. DENNE*, No. 3907, *post*.

Surveys & inquisitions.—*See* Sub-sect. 15, A. & B., *ante*.

SUB-SECT. 19.—REGISTERS.

A. Parish Registers and Books.

(a) Admissibility.

See Canon 70 of 1603; Parochial Registers Act, 1812 (c. 146); Evidence Act, 1851 (c. 99), s. 14.

3320. At common law.—*STURLA v. FRECCIA*, No. 3072, *ante*.

3321. Variation in spelling—Between various registers—Effect of.—*EGGLETON v. EGGLETON* (1843), 1 L. T. O. S. 529.

3322. Tampering with register suspected—Direction to jury.—*DOE d. ANGEL v. ANGEL* (1846), 7 L. T. O. S. 80.

3323. Only where not provable by living witnesses.—Six & a half acres of parish land lying in pieces scattered through R. estate, consisting of five hundred & fifty acres, were demised in 1635 at a yearly rent of £6, & from time to time portions of the same were sold & conveyed away, the rent

of £6 being charged exclusively upon the unsold part, of which thirty-one acres remaining in 1842 were purchased by deft.'s father. In all the deeds from 1786 downwards the thirty-one acres were described as being subject *inter alia* to a rent of £6 *per annum*, which deft. & all his predecessors paid to the parish:—*Held*: (1) deft. was entitled to make his own title deeds evidence, not for the purpose of proving facts which they assert, but to show the intention of deft. & his predecessors in making the payment; (2) & the parish books were evidence for the parish only where the entries were so old as not to be provable by living witnesses.—*A.-G. v. STEPHENS* (1855), 6 De G. M. & G. 111; 25 L. J. Ch. 888; 26 L. T. O. S. 189; 20 J. P. 70; 2 Jur. N. S. 51; 4 W. R. 191; 43 E. R. 1172, L. C.

Annotations :—**Generally, Mentd.** *Brown v. Wales* (1872), L. R. 15 Eq. 142; *Searle v. Cooke* (1890), 43 Ch. D. 519.

3324. Entry not contemporaneous—Not made in regular course—But over one hundred years old.—*LAUDERDALE PEERAGE*, No. 3448, *post*.

3325. Entry in handwriting of deceased vicar.—An entry in a parish register of different moduses, the sum total of which was in the handwriting of a deceased vicar, admitted in evidence.—*PERIGAL v. NICHOLSON* (1810), Wight. 63; 145 E. R. 1175.

3326. Register not kept according to canon.—(1) *Qu.*: as to admitting in evidence a parish register, not kept according to the canon, requiring weekly entries, or a copy without proof, that the original is not to be found.

(2) Parish register admissible evidence notwithstanding the loss of a leaf, not destroying the series of entries.—*WALKER v. WINGFIELD* (1812), 18 Ves. 413; 34 E. R. 384.

3327. Material page torn out.—*WALKER v. WINGFIELD*, No. 3326, *ante*.

3328. Of day book—Whence register compiled—To contradict register.—Day book from whence the register is made up not allowed as evidence to contradict the latter in a question of legitimacy.—*MAY v. MAY* (1737), 2 Stra. 1073; 93 E. R. 1040.

Annotation :—**Consd.** *Doe d. Warren v. Bray* (1828), 3 B. & C. 813.

(b) How Proved.

See Canon 70 of 1603; Parochial Registers Act, 1812 (c. 146); Evidence Act, 1851 (c. 99), s. 14; Local Government Act, 1894 (c. 73), s. 17 (8).

3329. Copy.—*DIKE v. POLHILL*, No. 3084, *ante*.

—*Sec. further, Sect. 9, ante.*

3330. Transcript to diocesan registry.—*A.-G. OLDHAM* (*circa* 1825), cited in Burn's History of Parish Registers, p. 252.

3331. — If original proved lost.—*WALKER v. BEAUCHAMP* (COUNTES), No. 2074, *ante*.

3332. — Unless return made under Parochial Registers Act, 1812 (c. 146).—*WALKER v. BEAUCHAMP* (COUNTES), No. 2074, *ante*.

3333. — In ejectment, it being proved by the rector of the parish of C. that no parish registers existed there of earlier date than 1733, the transcripts of the registers of that parish

Letters Patent under the Great Seal are records & are admissible in evidence, without proof of the King's letter directing the grant of them.—*DEVONSHIRE (DUKE) v. NEILL* (1877), 2 L. R. Ir. 132.—*IR.*

PART IV. SECT. 12, SUB-SECT. 19.—A. (a).

1. Applotment book of parish.—Not evidence of value of The applotment book of a parish is not evidence to prove the value of the benefice in years previous to the establishment to the composition

the parish (1849), 12 L. Eq. R. 559.—*IR.*

PART IV. SECT. 12, SUB-SECT. 19.—A. (b).

3329 i. Copy.—The entry of a marriage in a parish register may be proved by the production of a copy made by the clergyman from the register which the witness examined with him, without producing the clergyman or proving the register.—*FAXTON'S CASE* (1843), Ir. Clr. Rep. 800.—*IR.*

3329 ii. ——A certified copy of the

duplicate original register of a marriage is good evidence of the marriage in an action for restitution of conjugal rights, but proof *alunde* is required to identify the parties as the persons named in the register.—*RYKIE v. RYKIE* (1868), Buch. 114.—*S. AF.*

3329 iii. ——In an action for divorce a document purporting to be a true copy of the original marriage register is not, on its mere production, admissible as evidence of the marriage of the parties to the suit.—*MATOMELA v. MATOMELA* (1881), 2 E. D. C. 12.—*S. AF.*

for 1705 & 1706, returned under Canon 70 of 1603, were produced by the registrar of the diocese from the bishop's registry, & received as evidence of a marriage in 1705, & a baptism in 1706, of persons through whom the lessor of *pltf.* traced his title.—*DOE d. WOOD v. WILKINS* (1846), 2 Car. & Kir. 328.

3334. Extracts—Signed by proper person.]—Under Evidence Act, 1851 (c. 99), s. 14, extracts from parish registers of baptisms, marriages & deaths purporting to be signed, some by the "incumbent," some by the "rector," some by the "vicar" & some by the "curate" of the parishes:—*Held*: to be receivable in evidence on a petition for the payment of money out of *ct.*, the *ct.* considering that such incumbent was an "officer to whose custody," *etc.*, within the meaning of the Act.—*Re HALL'S ESTATE* (1852), 2 De G. M. & G. 748; 9 Hare, App. 1., XVI.; 22 L. J. Ch. 177; 20 L. T. O. S. 187; 17 Jur. 29; 1 W. R. 2; 42 E. R. 1064, L. J.

Annotation:—*Folld. Re Porter's Trusts* (1856), 25 L. J. Ch. 688.

3335. ——— Curate.]—An extract from a parish register, signed by the curate of the parish, is admissible in evidence under Evidence Act, 1851 (c. 99), s. 14.—*Re PORTER'S TRUSTS* (1856), 25 L. J. Ch. 688; 20 J. P. 741; 2 Jur. N. S. 340; 4 W. R. 443.

3336. Production from proper custody—Ancient books or documents—Parish registry.]—The *ct.* allowed *deft.* after publication, to prove an old paper found in the parish registry.—*CLARKE v. JENNINGS* (1793), 1 Anst. 173; 145 E. R. 835.

3337. ——— Bishop's or archdeacon's registry.]—*ARMSTRONG v. HEWITT*, No. 3245, *ante*.

3338. ——— The vicarage.]—(1) Terriers are of the highest order of evidence in tithe causes, & where they record tithes to be payable for certain articles *specialim*, are presumptive proof of such tithe being payable in kind. Where also they state any fact concerning the mode of rendering the tithe, such statement is evidence of that fact, & is allowed to qualify the render, & to define, in great measure, its legal character.

(2) The more ancient documents, as the ecclesiastical survey, *etc.*, are only *prima facie* evidence requiring to be supported by proof of usage, or other confirmation, & may be rebutted.

(3) A memorandum, entered by a former vicar in an old book, called a parochial register, & kept in an iron chest at the vicarage, is admissible evidence on behalf of the vicar. Such custody is proper for such a book, which is common property.—*DRAKE v. SMYTH* (1818), 5 Price, 369; Dan. 104; 3 Eag. & Y. 888; 146 E. R. 636, Ex. Ch.; on appeal (1824), M'Cle. & Yo. 216, n., H. L.; subsequent proceedings, *sub nom.* ATKINS & HURST *v.* DRAKE (1825), M'Cle. & Yo. 213.

Annotations:—*Generally*, *Mentd.* Short v. Leo (1821), 2 Jac. & W. 464; Raine v. Cairns (1841), 4 Hare, 327.

3339. ——— Parish chest.]—*ARMSTRONG v. HEWITT*, No. 3245, *ante*.

3340. ———]—*R. v. PEMBRIDGE* (INHABITANTS), No. 1804, *ante*.

3341. ——— Union workhouse—Indemnity bond.]—On trial of an issue, a bond to indemnify parish officers against the charge of a bastard was offered in evidence. It was dated in 1716, & was brought from a chest, kept in the workhouse of a union comprehending the parish, in which chest was kept muniments belonging to the union. There was no direct evidence how it was placed in the chest: but it was proved that, in 1842, several documents were brought in a cart to the workhouse by a pauper, & placed in the chest:—

Held: enough appeared to satisfy the rule of proving deeds to be brought from a proper depository, & the evidence was admissible.—*SLATER v. HODGSON* (1846), 9 Q. B. 727; 2 New Mag. Cas. 51; 2 New Sess. Cas. 488; 8 L. T. O. S. 160; 10 J. P. Jo. 770; 115 E. R. 1451.

3342. ——— Rate books.]—*SMITH v. ANDREWS*, No. 3282, *ante*.

3343. ——— Not residence of parish clerk.]—(1) Parochial Registers Act, 1812 (c. 146), s. 5, requires parish registers to be kept at the parson's house or in the church. The custody of such registers by the parish clerk at his house is not, unless accounted for, such reasonably proper custody as to render receivable in evidence an extract made by a witness from a book produced to him as the parish register by the clerk, at the clerk's house.

(2) We cannot lay down any general rule on the question of proper custody. We must be guided by the circumstances of each particular case (*PATTESON, J.*).

(3) No explanation was offered to account for his [the parish clerk's] custody. . . . If any explanation had been offered, we might, perhaps, not scrutinise it very closely (*COLERIDGE, J.*).—*DOE d. ARUNDEL (LORD) v. FOWLER* (1850), 14 Q. B. 700; 19 L. J. Q. B. 151; 14 L. T. O. S. 417; 14 J. P. 114; 14 Jur. 179; 117 E. R. 270.

(c) For What Purposes Admitted.

i. In General.

3344. Of facts stated therein—Whether conclusive.]—*CHANDOS PEERAGE CASE* (1802), cited in Hubback's Evidence on Succession at p. 482.

Annotations:—*Refd.* *Braybrooke v. Inskip* (1803), 8 Ves. 417; *Lloyd v. Passingham* (1809), 16 Ves. 59. *Mentd.* *Rosecommon's Claim* (1828), 6 Cl. & Fin. 97.

3345. Election to parish office—Entry in vestry book—Fact of election.]—An Act of Parliament for regulating the concerns of the poor in a particular parish, required that certain notice should be given of a vestry for the election of a treasurer, & that a treasurer should be elected at a vestry held in pursuance of such notice. To support an allegation in an indictment that A. was duly elected treasurer of the parish an entry in the vestry book, stating that A. was elected treasurer at a vestry duly held in pursuance of notice, is sufficient evidence.—*R. v. MARTIN* (1809), 2 Camp. 100.

3346. ——— Right of election.]—In the course of a trial it was ruled that old entries in the vestry-books of the parishes of St. Mary Colechurch & St. Mildred the Virgin were not evidence to show the right of election, as it did not appear whether the incumbent was present at the meetings they related to; but extracts from the register of the bishop of the diocese were received in evidence to prove the same appointments, as were also several entries of vestry meetings, at which the rector was present.—*HARTLEY v. COOK* (1832), 5 C. & P. 411; subsequent proceedings (1833), 9 Bing. 728.

3347. Right to church pew—Entry in vestry book.]—In an action for disturbing *pltf.*'s enjoyment of a pew claimed in right of a message, an old entry in the vestry book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the message, under whom *pltf.* claims, in consideration of his using it, is admissible evidence to prove *pltf.*'s right to the pew.—*PRICE v. LITTLEWOOD* (1812), 3 Camp. 284.

Annotation:—*Consd.* *Sturla v. Freccia* (1880), 5 App. Cas. 623.

3348. Delivery of certificate of settlement—Entry in parish book—By former parish officer.]—

Sec. 12.—Public documents: Sub-sect. 19, A. (c)

On an appeal, *resps.* in order to prove the fact of the delivery to them of a certificate given by *appls.* acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the handwriting of a former parish officer:—*Held*: such evidence was inadmissible.—*R. v. DEBENHAM (INHABITANTS)* (1818), 2 B. & Ald. 185; 106 E. R. 334.

Annotations:—*Consd.* *Irish Soc. v. Derry* (Bp.) (1846), 12 Cl. & Fin. 641. *Refd.* *Davies v. Morgan* (1831), 1 Tyr. 457; *R. v. Worth* (1843), 7 J. P. 287; *Sturla v. Freccia* (1880), 5 App. Cas. 623.

3349. Evidence of tithe modus—Rector's or Vicar's books.—Books of former rectors produced upon trial of an issue, whether any variation had been as to sums paid for tithes of houses in London.—*BENNET v. TREPPASS* (1723), Bunb. 143; 2 Gwill. 633; 145 E. R. 626.

Annotations:—*Mentd.* *St. Paul's, London v. Morris* (1803), 9 Ves. 155; *Antrobus v. East India Co.* (1806), 13 Ves. 9; *Payne v. Esdalle* (1888), 13 App. Cas. 613.

3350. — Although containing non-parochial entries—Not produced from strictly proper custody.—(1) Where a district modus was pleaded, & it appeared from ancient documents that the modus could not consistently with those documents have existed at the time of legal memory, the *ct.* decreed an account of tithes in kind, & refused an issue, notwithstanding the payments were proved to have existed for a great number of years.

(2) A district modus, to be good must cover all the lands in the district, & therefore where a modus was pleaded for a particular district, & it appeared from the evidence that certain farms within the district never paid or contributed, the modus was considered bad.

(3) Evidence that sums had been collected from the inhabitants from a person employed by the parson, & from a list furnished by him, affords strong presumption that the payments are farm moduses, & not a district modus, for if it were a district modus, the collection would be made by the parishioners & handed over to the incumbent.

(4) Vicar's books were admitted in evidence, though they contained private entries & memorandums of the vicar, not relating to the parish; & though one of the books had remained for many years in the hands of a representative of a deceased vicar, instead of having been delivered to the succeeding incumbent.—*MILLER v. JACKSON* (1826), 1 Y. & J. 65, Ex. Ch.

Annotation:—*Generally, Mentd.* *Durham v. Christ's Hospital, Durham* (1834), 4 L. J. Ex. Eq. 13.

3351. ——[—]—On the trial of an issue, under Tithe Act, 1836 (c. 71), whether a modus of £20 had been, during the statutable period, payable by the occupiers of lands in a hamlet to the rector in lieu of tithes, it appeared, by old terriers, that glebe lands, lying interspersed amongst the other lands in the hamlet, were in the occupation of the rector in the beginning of the seventeenth century, & that, some time about 1610, the occupant of the land in the hamlet occupied also the glebe lands; & that for more than the statutable period no tithes had been paid by any occupant of lands in the hamlet, & £20 *per annum* had been paid to the rector by the tenants of such lands. An account book kept by a deceased rector, containing receipts & payments by him relative to the living, was received in evidence for the present incumbent. The jury found that the payment had been made for tithes & glebe, & not for tithes only. On a case stating the above facts:—*Held*: the account

book was properly admitted in evidence.—*YOUNG v. CLARE HALL* (1851), 17 Q. B. 529; 21 L. J. Q. B. 12; 18 L. T. O. S. 90; 15 J. P. 770; 16 Jur. 81; 117 E. R. 1381.

3352. — Books of parish overseers.—Entries in the books of parish overseers, of sums therein stated to be for rates payable in respect of a modus admissible as evidence of modus.—*WARD v. POMFRET* (1832), 5 Sim. 475; 2 L. J. Ch. 22; 58 E. R. 416.

3353. Appropriation of parish rates.—The vestry clerk of a parish upon his appointment, by the vestry, to the office, was told that it would be part of his duty to collect the church rate & poor rate, & to apply them as his predecessor had done. In pursuance of these instructions, & in accordance with a practice which had prevailed in the parish for fifty or sixty years, the vestry clerk applied a portion of the money arising from a church rate made in *plfts.*' year of office as churchwarden to the payment of certain parochial charges not legally payable out of the church rate:—*Held*: one of *plfts.* being a vestry man, the parish books were admissible in evidence to show the usage of the parish as to the appropriation of the rates.—*COOPER v. LAW* (1859), 6 C. B. N. S. 502; 28 L. J. C. P. 282; 5 Jur. N. S. 1263; 141 E. R. 552.

3354. Account of law action—Entry in church book—Admissible quantum valeat.—*BIDDER v. BRIDGES*, No. 3024, *post*.

Evidence of boundaries.—*See* BOUNDARIES, Vol. VII., p. 318, Nos. 381, 383.

ii. Registers of Births.

3355. Fact of birth.—*VICARY v. FARTHING*, No. 3379, *post*.

3356. ——[—]—*DUDLY'S CASE*, No. 3380, *post*.

3357. — If also proof of identity.—*DRAYCOTT v. TALBOT*, No. 3382, *post*.

Birth certificate, *see* Sect. 12, sub-sect. 10, B. (b) i, *ante*.

iii. Registers of Baptism.

See Canon 70 of 1603; Parochial Register Act, 1812 (c. 146), Sched. A.

3358. Fact of baptism—Entry not made from personal knowledge of incumbent—Founded on minute supplied by parish clerk.—An entry in the register book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, & of which he received information from the parish clerk, is not admissible in evidence, nor is the private memorandum of the fact made by the clerk, who was present at the baptism.—*DOE v. WARREN v. BRAY* (1828), 8 B. & C. 813; 3 Man. & Ry. K. B. 428; 2 Man. & Ry. M. C. 66; 7 L. J. O. S. K. B. 161; 108 E. R. 1245.

Annotation:—*Refd.* *Lyell v. Kennedy* (1887), 56 L. T. 647.

3359. ——[—]—A baptismal certificate, when adduced in evidence at *Nisi Prius*, is evidence only of the fact of baptism, & not of any independent fact which is therein stated. It would be misdirection if the judge, who had admitted such a certificate in evidence, had failed to tell the jury that they were not to treat it as evidence of such independent fact; but the *ct.* will not, on that ground alone, grant a new trial, if it appear that there was other & abundant evidence on which the jury might have found their verdict, if the certificate objected to had been altogether excluded.

—*THRUSSELL v. BARKER* (1868), 17 L. T. 665.

3360. Date of birth—Supplied by other evidence.—*Re WHEATNALL* (1622), Palm. 325; 81 E. R. 1105.

3361. ———.]—**ZOUCHE PEERAGE CLAIM** (1804), Hubback's Evidence on Succession, p. 482; 44 *Lords Journals*, 433, H. L.
Annotation :—**Mentd.** *Braye Peerage* (1839), 6 Cl. & Fin. 757.

3362. ———.]—An entry in the register of the christening of a child, as to the time of birth, is not of itself evidence of the age.—**WHEN v. LAW** (1821), 3 Stark. 63, N. P.

Annotation :—**Refd.** *Doe d. Wollaston v. Barnes* (1834), 1 Mood. & R. 386.

3363. ———.]—If a parish register of baptisms state that the person baptised was born on a particular day, that is not evidence of the date of his birth.—**R. v. CLAPHAM** (1829), 4 C. & P. 29, N. P.
Annotation :—**Expld.** *Milne v. Leisler* (1862), 7 H. & N. 786.

3364. ———.]—A copy of an entry in a registry of baptism for 1820 in which it was alleged that the birth took place in 1795 is no evidence of the time of birth.—**DUINS v. DONOVAN** (OTHERWISE **DUINS**) (1830), 3 Hag. Ecc. 391; 162 E. R. 1165.

3365. ———.]—On an indictment for carnally knowing & abusing a female child under ten years of age, the best evidence of the age of the child ought to be produced. Where an offence of this kind was committed on Feb. 5, 1832, & the child's father proved, that on his return after an absence from home of a few days, on Feb. 9, 1822, he found that the child had been born, & was told by her grandmother that she had been born the day before; & the register of baptisms shows that the child had been baptised on Feb. 9, 1822 :—**Held** : not sufficient to prove that the child was under ten years old as the grandmother might have been called.—**R. v. WEDGE** (1832), 5 C. & P. 298, N. P.
Annotation :—**Consd.** *R. v. Hayes* (1847), 8 L. T. O. S. 518.

3366. ———.]—An entry in the baptismal register, that deft. was born on a day there mentioned, is no evidence of that fact.—**BURGHART v. ANGERSTEIN** (1831), 6 C. & P. 690, N. P.

Annotations :—**Mentd.** *Ryder v. Wombwell* (1868), L. R. 3 Exch. 90; *Nash v. Inman* (1908), 77 L. J. K. B. 626.

3367. ———.]—**Supported by affidavit.**—**JAMIESON v. MILL** (1837), 1 Jur. 790.

3368. ———.]—**Re BULLEY'S SETTLEMENT**, [1886] W. N. 80.

3369. ———.]—**ROBINSON v. BUCCLEUCH & QUEENSBERRY** (DUKE), No. 3390, *post*.

3370. Place of birth.—**R. v. CREECH ST. MICHAEL'S** (INHABITANTS) (1774), Burr. S. C. 765.

Annotations :—**Consd.** *R. v. North Petherton* (1826), 4 L. J. O. S. K. B. 213. **Refd.** *Hereford Union Grdns. v. Barton Regis Union Grdns.* (1880), 44 J. P. 736. **Mentd.** *R. v. Eriswell* (1790), 3 Term Rep. 707.

3371. ———.]—A register of baptism *per se* is no evidence of the place of birth of the party baptised.—**R. v. NORTH PETHERTON** (1826), 5 B. & C. 508; 8 Dow. & Ry. K. B. 325; 4 Dow. & Ry. M. C. 79; 2 Bott. 6th ed. 796; 4 L. J. O. S. K. B. 213; 108 E. R. 189.

Annotations :—**Consd.** *Doe d. Wollaston v. Barnes* (1834), 1 Mood. & R. 386. **Refd.** *R. v. Ovenden* (1848), 12 J. P. 565; *R. v. Crediton* (1858), 4 Jur. N. S. 926.

3372. ———.]—**Supported by other evidence.**—(1) Though a parish register is not conclusive evidence of the place of birth of the person baptised, it is admissible in evidence to be considered with other facts, upon the question as to the place of birth.

(2) The declaration of a deceased mother as to the time of birth, is admissible in evidence upon a question as to the place of birth of the child, though the father be living.—**R. v. BIRMINGHAM**

(INHABITANTS), **R. v. ASTON** (INHABITANTS) (1829), 8 L. J. O. S. M. C. 41.

3373. ———.]—Proof that A. & B. were married in the parish of Dale, & that their children, C., D., E., & F. were baptised there, is not evidence from which the justices are bound to infer that E. was born there.

Qu. : whether they would be justified in drawing such inference from the evidence.—**R. v. LUBBENHAM** (INHABITANTS) (1834), 5 B. & Ad. 968; 3 Nev. & M. K. B. 37; 2 Nev. & M. M. C. 34; 3 L. J. M. C. 50; 110 E. R. 1019.

3374. ———.]—Upon an application to two justices for an order for the removal of a pauper more than sixty years old who was said to have a birth settlement in A., the pauper proved that, as early as he could recollect, he had lived with his mother's father in A. & a certificate of the pauper's baptism was produced, bearing date about the time of the pauper's supposed birth & copied from a register of baptisms for A. found in the register book of the church of the parish of which A. was a township :—**Held** : this was some evidence that the pauper was born in township A.—**R. v. OVENDEN** (INHABITANTS) (1818), 3 New Mag. Cas. 27; 11 L. T. O. S. 222; 12 J. P. 565.

3375. ———.]—**HEREFORD UNION GUARDIANS v. BARTON REGIS UNION GUARDIANS** (1880), 44 J. P. 736.

3376. Legitimacy.—A baptismal register, in which the party is described as the illegitimate son of his mother, is admissible evidence on the trial of such an issue.—**COPE v. COPE** (1833), 5 C. & P. 601; 1 Mood. & R. 269, N. P.

Annotations :—**Consd.** *Re Turner, Glenister v. Harding* (1885), 29 Ch. D. 985. **Mentd.** *R. v. Mansfield* (1841), 1 Q. B. 444; *Gordon v. Gordon*, [1903] P. 141.

3377. ———.]—**When supported by other evidence.**—Although an entry in a baptismal register by the officiating clergyman of the day when the baptised child was born furnishes no proof *per se* that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question.—**Re TURNER, GLENISTER v. HARDING** (1885), 29 Ch. D. 985; 54 L. J. Ch. 1089; 53 L. T. 528.

3378. Christian name—Of party baptised.—It requires very strong evidence to satisfy the ct. that a parish register is not to be trusted in so material a matter as the Christian name of a child whose baptism is recorded.—**WEBB v.** (1854), 19 Beav. 312; 52 E. R. 382.

iv. Registers of Marriages.

See Canon 70 of 1603.

3379. Fact of marriage.—Parish books & registers are good evidence to prove births & marriages; & when produced, the jury may have them out of ct. while they are conferring on their verdict.—**VICARY v. FARTHING** (1595), Cro. Eliz. 411; 78 E. R. 653.

Annotation :—**Mentd.** *R. v. Martin* (1872), L. R. 1 C. C. R. 378.

3380. ———.]—A register book for the entry of marriages, births, etc., is evidence, & falsifying it, whether by conspiracy or not, should not go unpunished.—**DUDLEY'S CASE** (1658), 2 Sid. 71; 82 E. R. 1263.

PART IV. SECT. 12, SUB-SECT. 19.— A. (c) (iv).

m. Not evidence of—*Status before marriage.*—In the entry of the marriage.—**J.—VOL. XXII.**

riage in the church's marriage registry A's name appeared with the addition "bapt." a contraction for bachelor. There was nothing to show by whom the entry of the addition was made,

or that it was made in pursuance of a duty prescribed by statute :—**Held** : the register, while admissible in proof of the marriage could not be received as evidence that A. had previously

Sect. 12.—Public documents: Sub-sect. 10, A. (c) iv.

3381. ———.]—ANON. (1773), *Lofft*, 328; 98 E. R. 677.

3382. ———.]—**Supported by evidence of identity.**—The entry of the name & titles of persons in a church book, either for marriages or births, cannot be positive evidence of the marriage or birth of any person; unless the identity of the person named in such entries is fully proved, & strengthened also with circumstances of co-habitation, or the allowance of parties.—*DRAYCOTT v. TALBOT* (1718), 3 Bro. Parl. Cas. 564; 2 Eq. Cas. Abr. 585; 1 E. R. 1501, H. L.

3383. ———.]—In an action for criminal conversation an actual marriage may be proved by a copy of the register, & the minister, clerk, or subscribing witnesses to the register, are not the only competent witnesses to prove the identity of the persons married.—*BIRT v. BARLOW* (1779), 1 Doug. K. B. 171; 99 E. R. 113.

*Annotations:—***Refd.** *Catherwood v. Caslon* (1844), 13 M. & W. 261. **Mentd.** *Pain v. Terry* (1865), 12 L. T. 269; *Butterworth v. Butterworth & Englefield, etc.*, [1920] P. 126.

3384. ———.]—*BAIN v. MASON* (1824), 1 C. & P. 202, N. P.

3385. ———.]—In support of a plea of coverture, an examined copy of a register of marriage between deft. & J. was given in evidence. A witness deposed that he knew J. & his handwriting, & that the handwriting of J. in the register was that of the person whom he knew:—**Held:** the evidence was admissible without the production of the original register.—*SAYER v. GLOSSOP* (1848), 2 Exch. 409; 2 Car. & Kir. 694; 17 L. J. Ex. 300; 11 L. T. O. S. 225; 12 Jur. 465; 154 E. R. 552.

3386. ———.]—**Supporting evidence of cohabitation & reputation.**—Lessor of plff. in ejectment claimed as remainderman in tail. To establish the pedigree, he proved cohabitation & reputation of marriage between his alleged father & mother. He also produced a parish register signed by them, stating the performance of a marriage ceremony between them at a private house; & the archbishop's fiat for a special licence, with the affidavit upon which the fiat was obtained. No search had been made for the licence; & it appeared that there was no regular place of custody for such licences:—**Held:** the affidavit, fiat & register were admissible evidence, without production of the licence, to confirm the evidence of cohabitation & reputation, & as showing that parties bearing the names of the alleged father & mother had been engaged in taking measures for contracting a marriage.—*DOE d. EGREMONT (EARL) v. GRAZEBROOK* (1843), 4 Q. B. 406; 3 Gal. & Dav. 334; 12 L. J. Q. B. 221; 7 Jur. 530; 114 E. R. 951.

3387. ———.]—**Although register attested by one witness only.**—An examined copy of an entry in a parish register of marriages is receivable in evidence to prove a marriage, although the entry in the register purport to be attested by one

witness only, the words "In the presence of" in the entry being followed by one name only.—*DOE d. BLAYNEY v. SAVAGE* (1841), 1 Car. & Kir. 487.

3388. Time of marriage—Evidence as between strangers.—The registry of a marriage is evidence between strangers of the time of the marriage.—*DOE d. WOLLASTON v. BARNES* (1831), 1 Mood. & R. 386, N. P.

*Annotation:—***Mentd.** *Doe d. Bather v. Brayne* (1848), 5 C. B. 655.

Marriage certificates, *see* Sect. 12, sub-sect. 10, B. (b) ii., *ante*.

v. Registers of Burials.

See Canon 70 of 1003; Parochial Registers Act, 1812 (c. 146); &, generally, **BURIALS**, Vol. VII., p. 562.

3389. Fact of death—Although entry not made by incumbent from personal knowledge.—An entry in the parish book, kept at the parish church, of a burial in the workhouse cemetery within the parish, was evidence of the death of the person named, though it appeared that the incumbent sanctioned the entries in the book on the faith of statements made by others, & not from his personal knowledge of the burials.—*DOE d. FRANCE v. ANDREWS* (1850), 15 Q. B. 756; 117 E. R. 644.

*Annotations:—***Refd.** *Lyell v. Kennedy* (1887), 56 L. T. 647. **Mentd.** *Prudential Assee. v. Edmonds* (1877), 2 App. Cas. 487.

3390. Age of deceased.—Neither a certificate of baptism nor a certificate of burial, although purporting to state the age of the person to whom they refer, is any evidence of such age.—*ROBINSON v. BUCCLEUCH & QUEENSBERRY (DUKE)* (1887), 3 T. L. R. 472, C. A.

B. Episcopal Registers and Records.

3391. Of what the documents are evidence—Facts stated therein.—(1) A bishop's register is evidence of the facts stated in it. (2) An entry in a book deposited in the registry of a bishop, is evidence of the admission of a curate at the bishop's visitation.—*ARNOLD v. BATH & WELLS (Bp.)* (1829), 5 Bing. 316; 2 Moo. & P. 559; 7 L. J. O. S. C. P. 120; 130 E. R. 1083.

*Annotation:—***As to** (2) **Consd.** *Sturla v. Freccia* (1880), 5 App. Cas. 623.

3392. ———.]—**Presentation to living—By patron.**—A copy of the bishop's institution-book is not evidence of a presentation by the patron to a living.—*TILLARD v. SHEBBEARE* (1768), 2 Wils. 366; 95 E. R. 865.

3393. ———.]—**Admission of Incumbent.**—In a *qui tam* action for non-residence, where the declaration states deft. to be vicar of A., & he gives evidence that the parish is called B., the entry of deft.'s institution in the bishop's book by the name of A. is not conclusive evidence against him though it is evidence of the parish being called by both names.—*STILL v. COLERIDGE* (1801), *For*. 117; 145 E. R. 1131.

3394. ———.]—*ARNOLD v. BATH & WELLS (Bp.)*, No. 3391, *ante*.

composition, although in truth it included the tithes of a union of parishes.—*BRADSHAW v. STANNIS* (1837), 5 Ir. L. Rec. N. S. 191.—**IR.**

3391 iv. ———.]—Copies of the title certificate & applotment, compared & attested by the registrar of the diocese, are evidence of the contents of the original document.—*CROWLEY v. FLOOD* (1837), 2 Jo. Ex. Ir. 555.—**IR.**

3391 v. ———.]—*Re* **FERMOY PARISH TITHES** (1897), 31 L. L. T. 120.—**IR.**

not been married.—*JOHNSTON v. HAZEN* (1905), 26 C. L. T. 317; 3 N. B. Eq. Rep. 147.—**CAN.**

PART IV. SECT. 12, SUB-SECT. 19.

—B.

3391 i. *Of what the documents are evidence—Facts stated therein.*—A certificate granted by the bishop after registry in the diocese is conclusive evidence of the facts stated in it.—*GRAVES v. MURRAY* (1833), *Hayes & Jo.* 165.—**IR.**

3391 ii. ———.]—**Seemle:** a certificate of title composition is conclusive evidence, in an action against a title-payer, of the title of the person named therein as the person to whom the composition is due &—*ASKE v. LOCKE* (1836), 2 Jo. Ex. Ir. 11.—**IR.**

3391 iii. ———.]—When the certificate of title composition appears upon the face of it to have been made in respect of a single parish, it is conclusive evidence of that fact in any proceeding for the recovery of title

3395. — **Name of parish.]**—*STILL v. COLE-RIDGE*, No. 3393, *ante*.

3396. — **Endowment of vicarage.]**—*LEONARD v. FRANKLIN*, No. 3649, *post*.

3397. — **—.]**—*WOLLEY v. BROWNHILL*, No. 1853, *ante*.

3398. — **Leases.]**—A book in which leases were enrolled, & which was kept in the office of the auditor of the Bishop of Durham, such officer holding a patent office in the county palatine: *Held*: admissible evidence to sustain the claims of a lessee of the Bishop of Durham, the original & counterpart of the lease being lost.—*HUMBLE v. HUNT* (1817), *Holt*, N. P. 601, N. P.

Annotation:—*Reffd.* *Coombs v. Coother & Wheeler* (1829), *Mood. & M.* 398.

3399. — **—.]**—A book kept in the house of the dean & chapter of Sarum, purporting to contain copies of leases granted by the dean & chapter, is, as a public book, evidence of those leases for the purpose of reputation, without proof of possession under the leases.—*COOMBS v. COOTHER & WHEELER* (1829), *Mood. & M.* 398, N. P.

3400. — **Right to tithes.]**—In a suit for tithes by a rector against occupiers, defts. pleaded a modus to be payable to the vicar for the tithes claimed:—*Held*: (1) a copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for pltf., the Bishop's Registry having been searched for the original, without success, & no search was necessary either in the Augmentation Office, or in the vicar's house, although it was expressed, in the instrument, that one part of it was to remain with the vicar; (2) a terrier appearing to be signed by a former incumbent, who was both rector & vicar of the parish, & whose handwriting was proved, & by the churchwardens, was admissible for pltf., though it was produced from the custody of an individual who claimed the tithes of a particular district in the parish, & not from the usual depositories; (3) the decrees, but not the interrogatories & depositions, in two former suits, one in the Exchequer, & the other in Chancery, for the tithes of a particular farm in the parish, but which was not included in the present suit, were admissible for defts.—*TUCKER v. WILKINS* (1831), 4 Sim. 241; 58 E. R. 91.

3401. — **Collation to benefice—Exercise of right claimed.]**—*IRISH SOCIETY v. DERRY* (Bp.), No. 3513, *post*.

3402. — **— Evidence of fact of collation—Entries in First Fruits Office.]**—*IRISH SOCIETY v. DERRY* (Bp.), No. 3543, *post*.

3403. **Bishop's certificate—Evidence of fact of marriage—Day or place not mentioned.]**—A bishop's certificate of the fact of marriage is good without naming day or place of marriage.—*WICKHAM v. ENFIELD* (1634), *Cro. Car.* 351; 79 R. R. 908.

Annotations:—*Mentd.* *Davis v. Lees* (1742), *Willes*, 344; *R. v. Millis* (1844), 10 Cl. & Fin. 534.

3401 i. — **Collation to benefice.]**—*LONDON (GOVERNOR & ASSISTANTS) v. DERRY* (Bp.) (1840), *Smythe*, 479; *affd. on appeal* (1841), 4 L. R. 193.—*IR.*

PART IV. SECT. 12, SUB-SECT. 19.— C. (a).

n. English registers—Admissibility.]—A document purporting to be an extract from the marriage register of a church in London, England, signed by the curate, received without other evidence of the existence of the register or of the church.—*GRAHAM v. GRAHAM* (1872), 3 V. R. 139.—*AUS.*

o. — **—.]**—Pltf. in an action

for restitution of conjugal rights, who had been married in England, put in a copy of the entry in the church register of marriages which had been made in his presence for the purposes of this suit by the minister who had celebrated the marriage:—*Held*: such copy constituted sufficient proof of the marriage.—*HIGGINS v. HIGGINS* (1913), *C. P. D.* 242.—*S. AF.*

p. Certificate of incorporation—By London registrar—Sufficient.]—The simple production of a certificate purporting to be signed by a London registrar is sufficient evidence of the incorporation.—*It. v. HILL, STEAD &*

3404. Bishop's special licence—Evidence of marriage.]—In a petition for judicial separation, the marriage of the parties which had taken place in the Isle of Man was allowed to be proved by the production of the special licence for the marriage granted by the Bishop of Sodor & Man, & evidence by petitioner as to the marriage having been solemnised.—*ROHMANN v. ROHMANN* (1908), 25 T. L. R. 78; 53 Sol. Jo. 61.

Ecclesiastical surveys & inquisitions.]—See Sub-sect. 15, A. & B., *ante*.

C. Foreign and Colonial Registers and Certificates. (a) In General.

3405. General rule.]—(1) Scottish parish registers or certified extracts from them, receivable in Scottish cts. as kept under the sanction of public authority, are receivable in English cts. as to matters properly & regularly recorded in them.

(2) Foreign registers of baptisms & marriages or certified extracts from them are receivable in evidence in the cts. of this country as to those matters which are properly & regularly recorded in them (*LORD SELBORNE*).

(3) Anything imperfect or unsatisfactory in the way in which they were generally kept affects only their weight *in re dubia* & not their admissibility (*LORD SELBORNE*).—*LYELL v. KENNEDY, KENNEDY v. LYELL* (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353, H. L.

Annotations:—*Generally*, *Mentd.* *Trovor v. Hutclins* (1897), 76 L. T. 183; *Kelghley, Maxsted v. Durant*, [1901] A. C. 240; *Rold-Newfoundland Co. v. Anglo-American Telegraph Co.*, [1912] A. C. 555; *Henry v. Hammond*, [1913] 2 K. B. 515; *Finn v. Shelton Iron, Steel & Coal Co.* (1921), 131 L. T. 213.

(b) Scotland.

See Registration of Births, Deaths & Marriages (Scotland) Acts, 1851 (c. 80), 1855 (c. 29), 1860 (c. 85); Marriage (Scotland) Act, 1856 (c. 96), s. 12.

3406. Admissibility—Effect of imperfections or irregularities.]—*LYELL v. KENNEDY, KENNEDY v. LYELL*, No. 3405, *ante*.

3407. Evidence of birth, death & marriage—Copies inadmissible—Scottish peerage claim.]—*MARCHMONT PEERAGE CASE* (1822), *Minutes of Evidence*, May 21; cited in *Halsbury's Laws of England*, Vol. XIII, p. 536, n.

3408. Evidence of facts recorded—Parochial registers—Kept under public authority.]—*LYELL v. KENNEDY, KENNEDY v. LYELL*, No. 3405, *ante*.

3409. Evidence of marriage—Admissibility of copy—Register of episcopal chapels.]—In the absence of proof that registers of Episcopal Chapels at Edinburgh are by the law of Scotland documents of an authentic & public nature, copies thereof rejected as inadmissible [as evidence of marriage] by the law of England.—*CONWAY (OTHERWISE BEAZLEY) v. BEAZLEY* (1831), 3 E. R. 639; 162 E. R. 1292.

Ans:—*Mentd.* *Brook v. Brook* (1858), 3 Sm. & G. NEEDHAM (1881), 2 N. S. W. L. R. 194.—*AUS.*

q. For use at trial in England.]—A petition was presented by an Englishman praying the ct. to ordain the Registrar-General for Scotland to produce at the trial to take place in England, under the custody of an official to be selected by him, the parochial register of certain parishes in Scotland. Petition refused.—*KENNEDY v. DEPUTY CLERK REGISTRAR* (1889), 7 R. (Ct. of Sess.) 1129; 17 Sc. L. R. 760.—*SCOT.*

r. — **—.]**—*KING'S REMEMBRANCE* (1902), 4 F. (Ct. of Sess.) 559; 39 Sc. L. R. 390; 9 S. L. T. 422.—*SCOT.*

Sect. 12.—Public documents: Sub-sect. 19, C. (b), (c) & (d) i., ii. & iii.]

481; *Dolphin v. Robins* (1859), 7 H. L. Cas. 390; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Harvey v. Farnie* (1880), 6 P. D. 35; *Chesney v. Newsholme, Newsholme v. Chesney* (2), [1908] P. 301.

3410. ——— Marriage register.]—The ct., in the absence of any official record, accepted, as sufficient *prima facie* evidence of a marriage of the parents of an intestate, a statement contained in an extract from a Scottish marriage register of the year 1868, the bridegroom being the intestate's brother, in which, under the heading "Name, surname, & rank or profession of father," appeared the names & descriptions of both parents of the bridegroom.—*WIGLEY v. SOLICITOR TO THE TREASURY*, [1902] P. 233; 71 L. J. P. 115; 87 L. T. 745.

3411. ——— Admissibility of certified copy—Of marriage register—Proof of character of person certifying.]—*R. v. RIGBY* (1909), 73 J. P. Jo. 301.

3412. ——— Without evidence of law of Scotland.]—The validity of a marriage in Scotland by declaration in presence of two witnesses, afterwards duly registered pursuant to warrant of the Sheriff-Substitute, is sufficiently established in an English ct. by production of a copy of the entry in the register, duly signed by the Registrar, pursuant to Marriage Law (Scotland) Amendment Act, 1850 (c. 90), s. 2, without expert evidence of the law of Scotland.—*DREW v. DREW*, [1912] P. 175; 81 L. J. P. 85; 107 L. T. 528; 28 T. L. R. 479.

Annotation:—Folld. Daniels v. Daniels (1916), 33 T. L. R. 149.

3413. ——— ———.]—A certificate under Registration of Births, Deaths, & Marriages (Scotland) Act, 1854 (c. 80), s. 58, is sufficient proof of a regular Scottish marriage without the addition of expert evidence.—*DANIELS v. DANIELS* (1916), 33 T. L. R. 149.

3414. ——— Certificate of session clerk.]—The libel, in a cause of separation by reason of cruelty, pleaded the marriage in Scotland, & the session clerk's certificate of the registration of the marriage. The libel also pleaded several matters in the conduct of the husband which did not *per se* come up to actual cruelty:—*Held*: the certificate of the session clerk could not be received as evidence of the marriage.—*SAUNDERS v. SAUNDERS* (1846), 10 Jur. 143.

(c) Ireland.

See Marriages (Ireland) Act, 1841 (c. 81); Marriage Law (Ireland) Amendment Acts, 1863 (c. 27), 1873 (c. 16); Matrimonial Causes & Marriage Law (Ireland) Amendment Act, 1870 (c. 110).

3415. Evidence of births, marriages, deaths—Admissibility of copies—Church registers.]—The rule which requires marriages, births, & deaths, in England, to be proved by the registers, where there are no living witnesses, is not applicable to Ireland, where such registers have not been duly kept. Copies of instruments in writing there, & evidence of reputation, are admissible, after proof that search was made for registers.—*ROSCOMMON'S (EARL) CLAIM* (1828), 6 Cl. & Fin. 97; 7 E. R. 634, H. L.

3416. Evidence of marriage—Certified copy—Church register.]—The ct. accepted as evidence in

proof of a marriage solemnised in 1866, in Dublin, according to the rites of the Established Church of England & Ireland, a copy of an entry in the register of marriages, purporting to be signed, & certified as a correct copy of the entry, by the clergyman of the parish where the marriage was celebrated.—*WALLACE v. WALLACE* (1896), 74 L. T. 253.

Annotation:—Refd. Browning v. Browning (1918), 35 T. L. R. 159.

3417. ——— ———.]—A copy of an entry in the register of marriages, duly certified by the clergyman of the church where the marriage so registered has been solemnised, is sufficient to prove a lawful marriage according to the rites & ceremonies of the Protestant Episcopal Church of Ireland.—*WHITTON v. WHITTON*, [1900] P. 178; 69 L. J. P. 126; 64 J. P. 329.

3418. ——— Of certificate of marriage.]—Marriage at a Presbyterian church in Ireland is sufficiently proved by production of a copy of a certificate of marriage certified as a true copy by the Presbyterian minister, who celebrated the marriage.—*LEMON v. LEMON* (1920), 123 L. T. 585; 36 T. L. R. 525.

3419. ——— Certificate—From register office.]—A marriage which had been duly celebrated in a register office in Ireland may be proved by the certificate of such marriage.—*GUILLET v. GUILLET* (1911), 27 T. L. R. 416.

(d) Dominions and Dependencies.

i. Channel Islands and Isle of Man.

3420. Channel Islands—Copy of register of baptism—Evidence of age of person.]—A copy of a register of baptism in the island of Guernsey is not sufficient evidence here of a party being of age.—*LUET v. LE MESURIER* (1786), 1 Cox, Eq. Cas. 275; 29 E. R. 1164.

Annotation:—Consd. Coode v. Coode (1838), 1 Curt. 755.

3421. ——— Certificate—Evidence of marriage.]—Where in the case of a marriage in the Channel Islands the marriage ceremony has been celebrated elsewhere & otherwise than in a church in accordance with the rites & ceremonies of the Established Church of England & Wales, evidence of the validity of the marriage according to the local law is still required.—*WESTLAKE v. WESTLAKE*, [1910] P. 167; 79 L. J. P. 36; 102 L. T. 396; 26 T. L. R. 223; 54 Sol. Jo. 215.

3422. ——— ———.]—A certificate of a marriage having been celebrated in Jersey according to the forms of the Church of England admitted as sufficient evidence of the fact of the marriage without calling expert evidence.—*BOUGHEY v. BOUGHEY & FOAN* (1917), 86 L. J. P. 89; 117 L. T. 150.

3423. Isle of Man—Copy of certificate—Evidence of marriage—Sufficiency of evidence.]—The fact of a marriage celebrated in the Isle of Man, though averred in the libel & not controverted by the answer, is not sufficiently proved in a suit for divorce on account of adultery, by the production of a copy of the certificate; but further proof was supplied by the *vinâ voce* examination of a witness before the Judicial Committee under Judicial Committee Act, 1833 (c. 41), s. 7.—*MELIN v. MELIN* (1838), 2 Moo. P. C. C. 493; 12 E. R. 1094, P. C.

Annotation:—Refd. Parlbay v. Parlbay (1851), 15 Jur. 973.

PART IV. SECT. 12, SUB-SECT. 19.—C. (c).

a. Evidence of marriage—Certified copy—Parish registry.]—A certified copy of the registry of marriage from the parish registry in Ireland:—*Held*: sufficient.—*CRAIG v. TEMPLETON* (1860), 8 Gr. 483.—*CAN.*

ii. *India.*

See Indian Christian Marriage Act, 1872 (Act XV. of 1872); Army Act, 1881 (c. 58), s. 163 (1) (g), (h).

3424. Proof of birth—Admissibility of copy—Of baptismal certificate—Sufficiency.]—JEUNE v. WARD (1818), 2 Stark. 326, N. P.; *subsequent proceedings*, 1 B. & Ald. 653.

3425. ——— Of baptismal registers.]—In an action to determine the right to letters of administration, the issue being to the legitimacy of certain persons, copies of registers of baptisms in India were admitted in evidence.—*QUEEN'S PROCTOR v. FRY* (1879), 4 P. D. 230; 48 L. J. P. 68; 41 L. T. 530.

*Annotations:—***Apld.** Westmacott v. Westmacott (1899), 68 L. J. P. 63. **Mentd.** *Re* Perton, Pearson v. A-G (1885), 53 L. T. 707.

3426. Proof of marriage—Admissibility of register—Compiled by Secretary of State for India—Roman Catholic marriage.]—The ct. admitted as evidence, in proof of a marriage which had been performed by a Roman Catholic priest in India, a register of marriages compiled by the Secretary of State for India from periodical reports sent to him from India by clergymen of various denominations.—*REGAN v. REGAN* (1892), 67 L. T. 720; 1 R. 493.

3427. ——— Admissibility of certificate—From India Office.]—The solemnisation of a marriage between Christians in British India is proved by the production of a certificate of the marriage from the India Office.—*WESTMACOTT v. WESTMACOTT*, [1899] P. 183; 68 L. J. P. 63; 80 L. T. 632.

3428. ——— ———.]—The solemnisation of a marriage between Christians in British India may be proved by the production of a certificate of the marriage from the India Office.—*BRAID v. BRAID* (1909), 25 T. L. R. 616.

3429. ——— Admissibility of copy of certificate—From India Office.]—*DE GRUYTHIER v. DE GRUYTHIER & FAICINIE* (1900), *Times*, Nov. 2.

3430. ——— Admissibility of Army Marriage Register—Marriage of British officer.]—*ADAMS v. ADAMS*, [1900] W. N. 32.

iii. *Other Dominions and Dependencies.*

3431. General rule—Where colony under English law.]—(1) A collated copy of an entry in the marriage register at Barbadoes admitted as evidence.

(2) I am not aware of any case in which it has been laid down that where a register is kept in any colony under English law, an examined copy of such register is not evidence (*DR. LUSHINGTON*).—*COODE v. COODE* (1838), 1 Curt. 755; 163 E. R. 262.

3432. Evidence of marriage—Copy—Of marriage register—Barbadoes.]—*COODE v. COODE*, No. 3431, *ante*.

3433. ——— Colonial law in force.]—In a question respecting the validity of a marriage in a British colony, governed by a law of its own, solemnised between British subjects, according to the rites & ceremonies of the Church of England, by a clerk in holy orders, of that church, the officiating minister of the parish, it is sufficient to plead that a legal marriage was had (a copy of the entry of the marriage in the register book being exhibited), without setting forth the *lex loci*, which would appear in the evidence.—*WARD v.*

DEY (1840), 1 Rob. Eccl. 759; 5 Notes of Cases, 66; 8 L. T. O. S. 198; 10 Jur. 1016; 163 E. R. 1204; *subsequent proceedings* (1849), 1 Rob. Eccl. 767.

*Annotations:—***Apld.** *Browning v. Browning* (1918), 35 T. L. R. 159; *Perry v. Perry*, [1920] P. 361.

3434. ——— Certificate—Of registrar—St. Helena.]—A certificate of the registrar of the island of St. Helena showing that a marriage celebrated in that island & according to Ordinance No. 3 of 1851, is sufficient evidence of the validity of the marriage in English cts.—*ROE v. ROE* (1916), 115 L. T. 792; 33 T. L. R. 83; 61 Sol. Jo. 301.

3435. ——— Of entry in ecclesiastical register.]—A marriage celebrated in a British colony according to Church of England usage may be proved by the production of a certificate of an entry in an ecclesiastical register without expert evidence of the validity of the marriage according to the local law.—*PERRY v. PERRY*, [1920] P. 361; 89 L. J. P. 192; 123 L. T. 586.

3436. ——— As prescribed by colonial law.]—A marriage celebrated in a British colony may be established without further evidence by a certificate of its celebration, prescribed by a colonial statute & made admissible by that statute.—*BONNOTE v. BONNOTE* (1920), 89 L. J. P. 140; 123 L. T. 174.

3437. ——— Certified & sealed copy of—Hong Kong.]—Where a marriage has been solemnised in Hong Kong in accordance with the provisions of sect. 20 of No. 7 of the Ordinances of Hong Kong 1875, it can be proved by the production of a copy of the certificate of marriage which has been signed & certified by the Registrar-General as a true copy, & sealed & stamped with his official seal.—*SMITH v. SMITH* (1913), 109 L. T. 744.

3438. ——— Certified extract—From marriage register—Ceylon.]—*DE MOWBRAY v. DE MOWBRAY* (1921), 37 T. L. R. 830.

3439. ——— Signed by registrar—Gibraltar.]—A marriage celebrated before a registrar at Gibraltar is sufficiently proved by production of a certified copy of the entry signed by the registrar.—*WRIGHT v. WRIGHT & BOOTHMAN* (1923), 129 L. T. 832; 39 T. L. R. 715; 67 Sol. Jo. 791.

3440. ——— Marriage register—Duplicate register—Transmitted to England under authority.]—The duplicate registers of marriage kept in the East Indies & transmitted to this country by the direction of the governing authority there are admissible in evidence.—*RATCLIFF v. RATCLIFF & ANDERSON* (1859), 1 Sw. & Tr. 467; 29 L. J. P. M. & A. 171; 33 L. T. O. S. 262; 5 Jur. N. S. 714; 7 W. R. 726; 164 E. R. 816.

*Annotations:—***Refd.** *Regan v. Regan* (1892), 67 L. T. 720. **Mentd.** *Niboyet v. Niboyet* (1878), 4 P. D. 1; *Medley v. Medley* (1882), 51 L. J. P. 74.

3441. ———.]—The register of a marriage celebrated in a British colony according to the rites of the Church of England is sufficient evidence of the marriage & its validity.—*BROWNING v. BROWNING* (1918), 35 T. L. R. 159; 63 Sol. Jo. 214.

*Annotation:—***Refd.** *Perry v. Perry*, [1920] P. 361.

3442. Evidence of pedigree—Extracts from parish registers—When admissible.]—Extracts from colonial parish registers of the entries of marriages, baptisms, & burials, are not receivable in evidence in support of pedigree, unless it be proved that such registers are required to be kept by the law of the colony, & such extracts are proved to be correct copies of the register, & are

PART IV. SECT. 12, SUB-SECT. 19.—C. (d) (iii).

1. *Evidence of birth—Certificate of birth—Queensland.]—*R. v. HANLON (1893), 14 N. S. W. L. R. 312; 10 N. S. W. W. N. 3.—**AUS.**

Sect. 12.—Public documents: Sub-sect. 10, C. (d) iii.

signed by the registrar, whose signature must also be verified.—*EVANS v. BALL* (1878), 38 L. T. 141; *on appeal* (1882), 47 L. T. 165, H. L.

Annotations :—*Mentd.* *Re Ball, Slattery v. Ball* (1888), 59 L. T. 800; *Re Bogg, Allison v. Placc,* [1917] 2 Ch. 239; *Re Twopeny's Settlement, Monro v. Twopeny,* [1924] 1 Ch. 522.

(c) Foreign Countries.

See Marriage Act, 1890 (c. 47); Foreign Marriage Act, 1892 (c. 23), ss. 9–11, 17; Ionian Isles Marriage Act, 1860 (c. 80), s. 4.

3443. Evidence of birth—Certificate—From chaplain to British Ambassador—At Florence.—A copy of an entry, made from a certificate of baptism by a chaplain of a British minister at a foreign pt., is not sufficient evidence of birth & parentage.—*DUFFERIN & CLANBOYE'S (LORD) CLAIM* (1848), 2 H. L. Cas. 47; 9 E. R. 1009, H. L.

3444. ——— Crown Rabbi of Russia.—*R. v. WILOWSKI* (1908), 149 C. C. Ct. Cas. 334.

3445. ——— Copy of register—French register—Kept according to French law.—Attested copies of French registers of marriages, births & deaths :—*Held* : admissible evidence, upon the testimony of a French advocate, that such registers were kept according to French law, & would be received in evidence in the French cts.—*PERTH EARLDOM* (1848), 2 H. L. Cas. 865; 9 E. R. 1322, H. L.

3446. Evidence of marriage—Certificate—Dutch minister.—*ALSOP v. BOWTHRELL* (1610), Cro. Jac. 541; 79 E. R. 464.

Annotations :—*Refd.* *Ondehund v. Barker* (1715), Willes 538. *Mentd.* *Altham v. Anglesa* (1709), 11 Mod. Rep. 210; *St. Andrew v. St. Brides* (1717), 1 Stra. 51; *Pendrell v. Pendrell* (1732), 2 Stra. 925.

3447. ——— Portugal—Not taken from Portuguese register.—A certificate of a marriage in a foreign country [Portugal], not purporting to be a copy of an entry in the register of marriages kept by the law of that country, but only containing a reference to the register, cannot be received as evidence of the marriage, although it would be evidence of the marriage in the foreign cts.—*FINLAY v. FINLAY & RUDALL* (1862), 31 L. J. P. M. & A. 149.

3448. ——— Minister in New York.—(1) A minute of date of 1749, from an original unsigned minute book, produced from the proper custody & kept in accordance with a charter of a society, is admissible evidence.

(2) A memorandum in a register of a church by its deceased rector made about one hundred & eight years ago, though not a contemporaneous entry made in the regular course of the register is admissible as evidence, & goes to prove that the rector did the things stated in the memorandum.

(3) A., then ill of the malady of which he died, & two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced (*inter alia*) in support of the marriage from the custody of the family a certificate signed by C. that he had married A. & B. according to the rites of the Church of England as by law established, & an affidavit, signed by the mayor of New York, to the effect that C. had made an oath of the truth of the statements in the certificate : a will of date anterior to the marriage, by which A.

left all his property to B. & of the children then born; copies of letters showing that one of the exors. wrote to his co-exor. in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed herself in A.'s surname; that the children were recognised & taken care of by members of the family as A.'s children; & also War Office records showing that B. received a pension as A.'s widow there was ample proof of a legal marriage.—*LAUDERDALE PEERAGE* (1885), 10 App. Cas. 692, H. L.

Annotations :—*Generally*, *Mentd.* *Lovat Peerage* (1885), 10 App. Cas. 763; *Whans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

3449. ——— Germany—Certificate of religious ceremony only.—The certificate relating to the religious ceremony of a marriage in Germany will be accepted as evidence of the marriage if the certificate of the civil ceremony is, under the circumstances, not procurable.—*BRICE v. BRICE* (1919), 35 T. L. R. 486; 63 Sol. Jo. 535.

3450. ——— Poland—Verified by consul in this country.—*MONDSCHIEIN v. MONDSCHIEIN* (1921), 37 T. L. R. 665.

3451. ——— High Commissioner at Constantinople.—The ct. accepted as evidence of a marriage a certificate of a ceremony of marriage before the British High Comr. in Constantinople at a date when owing to war conditions no ambassador or consul was there.—*WATTS (OTHERWISE CAREY) v. WATTS* (1922), 38 T. L. R. 430.

3452. ——— Copy of register—From Swedish chapel in Paris.—A copy of the register of a foreign chapel [chapel of Swedish ambassador in Paris] is not evidence to prove a marriage.—*LEADER v. BARRY* (1795), 1 Esp. 353, N. P.

Annotation :—*Refd.* *Coode v. Coode* (1838), 1 Curt. 755.

3453. ——— Kept at hotel of British Ambassador—In Paris.—The book kept at the British ambassador's hotel in Paris, in which the ambassador's chaplain makes & subscribes entries of all marriages of British subjects, celebrated by him, has not the authenticity of an English parish register. An attested copy of an entry in it, is not admissible to prove a marriage.—*ATHLONE'S (EARL) CLAIM* (1811), 8 Cl. & Fin. 262; 8 E. R. 102, H. L.

3454. ——— French register—Kept according to French law.—*PERTH EARLDOM*, No. 3445, *ante*.

3455. ——— Chilian register—Sufficiency of copy.—Proof of a marriage in Chili was established by the production of a certified extract of the entry of the marriage in the marriage register, proved to be kept in Chili, in compliance with the requirements of the laws of Chili, & to be admissible in evidence in Chili, upon the ct. being satisfied of the identity of the parties named in the certificate, & of the curate rector who gave the certificate.—*ABBOTT v. ABBOTT & GODOY* (1860), 4 Sw. & Tr. 254; 29 L. J. P. M. & A. 57; 164 E. R. 1513.

3456. ——— British factory at St. Petersburg.—A marriage at the chapel of the British factory at St. Petersburg by the chaplain of the factory, according to the rites & ceremonies of the Church of England, was sufficiently proved by production of an entry in the marriage register of the diocese of London, which purported to be an entry of such marriage certified as a true copy of an entry in the marriage register book of the British factory at St. Petersburg by the acting

PART IV. SECT. 12, SUB-SECT. 19.—C.

a. Diploma of foreign university—Proof of degree.—The production of

a document purporting to be a diploma of the University of Munich, bearing a seal which pltf. deposed to be the seal of the University is sufficient

evidence that pltf. held the degree mentioned in the diploma.—*MIRBACH v. MCHARDY* (1890), 8 N. Z. L. R. 248.—N. Z.

chaplain to the Russia Co.—*HIGGS v. HIGGS* (1920), 124 L. T. 382; 36 T. L. R. 690; 61 Sol. Jo. 715.

3457. Evidence of death—Copy of register—French register—Kept according to French law.]—PERTH EARLDOM, No. 3415, *ante*.

3458. ———— Consulate at Madeira.]—*Re FORBES* (1852), 1 W. R. 32.

D. Non-Anglican Church Registers and Records.

See Non-Parochial Registers Act, 1840 (c. 92).

3459. Admissibility — Dissenting chapel.]—Copies of the register of a dissenting chapel not to be pleaded as evidence.—*NEWHAM v. RAITHBY* (1811), 1 Phillim. 315; 161 E. R. 990.

Annotation:—Refd. Doe d. Warren v. Bray (1828), 8 B. & C. 813.

3460. ————.]—Books kept by the session clerk of a Scottish chapel, containing minutes of the kirk session, & other proceedings of the congregation:—*Held: admissible in evidence in a suit between members of the congregation.*—*MILLIGAN v. MITCHELL* (1837), 3 My. & Cr. 72; 7 L. J. Ch. 37; 1 Jur. 888; 40 E. R. 852, L. C.

Annotations:—Mentd. Giles v. Giles (1836), 1 Keen, 685; *Tyler v. Bell* (1836), Donnelly, 190; *Wood v. Wood* (1840), 4 Y. & C. Ex. 135; *Hodson v. Ball* (1842), 1 Ph. 177; *Holland v. Baker* (1842), 6 Jur. 1011; *Ranger v. G. W. Ry.* (1843), 13 Sm. 368; *Free Church of Scotland (General Assembly) v. Overtoun*, *Macalister v. Young*, [1904] A. C. 515.

3461. ———— Society of Friends—At common law —Under statute.]—(1) The registers of births, marriages, deaths & burials kept by the Society of Friends prior to July 1, 1837, when Births & Deaths Registration Act, 1836 (c. 86), came into operation, were not evidence at common law.

(2) On being deposited at Somerset House under Non-Parochial Registers Act, 1840 (c. 92), these registers became statutory evidence under sect. 6, but entries therein are only provable by production of the original registers or by a certificate under the seal of the General Register Office under sect. 9.

(3) A certificate certified by the recording clerk of the society as a true extract from the society's digest of those registers is inadmissible on the above grounds on the ground that it is only an extract from a digest of registers that are still in existence.—*Re WOODWARD, KENWAY v. KIDB.* [1913] 1 Ch. 392; 82 L. J. Ch. 230; 108 L. T. 635; 57 Sol. Jo. 426.

3462. Of what they are evidence—Registers of Mayfair Chapel—Marriage.]—*MORRIS v. MILLER* (1767), 4 Burr. 2057; 1 Wm. Bl. 632; 98 E. R. 73.

Annotations:—Expld. Birt v. Barlow (1779), 1 Doug. K. B. 171. *Apid. Reed v. Passer* (1794), Peake, 303. *Expld. R. v. Hassall* (1826), 2 C. & P. 434. *Refd. Catherwood v. Carson* (1844), 13 M. & W. 261.

PART IV. SECT. 12, SUB-SECT. 19. —D.

3465 i. Of what they are evidence—Certificate of Roman Catholic priest—Baptism.]—Entries made in the chapel books by Roman Catholic clergymen, whose death & handwriting have been proved, are evidence of a marriage or baptism thereby recorded.—*MALONE v. L'ESTRANGE* (1839), 2 I. Eq. R. 16.—*IR.*

3466 i. ———— Marriage.]—*MALONE v. L'ESTRANGE* (1839), 2 I. Eq. R. 16.—*IR.*

3466 ii. ————.]—*Semble: entries of births & marriages made by the curate of a Roman Catholic chapel in the discharge of his duty are not admissible as evidence.*—*FENNIE v. CARROLL* (1868), 17 W. R. 344.—*IR.*

3466 iii. ————.]—An entry in the Roman Catholic registry of marriages & baptisms of a parish signed

by a clergyman who was proved to be deceased, & to have been the Roman Catholic curate of the parish:—*Held: inadmissible.*—*RYAN v. KING, LANNEN, INTERVENIENT*, [1889] 25 L. R. Ir. 184.—*IR.*

PART IV. SECT. 12, SUB-SECT. 19. —F.

3467 i. Ship's register—Evidence of ownership.]—The certificate of registration of vessels under 8 Vict. c. 5, is the legal evidence by which ownership can be proved. *BOCHUS v. SHAW* (1859), 8 C. P. 391. *CAN.*

3467 ii. ————.]—*LAKE SUPERIOR NAVIGATION CO. v. BEATTY* (1873), 31 U. C. R. 201. *CAN.*

3467 iii. ————.] In an action against the consignee of a ship to recover the freight collected by him, *pltf.* put in evidence a certified copy of the ship's register to show that he

3463. ———— Burial register of Wesleyan chapel—Death.]—*WHITTUCK v. WATERS*, No. 3887, *post*.

3464. ———— Jewish register of circumcision—Age.]—In trespass for taking *pltf.*'s goods, with a plea of not possessed, it was proposed to show that the goods were not his, by showing, *inter alia*, that he was not twenty-one. To show this, it was proved, that, by the custom of the law of the Jews, children are circumcised on the eighth day from their birth, & that it was the duty of the Chief Rabbi to perform this rite, & make an entry of it in a book. It was proposed to give in evidence the entry in this book of *pltf.*'s circumcision, the entry being in the handwriting of a Chief Rabbi, who was dead:—*Held: the entry was not receivable in evidence.*—*DAVIS v. LLOYD* (1814), 1 Car. & Kir. 275, N. P.

3465. ———— Certificate of Roman Catholic priest—Baptism.]—A certificate of baptism from a Roman Catholic chapel, signed by the priest, is not good evidence.—*D'AGLIE v. FRYER* (1811), 13 L. J. Ch. 398.

3466. ———— Marriage.]—In an indictment for bigamy the evidence tendered of the former marriage was a certificate of the priest in charge of a Roman Catholic church by whom it was alleged the parties had been married, identity of prisoner as one of the persons mentioned in the certificate, & a statement by prisoner when the warrant of arrest was read over to him: "That's all right; but I did not know that my former wife was alive":—*Held: that the evidence was insufficient to prove the former marriage.*—*R. v. LINDSAY* (1902), 66 J. P. 505; 18 T. L. R. 761, N. P.

Annotation:—Refd. R. v. Naguib, [1917] 1 K. B. 359.

E. Prison Registers.

See, now, Non-Parochial Registers Act, 1840 (c. 92), s. 20.

F.

See, now, Merchant Shipping Act, 1891 (c. 60), ss. 64, 695.

3467. Ship's register—Evidence of ownership.]—Proof of the execution of a bill of sale of a ship to deft. is not evidence to charge him as an owner with stores furnished to the ship, without showing his assent to such sale. Neither is the register of the ship, naming him as a part-owner, made by & upon the oaths of others, *prima facie* evidence to charge him as owner without his assent or adoption.—*TINKLER v. WALPOLE* (1811), 14 East, 226; 101 E. R. 587.

Annotation:—Refd. Pirie v. Anderson (1812), 4 Taunt. 652. A ship's register is not a public instrument; it is an instrument of a private nature (*HEATH, J.*).

was the registered owner at the time of the earning of the freight & its receipt by deft., deft. may prove that *pltf.* was not the real owner, & that the freight did not belong to him.—*SCHOFIELD v. ANDERSON* (1892), 31 N. B. R. 518.—*CAN.*

3467 iv. ————.]—An extract from the register book kept & certified pursuant to Merchant Shipping Act, 1894 (Imp.), is proof of ownership in an action for damages for an accident causing the death of an employee.—*BODDINGTON v. DONALDSON* (1917), 44 N. B. R. 290. *CAN.*

3467 v. ————.] It is incompetent on the part of the person, who, from the certificate of registry, appears to be the owner of a ship to adduce evidence to the effect of contradicting the certificate by proving that he is not the real owner.—*MOIRON v. BLACK* (1843), 5 Dunl. (Ct. of Sess.) 411.—*SCOT.*

Sect. 12.—Public documents: Sub-sect. 19, F. & G.]

3468. ———.]—The original certificate of a ship's registry is no evidence for pltf. upon a policy of insurance that the interest in the ship is in the persons in whom it is averred, & for whom he effected the insurance as agent.—*PIRIE v. ANDERSON* (1812), 4 Taunt. 652; 3 Camp. 242, n.; 128 E. R. 487.

3469. ———.]—In an action for stores supplied to a ship, if deft. pleads in abatement that he is only liable jointly with others, it is not enough for him to produce the ship's register, containing the names of himself & those others as owners of the ship.—*FLOWER v. YOUNG* (1812), 3 Camp. 240, N. P.

3470. ———.]—In an action against the owner of a ship for stores supplied to her, the register purporting to be granted on the oath of deft., & stating him to be sole owner, is no evidence of ownership.—*SMITH v. FUGE* (1813), 3 Camp. 456, N. P.

3471. ———.]—*ROBINSON v. MACDONNELL* (1810), 5 M. & S. 228; Holt, N. P. 612, n.; 105 E. R. 1034; *subsequent proceedings, sub nom. Re SHIP WAIRE, Re ROBINSON, CLARKSON & PARKER, Re SHARPS* (1817), 8 Price, 269, n.

Annotations :—*Refd.* *Hay v. Fairbairn* (1818), 2 B. & Ald. 193; *Monkhouse v. Hay* (1820), 8 Price, 256; *Kirkley v. Hodgson* (1823), 1 B. & C. 588. *Mentd.* *Curtis v. Amber* (1820), 1 Jac. & W. 526; *Duck v. Braddyll* (1824), M'Cle. 217; *Doe d. Kettle v. Lewis* (1830), 10 B. & C. 673; *Douglas v. Russell* (1831), 4 Sim. 524; *Leslie v. Guthrie* (1835), 1 Bing. N. C. 697; *Metcalf v. York (Archbp.)* (1836), 1 My. & Cr. 547; *Parry v. Deere* (1836), 2 Har. & W. 395; *Re Daniel, Ex p. Ashby* (1855), 25 L. T. O. S. 188; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352.

3472. ———.]—The Registry is conclusive evidence of the title, & an endorsement on that registry good against a prior equitable mtgee., although the party subsequently obtaining registry of his encumbrance had full notice of the prior charge.—*COOMBS v. MANSFIELD* (1855), 3 Drew. 193; 3 Eq. Rep. 566; 24 L. J. Ch. 513; 25 L. T. O. S. 29; 1 Jur. N. S. 270; 3 W. R. 345; 61 E. R. 877.

3473. ———.]—*Primâ facie only.*—The register under Merchant Shipping Act, 1876 (c. 80), is only *primâ facie* evidence of ownership, & its statutory effect may be displaced by proof of what the facts really are.—*BAUMWOLL MANUFACTURER VON CAHL, SCHIEBLER v. FURNESS*, [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; 9 T. L. R. 71; 7 Asp. M. L. C. 263; 1 R. 59, H. L.

Annotations :—*Refd.* *Barracough v. Brown* (1896), 65 L. J. Q. B. 333; *Associated Portland Cement Manufacturers* (1910) v. Ashton, [1915] 2 K. B. 1. *Mentd.* *Manchester Trust v. Furness*, [1895] 2 Q. B. 539; *Kowland & Marwood's S.S. Co. v. Nilson* (1897), 13 T. L. R. 459; *Jackson v. S.S. Blanche, The Hopper*, No. 66, [1908] A. C. 126; *Kish v. Taylor*, [1912] A. C. 604.

3474. ———.]—*Evidence of nationality.*—To prove that a ship is British-built, a British register so describing her is by itself no evidence.—*REUSSE v. MEYERS* (1813), 3 Camp. 475, N. P.

3475. ———.]—In order to convict a person under Merchant Shipping Act, 1854 (c. 104), of harbouring a seaman who has deserted from his ship, it is necessary to prove that the ship is a British ship, which proof must be given by evidence of the ship being duly registered.—*LEARY v.*

LLOYD (1860), 3 E. & E. 178; 29 L. J. M. C. 194; 3 L. T. 210; 24 J. P. 662; 6 Jur. N. S. 1243; 121 E. R. 409.

Annotations :—*Mentd.* *Poll v. Dambe*, [1901] 2 K. B. 579; *The Tagus* (1902), 87 L. T. 598.

3476. ———.]—*Not conclusive.*—A ship's register, containing a statement of British ownership, even if by Merchant Shipping Act, 1854 (c. 104), s. 107, made *primâ facie* proof of such ownership, may be outweighed by circumstantial evidence to the contrary. *Scmble*: above sect. does not make the register *primâ facie* proof of disputed British nationality.—*THE PRINCESS CHARLOTTE* (1863), Brown. & Lush. 75; 167 E. R. 306; *subsequent proceedings* (1864), 33 L. J. P. M. & A. 188.

3477. ———.]—*Evidence of tonnage—Not conclusive.*—In an action of limitation of liability defts. by their defence denied that the registered tonnage of pltf's ship was the correct tonnage, & at the hearing tendered evidence in support of their defence:—*Held*: the evidence was admissible.—*THE RECEPTEA* (1889), 14 P. D. 131; 58 L. J. P. 70; 61 L. T. 698; 6 Asp. M. L. C. 433.

Annotation :—*Refd.* *Brierley v. Brierley & Williams* (1918), 34 T. L. R. 458.

3478. ———.]—*Evidence of capture.*—Lloyd's books are evidence of a capture, not of notice of a loss to any person in particular; but coupled with other evidence, may go to the jury.—*ABEL v. POTTS* (1800), 3 Esp. 242, N. P.

3479. ———.]—*Evidence of notice of loss.*—*ABEL v. POTTS*, No. 3478, *ante*.

3480. Lloyd's list—*Admissible against assured.*—In action on insurance policy.—Lloyd's list is evidence against the assured, if it be shown that the broker had read it, before the policy was effected.—*BAIN v. CASE* (1829), as reported in 3 C. & P. 496, N. P.

3481. ———.]—*To prove vessel copper-fastened.*—“Lloyd's Register of Shipping” was not admissible in evidence to show that the vessel was considered as copper-fastened.—*FREEMAN v. BAKER* (1833), 5 C. & P. 475, N. P.

3482. ———.]—*To prove knowledge of date of sailing.*—*ECCLES v. HARVEY* (1845), 4 L. T. O. S. 99, 398.

3483. Custom House register—*Evidence of ownership.*—To prove A. is liable as registered owner of a ship, entries in the custom house books of the port of London & of the out port to which the ship belongs, stating that she was transferred to A. by B., the original owner, are not sufficient evidence.—*FRASER v. HOPKINS* (1809), 2 Camp. 170, N. P.

3484. ———.]—An entry in the register book at the custom house stating that a certificate of register was granted on an affidavit by A. that he was an owner:—*Held*: not admissible as secondary evidence of ownership against A. although all the affidavits on which registers had been granted were burnt at the custom house.—*TEED v. MARTIN* (1814), 4 Camp. 90, N. P.

3485. ———.]—*Admissibility—In criminal prosecution.*—A shipping entry at the custom-house although to some purposes a public document, is not evidence to affect the person whose duty it was to cause the entry to be made, criminally, the materials from which the entry was made, by the

3473 i. ———.]—*Primâ facie only.*—GRANT v. ROBERTSON (1871), 8 N. S. L. 247.—CAN.

3473 ii. ———.]—Certificate of registry of British ship must be received as *primâ facie*, or as presumptive proof of all the matters con-

—tained or cited in such registry.—SMITH v. FULTON (1877), 2 R. & C. —CAN.

3474 i. ———.]—*Evidence of nationality—How proved.*—On an information for harbouring a seaman who has deserted

from a British ship, evidence that the ship sailed under the British flag is sufficient evidence of the ship being British without production of the registration certificate or a certified copy thereof.—R. v. CLARK (1879), 5 V. L. R. 440.—AUS.

proper officer, having been accidentally destroyed.—*HUGHES v. WILSON* (1816), 1 Stark. 179, N. P.

Annotation:—*Reid*. *Huntley v. Donovan* (1850), 15 Q. B. 96.

3486. — *To prove ship's burthen.*—*HUNTLEY v. DONOVAN*, No. 3145, *ante*.

Log books.—*See* Sub-sect. 8, *ante*.

Lighthouse books.—*See* Sub-sect. 7, *ante*.

G. Miscellaneous Registers.

3487. Army register—Examination regarding settlement.—The original examination of a soldier respecting his settlement, taken under the Mutiny Act, 1794 (c. 13), is admissible in evidence, as well as the attested copy directed by the Act to be delivered to the commanding officer of the regiment.—*R. v. WARLEY (INHABITANTS)* (1796), 6 Term Rep. 534; 101 E. R. 687.

3488. — *Regimental description book—Evidence of birth of soldier.*—An entry in the description book of a regiment of the Guards, dated 1799, which book was made up from the attestation of recruits, but as to which book the Mutiny Act, 1861 (c. 7) of that period did not make it evidence as to the matters contained in it, is not admissible evidence of the birth of the soldier there mentioned, either on the ground that the original was to be presumed to be made on oath, or on the ground that the book was kept by a public officer in the course of his duty.—*R. v. SUDBURY (GOVERNORS OF THE POOR)* (1863), 27 J. P. 823.

3489. — *Medical sheet—To prove adultery.*—To prove that resp., a soldier in the Army, had committed adultery, an Army form medical sheet under Royal Army Medical Service Rules, r. 208, showing that respondent had been admitted to hospital suffering from a certain illness, was put in evidence:—*Held*: this being an official document properly produced was evidence of adultery.—*GLEEN v. GLEEN* (1900), 17 T. L. R. 62.

3490. Naval registers—Muster-book.—The muster-book of the Navy Book is admissible evidence.—*R. v. FITZGERALD & LEE* (1741), 1 Leach, 20.

Annotation:—*Folld*. *R. v. Rhodes* (1742), 1 Leach, 21.

3491. — *To prove identity.*—On an indictment for forging a seaman's will, the muster-book of the Navy Office is good evidence to prove the identity of supposed testator. *R. v. RHODES* (1742), 1 Leach, 21.

3492. — *Where deft. relies on coverture as a defence to an action, it is not sufficient evidence that her husband was living at a particular time to produce the muster of a ship from the Admty., in which a person of his name is found, without other evidence of his identity.*—*BARBER v. HOLMES* (1800), 3 Esp. 190, N. P.

3493. — *Casualty list—To prove death.*—The book kept at the sick & hurt office, containing copies of the returns made by the officers of persons that have died on board of King's ships, is evidence of the death of seamen.—*WALLACE v. COOK* (1804), 5 Esp. 117, N. P.

3494. Election register—Admissibility—Of copy.—On an indictment against a voter for making a false declaration as to his possession of the "same

qualification" under Representation of the People Act, 1832 (c. 45), s. 58, a copy of the original register, made according to sect. 55, may be received in evidence; & it is sufficient if it resemble the original in respect of deft.'s name & description.—*R. v. DODSWORTH* (1837), 8 C. & P. 218; 2 Mood. & R. 72; 2 Jur. 131, N. P.

Annotation:—*Mentd*. *R. v. Bowler* (1842), Car. & M. 559.

3495. — *Although irregularly kept.*—An irregular list of voters admitted as evidence.—*R. v. CLARKE* (1859), 1 F. & F. 651.

3496. — *The register of voters at a parliamentary election, made in pursuance of Parliamentary Voter's Registration Act, 1843 (c. 18), ss. 48, 49, is a document of such a public nature as to be admissible in evidence upon its mere production by the returning officer, & therefore an examined or certified copy of it is also admissible.*

In an action for penalties, under the Corrupt Practices at Elections Act, 1854 (c. 102), plff. gave in evidence a copy of the writ & return from the office of the clerk of the Crown, certified by a clerk in the office to be a true copy of the original writ & examined therewith. Deft.'s counsel having allowed it to be given in evidence as a certified copy:—*Held*: assuming it was not, there was no ground for granting a new trial.—*REED v. LAMB* (1860), 6 H. & N. 75; 29 L. J. Ex. 452; 6 Jur. N. S. 828; 158 E. R. 32.

— *How far conclusive.*—*See* ELECTIONS, Vol. XX., pp. 40-42.

3497. Register of parish apprentices—Evidence of allowance of apprenticeship.—On appeal against an order of removal, resp. alleging a parish apprenticeship, & ground having been laid for the reception of secondary evidence, resp. produced the register book of parish C., which contained an entry in the form prescribed by Parish Apprentices Act, 1802 (c. 46), s. 1, stating that, on Apr. 7, 1823, W., aged, etc., son of etc., was bound apprentice to R., farmer, residing etc., until the age of twenty-one, by the overseers of C., who were named. In the last column were the words "Magistrates assenting, J. H., L. St. A.," which appeared to be the actual signatures of magistrates so named. The apprenticed party, in his examination, deposed that he was bound apprentice by the overseers of C., & stated the other particulars relating to himself, as given in the register. The sessions held, on objection taken, that the examinations did not contain sufficient legal evidence of the apprenticeship, because they did not show that the justices had made any order for the binding, as directed by Parish Apprentices Act, 1816 (c. 139), s. 1, though in the opinion of the sessions it did appear that the justices had allowed, by signing & sealing, an indenture which recited an order, & they quashed the order of removal, subject to a case which put the question: whether sufficient legal evidence of a parish apprenticeship appeared in the examinations:—*Held*: the signature of the justices would have been evidence of an assent under stat. 1802 Act, but the sessions could not presume from the facts & documents an order or an allowance by the justices, pursuant to 1816

PART IV. SECT. 12, SUB-SECT. 19. —G.

3494i. Election register—Admissibility—Of copy.—The voters' list is a public document & as the original can be received in evidence a copy certified by the Clerk of the Crown in Chancery is also evidence under Canada Evidence Act.—*Re ALBERTA DOMINION ELECTION* (1905), 1 W. L. R. 486; 6 Terr. I. R. 390—CAN.

b. Land register—Proof of title.—In accordance with Registration Act, 1841, priority of registration to create priority of title must be by memorial as provided by such Act: & a registration under Real Property Act is not such a registration as to give priority over a prior unregistered instrument.—*LEAN v. MAURICE* (1874), 8 S. A. L. R. 119.—AUS.

c. — *Keelan v. Garvey.*

[1921] 11 R. 107, 173.—IR.

d. Professional registers—Medical register—Sufficiency of certificate.—Sufficient proof of status as a registered medical practitioner may be shown by the production of a certificate under the hand of the registrar of the College of Physicians & Surgeons of Saskatchewan, which expressly stated that he was registered, & by the production by the registrar of the *de facto* register of

Sect. 12.—Public documents: Sub-sect. 19, G.]

Act, s. 1.—*R. v. EAST STONEHOUSE (INHABITANTS)* (1847), 10 Q. B. 230; 2 New Sess. Cas. 588; 2 New Mag. Cas. 85; 16 L. J. M. C. 49; 8 L. T. O. S. 448; 11 J. P. 227; 11 Jur. 238; 116 E. R. 88.
Annotations.—*Distd.* *R. v. Broadhempston* (1858), 1 E. & E. 154. *Refd.* *R. v. Macclesfield* (1848), 11 Q. B. 78, n.

3498 ———.]—On appeal to sessions against an order of removal, it became necessary to prove the settlement of W., by a parochial apprenticeship to P., entered into in parish B. It was shown that, in 1824, when W. was nine years old, he, with his father & the overseers of B. & P., went before some county magistrates for the purpose of B. being bound apprentice to P.; that the magistrates asked the father if he had any objection, to which he answered, "No"; that some papers were drawn up; & that W. commenced serving as apprentice to P. next morning, & served two or three years. Search was made for a magistrates order & an indenture of apprenticeship; but they could not be found. In the parish register book of indentures of 1824 was an entry dated of that year, stating the date of indenture, 1824; the name of P. as the person to whom the binding was; a name of a person, taken to be intended for W., as apprentice; & the names & residences of W.'s parents. This, according to the entry, was signed by three persons there termed "overseers parties to the indenture," & by two persons there termed "magistrates assenting." The sessions having held the apprenticeship proved, & having affirmed the settlement, subject to the opinion of this ct. whether there was sufficient or reasonable evidence from which the sessions might infer that W. was duly bound a parish apprentice to P.:—*Held*: inasmuch as the examination before magistrates, & the secondary evidence of an indenture furnished by the register & the actual service, made sufficient ground for presuming that an indenture was duly executed, that it recited an order of allowance by the justices, & that such order had in fact been made, so as to constitute a compliance with the requisites of Parish Apprentices Act, 1816 (c. 139), s. 1.—*R. v. BROADHEMPSTON (INHABITANTS)* (1858), 1 E. & E. 154; 28 L. J. M. C. 18; 32 L. T. O. S. 145; 5 Jur. N. S. 267; 7 W. R. 56; 120 E. R. 866; *sub nom.* *BROADHEMPSTON v. EAST STONEHOUSE*, 23 J. P. 501.

3499. Land register.—Evidence of redemption of land tax.—*POPPELTON v. BUCHANAN, BUCHANAN v. POPPLETON*, No. 3140, *ante*.

3500. Professional registers.—Roll of attorneys.—Book in master's office.—The book from the master's office, wherein are entered the names of the attorney of the ct., is good evidence to prove a party an attorney, without production of the roll.—*R. v. CROSSLEY* (1797), 2 Esp. 524, N. P.

Annotation.—*Refd.* *Graham v. Ingleby* (1848), 2 Exch. 442.

3501. ———. Law list.—Upon an indictment for obtaining money by a false pretense, made by the prisoner, "that he was an attorney," it is not necessary to prove the negative in any other way than by production of the Law List, in which the prisoner's name does not appear as an attorney, as Solicitor's Act, 1860 (c. 127), makes the Law List evidence & shifts the burden

the college, upon which practitioner's name appeared, although the register was open to some objection as not having been formally accepted by the college council.—*SANDWICH v. COWPER & GARDUCH* (1911), 17 W. L. R. 1; 4 Sask. L. R. 12.—*CAN.*

3502. ———. Pharmaceutical Society.—A printed copy of the register, purporting to be printed & published

in accordance with Pharmacy Act, (1r.), 1875, s. 27, is admissible in evidence though not certified & countersigned.—*BARRITT v. HENRY*, [1904] 2 L. R. 693.—*IR.*

3. Register of trade marks.—Certificate prima facie evidence.—Of registration.—Where the sole issue between the parties is the validity of the registration of a trade mark, the

of proving its inaccuracy from the prosecution to the prisoner.—*R. v. WENHAM* (1866), 10 Cox, C. C. 222.

3502. ———. Medical register.—Admissibility of copy.—*Scmble*: a book purporting to be a copy of the "Medical Register" pursuant to the Act, & professing to be "published & sold at the office of the General Council of Medical Education & Registration," is admissible under Medical Act, 1857 (c. 90), s. 27.—*PEDGRIFF v. CHEVALLIER* (1860), 8 C. B. N. S. 246; 29 L. J. M. C. 225; 2 L. T. 360; 25 J. P. 181; 6 Jur. N. S. 1341; 8 W. R. 500; 141 E. R. 1160.

3503. Register of trade marks.—Rejected marks.—Evidence that such marks are publici juris.—The books of the Registrar of Trade Marks which shows marks, the registration of which has been refused are not evidence that these marks are publici juris.—*ORR EWING & Co. v. JOHNSTON & Co.* (1880), as reported in 13 Ch. D. 434; *on appeal, sub nom. JOHNSTON v. ORR EWING* (1882), 7 App. Cas. 219, H. L.

Annotations.—*Mentd.* *Read v. Richardson* (1881), 45 L. T. 54; *Singer Manufacturing Co. v. Look* (1882), 8 App. Cas. 15; *Somerville v. Schombri* (1887), 12 App. Cas. 453; *Upper Assam Tea Co. v. Herbert* (1889), 7 L. P. C. 183; *Baker v. Rawson, Re Baker's Trade Mks., Re Rawson's Appln.* (1890), 60 L. J. Ch. 49; *Montgomery v. Thompson*, [1891] A. C. 217; *Wilkinson v. Griffith* (1891), 8 R. P. C. 370; *Reddaway v. Banham Hemp Spinning Co.*, [1892] 2 Q. B. 639; *Re Dexter's Appln., Re Wills's Trade Mks.*, [1893] 2 Ch. 262; *Paine v. Daniells' Breweries, Re Paine's Trade Mks.*, [1893] 2 Ch. 567; *Re Soc. Anon. des Verreries de L'Etoile Trade Mks.*, [1891] 1 Ch. 61; *White v. Mellin* (1895), 61 L. J. Ch. 308; *Powell v. Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Reddaway v. Banham*, [1896] A. C. 199; *Bourne v. Swan & Edgar* (1902), 51 W. R. 213; *Grand Hotel Co. of Caledonia Springs v. Wilson*, [1904] A. C. 103; *Hennessy v. Keating* (1908), 25 R. P. C. 361; *Boord Incorporated v. Bagots, Hutton*, [1916] 2 A. C. 382.

3504. Register of hackney carriages.—Evidence of ownership.—A licence for a taxicab was applied for & issued to deft. as the managing director of a limited co., & his name & address were entered in the register of licences of hackney carriages, kept at Scotland Yard, under the headings "Name of Proprietor" & "Address" with the addition of the words "Managing Director" & the name & address of the co. Pltf., a member of the public, was injured by, as he alleged, the negligent driving of the cab, & he brought an action against deft. to recover damages. At the trial pltf. put in a certified copy of the entry in the register for the purpose of proving that deft. being registered as the proprietor of the cab, was liable for the acts of the driver. Deft. tendered evidence to show that he was not the owner or part owner of the cab, & was therefore not liable. The judge rejected the evidence upon the ground that the entry in the register was conclusive as to the liability of deft. as proprietor for the acts of the driver:—*Held*: the register was not conclusive & the evidence was wrongly rejected.—*KEMP v. ELISHA*, [1918] 1 K. B. 228; 87 L. J. K. B. 428; 118 L. T. 246; 82 J. P. 81; 62 Sol. Jo. 174; 16 L. G. R. 17, C. A.

3505. Register of bankruptcy certificate.—To prove allowance of certificate.—*HENRY v. LEIGH*, No. 2214, *ante*.

3506. Register of shareholders.—Evidence of liability.—Deft. by letter, requested the provisional

certificate of registration is not conclusive proof but only prima facie evidence of the correctness of registration.—*HORNSBY v. HUDSON* (1890), 11 N. S. W. Eq. 148; 6 N. S. W. N. S. 2.—*AUS.*

3506 1. Register of shareholders.—Evidence of liability.—The register of shareholders of a joint-stock co. is prima facie evidence of the member-

committee to allot to him one hundred shares in a proposed railway co. In answer he received the following letter: "Sir, The provisional committee having allotted to you fifty shares of £20 each in this undertaking, I am instructed to request that you will pay a deposit upon them of £1 10s. per share, on or before the 30th instant, to one of the following bankers," etc. "I beg also to inform you that scrip certificates for the above number of shares will be delivered to you in exchange for this letter, & the banker's receipt for the deposit after the execution of the parliamentary contract, & subscribers' agreement which will lie for your signature at this office on & after Monday the 30th instant." At the foot of the letter was the following memorandum: "The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above, & the parliamentary contract & subscribers' agreement must be signed on or before Aug. 20, 1815." Deft. paid the deposit, but did not sign the parliamentary contract or subscribers' agreement. The co. was afterwards incorporated, & deft.'s name was placed on the sealed register of shareholders. In an action for calls:—*Held*: deft. was not a shareholder, & the above circumstances were an answer to the *prima facie* case arising from the production of the register containing deft.'s name.—*WATERFORD, WEXFORD, WICKLOW & DUBLIN RY. CO. v. PIDCOCK* (1853), 8 Exch. 279; 7 Ry. & Can. Cas. 437; 22 L. J. Ex. 146; 17 Jur. 26; 155 E. R. 1352; *sub nom.* DUBLIN & WICKLOW RY. CO. v. PIDCOCK, 20 L. T. O. S. 210; 1 W. R. 153.

Annotations:—*Refd.* Edwards v. Kilkenny & G. S. & W. Ry. (1863), 14 C. B. N. S. 526. *Mentd.* New Brunswick & Canada Ry. & Land Co. v. Mugeridge (1859), 33 L. T. O. S. 317; Burke v. Lechmere (1871), 19 W. R. 565.

3507. ———.]—Joint Stock Banks Act, 1814 (c. 113), s. 16, which prescribes the form of memorial to be filed at the stamp office is directory only; & inaccuracy, therefore, in the heading, does not prevent its being evidence against the persons therein named as shareholders. *Qu.*: whether s. 21 makes it conclusive evidence.—*DOSSETT v. HARDING* (1857), 1 C. B. N. S. 524; 20 L. J. C. P. 107; 3 Jur. N. S. 138; 140 E. R. 214.

Annotations:—*Fold.* Powis v. Harding (1857), 1 C. B. N. S. 533. *Consd.* Powis v. Butler (1858), 3 C. B. N. S. 645. *Mentd.* Fry v. Russell (1858), 3 C. B. N. S. 665; *Re* Overend Gurney, Oakes v. Turquand & Harding, Peck v. Same (1867), L. R. 2 H. L. 325.

3508. *S. P. POWIS v. HARDING* (1857), 1 C. B. N. S. 533; 26 L. J. C. P. 107; 3 Jur. N. S. 138; 140 E. R. 217.

Annotations:—*Mentd.* Fry v. Russell (1858), 3 C. B. N. S. 665; *Re* Overend, Gurney, Oakes v. Turquand & Harding, Peck v. Same (1867), L. R. 2 H. L. 325.

3509. *Post office register of telegrams—Admissibility.*]—Documents kept by the Post Office for the purpose of showing at what time telegrams

are received & sent out are not admissible in evidence as public records, as they are not documents to which the general public have access, nor the result of any public inquiry, nor the subject of any public right.—*HEXNE v. FISCHER & CO.* (1913), 110 L. T. 264; 30 T. L. R. 190.

3510. *Judicial registers—Minute book of London quarter sessions—Recording confinement & discharge from debtors prison—Evidence of title of assignee of bankrupt.*]—Entries in the minute-book of the quarter sessions for London, that T. was a prisoner on a day certain for debt in the Fleet prison, & was discharged; & that C. was chosen assignee of his estate, together with proof of the assignment, & that T. took the oath prescribed by Insolvent Act, 1811 (c. 125), upon being discharged were held sufficient to support the title of C. claiming in ejectment as assignee of the estate of T. under the Act, without proving that T. was a prisoner on the day mentioned in the Act.—*DOE d. COOKSON v. THORP* (1816), 5 M. & S. 72; 105 E. R. 978.

3511. ——— *Conviction register—Of court of summary jurisdiction—To prove previous conviction.*]—The register of the minutes or memorandum of convictions of a ct. of summary jurisdiction which has to be kept under Summary Jurisdiction Act, 1879 (c. 49), s. 22, by the clerk of the ct. is admissible in evidence to prove a previous conviction of deft. for a similar offence in the same court.—*POLICE COM. v. DONOVAN*, [1903] 1 K. B. 895; 72 L. J. K. B. 515; 88 L. T. 555; 67 J. P. 147; 52 W. R. 14; 19 T. L. R. 392; 47 Sol. Jo. 437; 20 Cox, C. C. 435, D. C.

Annotation:—*Mentd.* Wing v. Epsom U. D. C. (1904), 68 J. P. 259.

3512. *Register of attendances by medical officer—Of poor law union—Admissibility.*]—A register of attendances, etc., kept by the medical officer of a poor law union, & laid before the board of guardians weekly for inspection, in obedience to rules made by the comrs. under Poor Law Amendment Act, 1834 (c. 76), s. 15, is not receivable in evidence for the party making it, as a public official book.—*MEYRICK v. WAKLEY* (1838), 8 Ad. & El. 170; 3 Nev. & P. K. B. 284; 1 Will. Woll. & H. 268; 7 L. J. Q. B. 190; 2 J. P. 261; 2 Jur. 838; 112 E. R. 802; *sub nom.* MEYRICK v. WAKLEY, 8 C. & P. 283.

Annotations:—*Refd.* Irish Soc. v. Derry (Bp.), (1846), 12 Cl. & Fin. 641; Sturla v. Freccia (1880), 5 App. Cas. 623.

3513. *Register in public library—Of births of children of dissenters—Not admissible.*]—Entry of birth of a dissenter's child in a register kept for the purpose at a public library is not evidence.—*Ex p. TAYLOR* (1820), 1 Jac. & W. 483; 37 E. R. 452.

Annotation:—*Consd.* *Re* Woodward, Kenway v. Kidd (1913), 82 L. J. Ch. 230.

ship of persons whose names appear on the register.—*SOUTHLAND FROZEN MEAT & PRODUCE EXPORT CO., LTD. v. POTTER* (1884), 3 N. Z. L. R. 308.—*N.Z.*

3508 ii. ———.]—In an action at the instance of a ry. co. against shareholders for payment of calls:—*Held*: the book kept as a register of the co. was not receivable as *prima facie* evidence in favour of the co. in respect it did not contain the correct number of shares belonging to each person & the amount of subscriptions paid upon such shares.—*CALEDONIAN & DUM-BARTONSHIRE JUNCTION RY. CO. v. LOCKHART* (1855), 17 Dunl. (Ct. of Sess.) 17; 27 Sc. Jur. 464.—*SCOT.*

g. *Register of mines office—Con-*

clusiveness of entry.]—The name of relator being shown to have been entered in the only register kept in the mines office for that purpose from June, 1893, to Aug. 1895:—*Held*: strong & legal evidence would be required to overcome the effect of such a public record.—*TEMPLE v. A. (I. OF NOVA SCOTIA* (1897), 29 N. S. R. 279; 27 S. C. R. 355.—*CAN.*

h. *Common registry—Registration of tenure—Not prima facie evidence.*]—*LUKHYNARAIN CHUTTOPADHYA v. HORACHAND GOSWAMY* (1882), 1 L. R. 9 Calc. 116.—*IND.*

k. *Horoscope—As proof of age.*]—A horoscope, which had been a public record from a period *ante litem motam*,

was relied upon by defts. & was put in as an "admission":—*Held*: to be admissible in evidence of plff.'s age.—*RAJA GOUNDAN v. RAJA GOUNDAN* (1893), 1 L. R. 17 Mad. 134.—*IND.*

l. *Register of official correspondence—Copies of letters.*]—*NAVANEETHA KRISHNA THEVAR v. RAMANWAMI PANDIA THALAVAR* (1916), 1 L. R. 40 Mad. 871.—*IND.*

m. *Date of death.*] A register of births & deaths kept by village officials under the orders of the Board of Revenue is a public document & an entry in such register recording the death of a person is evidence of the actual date of his death.—*RAMALINGA REDDI v. KOTAYYA* (1918), 1 L. R. 41 Mad. 26.—*IND.*

§. 12.—*Public documents: Sub-sects. 20, 21*

SUB-SECT. 20.—REVENUE BOOKS.

See, generally, REVENUE.

3514. Admissibility of copy—Entry in custom house book.]—Upon an information against the master of an American vessel on 48 Geo. 3. c. 56, s. 11, to recover penalties incurred under that statute. Copy of entry in a custom-house book offered to be given in evidence. Objected, that the original ought to have been received, but this reversed by Ct. of Exchequer Chamber. House of Lords decides, that, under the circumstances of the particular case, the copy might be read, & judgment of Ct. of Exchequer Chamber was affirmed.—*TOMKINS v. A.-G.* (1813), 1 Dow, 404; 3 E. R. 714, H. L.

3515. — Duly proved—Of excise accounts.]—*DUNBAR v. HARRIE*, No. 3142, *ante*.

3516. — Entry in stamps office books.]—*HARRISON v. BORWELL*, No. 3521, *post*.

3517. Of what they are evidence—Partnership—Books of receiver of duty on carts.]—An entry in the books of the receiver of the duties on carts, etc., is not evidence of property, without showing by whom the entry was made.—*WEAVER v. PRENTICE* (1795), 1 Esp. 369, N. P.

3518. — Stage coach licence books.]—The entry in the office in Somerset House for licensing stage coaches is no evidence to prove that the persons named in the licence are owners of the coach.—*STROTHER v. WILAN* (1814), 4 Camp. 24, N. P.

3519. — Premises for keeping of beer.]—An entry by A. at the Excise Office of premises for the keeping of beer for home consumption & exportation in the name of himself, B. & C., is conclusive with respect to the other parties.—*ELLIS v. WATSON* (1819), 2 Stark. 478, N. P.

3520. — Allowance of time for malting—Excise books.]—Proof of malt not having required so long a space of time in working, & passing through the floors, from the cistern to the kiln, as it had been entered as having taken for that purpose, will, in some cases, be considered *prima facie* evidence of fraud, & duties are recoverable for the amount of so much grain malted as would be commensurate with such excess of time as if so much of the duty were in arrear. The average number of days necessary for working the grain intended for malt between the steeping & drying is computed by the Excise at sixteen. Excise books transcribed from the malter's specimen paper are admissible evidence against him, without calling the officers to substantiate them, & that although they should be charged to be fraudulent & collusive without proof of their being so.—*R. v. GRIMWOOD* (1815), 1 Price, 369; 145 E. R. 1132.

3521. — Payment of legacy.]—A copy of an entry in the books of the Stamp Office of payment

of the legacy duty is, under Legacy Duty Act, 1795 (c. 52), s. 27, evidence of the payment of such duty for all purposes; but such copy signed by the Comptroller of the Stamp Duties, & not proved by a witness who examined it with the original, is not admissible.—*HARRISON v. BORWELL* (1839), 10 Sim. 380; 9 L. J. Ch. 72; 4 Jur. 245; 59 E. R. 662.

SUB-SECT. 21.—STATUTES.

See Evidence Act, 1845 (c. 113), s. 3; 13 & 14 Vict. c. 21, s. 7; Documentary Evidence Act, 1882 (c. 9), s. 2; Interpretation Act, 1889 (c. 63), s. 9, & generally, STATUTES.

3522. Public statutes—Admissibility of printed copy—Comparison with original.]—A printed proclamation or printed Act is good evidence, though not compared with the record.—*DUPAYS v. SHEPHERD* (1698), 12 Mod. Rep. 216; 88 E. R. 1272.

3523. — — — — —]—*R. v. JEFFERIES* (1721), 1 Stra. 446; 93 E. R. 626.

3524. — Absence of imprint of official printer.]—*R. v. TOMS* (1732), 2 Barn. K. B. 123; 91 E. R. 396.

3525. — — — — — Other evidence of authenticity.]—Omission of the imprint of the Govt. printer from copies of colonial statutes supplemented by evidence that the copies in question had been sent to the Bar Library in accordance with official regulations.—*TAYLOR v. TAYLOR & HOOPER* (1923), 129 L. T. 30; 39 T. L. R. 225.

3526. — Evidence of facts recited therein.]—The King's proclamation, reciting, that it had been represented that certain outrages had been committed in different parts of certain counties, & offering a reward for the discovery & apprehension of offenders, is admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those parts. So, a preamble to an Act of Parliament, reciting the existence of such outrages, & making provision against them, is admissible for the same purpose.—*R. v. SUTTON* (1816), 4 M. & S. 532; 105 E. R. 931.

Annotations:—Reid. Woodward v. Cotton (1834), 3 L. J. Ex. 300. *Mentd. Crease v. Barrett* (1835), 5 Tyr. 458; *De Rutzen v. Farr* (1835), 4 Ad. & El. 53.

3527. — — — — — Prima facie only.]—The insertion of the name of a town in Schedule A. of Municipal Corp'n. Reform Act, 1835 (c. 76), is *prima facie* evidence of the existence of a municipal corp'n. there: but if facts be adduced on affidavit to negative that presumption, a *mandamus* will not issue to compel the delivery of books, papers, monies, etc. by the ancient officers of the town, to the council elected under the new Act.—*R. v. GREENE* (1837), 6 Ad. & El. 518; 1 Nev. & P. K. B. 631; Will. Woll. & Dav. 291; 112 E. R. 210.

Annotation:—Reid. R. v. Haughton (1853), 17 Jur. 455.

3528. Private Acts—Local & personal Acts

PART IV. SECT. 12, SUB-SECT. 20.

n. Of what they are evidence—Arrears of payment—Treasurer's books.]

—In ejectment upon a sale for taxes:—*Held: the treasurer producing his official books & showing that the lands were charged with the taxes when the warrant issued, was sufficient proof of their being in arrear.*—*HALL v. HILL* (1863), 22 U. C. R. 578.—**CAN.**

o. — — — — —]—In cases where eight years' taxes charged on lands have been paid, in proof that the taxes paid have been legally charged, the production of the treasurer's books is sufficient.—*FRASER v. WEST* (1870),

21 C. P. 161.—**CAN.**

p. — — — — —]—An extract from the treasurer's books showing credits against the taxes charged, is not sufficient proof of the taxes being unpaid. — *KEMPT v. PARKYN* (1877), 28 C. P. 123.—**CAN.**

q. — — — — —]—In ejectment under a tax deed *pltf.*, to prove the taxes being in arrear, produced the treasurer's books containing such entry:—*Held: sufficient prima facie evidence.*—*HUTCHINSON v. COLLIER* (1877), 27 C. P. 249.—**CAN.**

r. — — — — —]—A sale of non-resident lands for taxes being im-

peached on the ground of no taxes being due, the original non-resident collector's rolls were produced, showing amounts in arrear for each year respectively. The due preparation of the warrant to sell, & advertising in the *Official Gazette*, were also proved:—*Held: sufficient proof of the taxes being due.*—*FITZGERALD v. WILSON* (1884), 8 O. R. 559.—**CAN.**

PART IV. SECT. 12, SUB-SECT. 21.

a. Public statutes—Embodied in local regulations—How proved.]—In a complaint which charged a person with a contravention of Foot & Mouth

distinguished.]—*RICHARDS v. EASTO* (1846), 15 M. & W. 244; 3 Dow. & L. 515; 15 L. J. Ex. 163; 8 L. T. O. S. 253; 10 Jur. 695; 153 E. R. 840.

Annotations:—*Consd.* R. v. L. C. C., [1893] 2 Q. B. 454. *Refd.* *Barnet v. Cox* (1847), 9 Q. B. 617; *Moore v. Shepherd* (1854), 10 Exch. 424; *Shepherd v. Sharp* (1856), 1 H. & N. 115. *Mentd.* *Filliter v. Phippard* (1847), 11 Q. B. 347; *Law v. Dodd* (1848), 1 Exch. 845; *Carr v. Royal Exchange Assce.* (1862), 1 B. & S. 956.

3529. — How proved—Admissibility of King's printers' copy.]—*ANON.* (1699), 2 Salk. 566; 91 E. R. 477.

3530. — — — — —.]—*Re YARMOUTH & VENTNOR RY. CO.*, [1871] W. N. 236.

Annotation:—*Mentd.* *A.-G. v. Bournemouth Corpn.* (1902), 71 L. J. Ch. 730.

3531. — — — — — Where Act declares itself to be public—For purposes of proof.]—(1) In an action tolls claimed by a corp'n. an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, & by the lessee to the collectors, by which they have actually collected, is admissible in evidence for the corp'n.

Contra, when the copies in the hands of the lessee are not shown to have been delivered to him from the corp'n., although they correspond accurately with the old schedule.

(2) An Act of Parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed & taken to be a public Act & shall be judicially taken notice of without being specially pleaded."—*BRETT v. BEALES* (1829), *Mood. & M.* 416; *subsequent proceedings* (1830), 10 B. & C. 508.

Annotations:—*As to* (2) *Consd.* *Deamont v. Mountain* (1834), 10 Bing. 404; *Woodward v. Cotton* (1834), 1 Cr. M. & L. 44. *Refd.* *Beaufort v. Smith* (1849), 4 Exch. 450; *York & North Midland Ry. v. R.* (1853), 22 J. Q. B. 225. *Generally, Mentd.* *Pim v. Currell* (1840), 6 M. & W. 234.

3532. — — — — —.]—Where an Act for conducting a private concern is declared to be a public Act & is required to be judicially taken notice of as such by all the judges without being specially pleaded, it is unnecessary at a trial to prove it by an examined copy of the original. — *BEAUMONT v. MOUNTAIN* (1834), 10 Bing. 404; 4 Moo. & S. 177; 3 L. J. C. P. 118; 131 E. R. 961. **Annotation:—***Refd.* *Woodward v. Cotton* (1834), 1 Cr. M. & L. 44.

3533. — Whether evidence of facts recited in them—Position of highway.]—Upon an indictment against a parish for the non-repair of a highway, any evidence to show that the road is not situate in the parish indicted is inadmissible, even though it should be recited in a local Act of Parliament as a fact that the road was in another parish. — *R. v. HAUGHTON (INHABITANTS)* (1853), 1 E. & B. 501; 22 L. J. M. C. 89; 20 L. T. O. S. 247; 17 J. P. 585; 17 Jur. 455; 1 W. R. 164; 6 Cox, C. C. 101; 118 E. R. 523.

Annotations:—*Refd.* *Mersey Docks Trustees v. Cameron, Jones v. Mersey Docks Trustees* (1865), 20 C. B. N. S. 56; *Merttens v. Hill*, [1901] 1 Ch. 842. *Mentd.* *Fevversham v. Emerson* (1855), 11 Exch. 385; *Petrie v. Nuttall* (1856), 25 L. J. Ex. 200; *R. v. Maybury* (1864), 4 F. & F. 90; *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Great Torrington Commons Conservators v. Moore Stevens* (1903), 73 L. J. Ch. 124; *Wakefield Corp'n. v. Cooke*, [1903] 1 K. B. 417.

Disease Order, 1892, & the county regulations of the local authority:—*Held*: the order & regulations following thereon having the force of an Act of Parliament, & there being no dispute as to their terms, they need not be proved as a matter of evidence.—*SHARP v. LEITH* (1892), 20 R. (Ct. of Sess.) 12; 30 Sc. L. R. 34.—*SCOT.*

PART IV. SECT. 12. SUB-SECT. 22.
1. Board of land & works—Notice

of forfeiture—Under Land Act, 1869 (No. 360), s. 101.—A notice of forfeiture within the above sect. is conclusive evidence not only of the formal acts of the board of land & works but also that the forfeiture has been incurred & the board has elected to revoke the lease.—*THORNBURN v. BUCHANAN* (1871), 2 V. R. (Law) 169.—*AUS.*

a. Returns—Of commissioners of highways—Not evidence of—Laying

3534. — — — — — Death of life tenant.]—Recital of the death of a prior tenant for life in a private Act of Parliament:—*Held*: insufficient evidence of the death.—*COWELL v. CHAMBERS* (1856), 21 Beav. 619; 52 E. R. 999.

3535. — No evidence of notice of incumbrance—To purchaser.]—(Certain leasehold houses were sold by auction, which were described in the particulars & conditions of sale as a well-secured rental with reversionary interest, & as an eligible investment. By the provisions of a local Act, for the establishment of the South London Market Co., the Co. were authorised to treat for, purchase, & take the premises in question for the purposes of the Act. No notice was given of this liability in the particulars & conditions of sale; & the jury found as a fact that the vendee had no notice of the liability. The conditions contained no express warranty of title:—*Held*: (1) plff. was not justified in stating this contract in the declaration, as a warranty of a clear title, free from all charges, incumbrances, & liabilities; (2) the purchaser was entitled to rescind the contract, on ascertaining that the premises were liable to be taken for the purposes of the Act.—*BALLARD v. WAY* (1836), 1 M. & W. 520; 2 Gale, 61; *Tyr. & Gr.* 851; 5 L. J. Ex. 207; 150 E. R. 540.

Judicial notice, *see* Part III., Sect. 5, sub-sect. 2,

SUB-SECT. 22.—OTHER PUBLIC DOCUMENTS.

3536. Papal bull—Evidence of right to tithes.]—*CLANRICKARD (EARL) v. DENTON (LADY)* (1619), *Palm.* 37; 1 Gwill. 360; 81 E. R. 967; *sub nom.* *DENTON (LADY) & CLANRICKARD'S (EARL) CASE*, 2 Roll. Rep. 207.

Annotations:—*Mentd.* *Byam v Booth*, etc. (1816), 2 Price, 231; *Pago v. Wilson* (1821), 2 Jac. & W. 513; *Salkeld v. Johnson* (1846), 2 Q. B. 749.

3537. — — — — —.]—Plff. claimed tithe of cattle depastured on M. Grange. A minister's accounts, a papal bull, & an ancient parish register deposited in the archives of a college may be read in evidence. —*TOWRIE v. PEARSON* (1652), 1 Wood, 13.

3538. Official letter from Secretary of State—Evidence of Crown right—Release of property seized as prize.]—That the Crown has actually exercised the power [of releasing ships & goods taken *jure belli*, before adjudication & without the consent of the captors] is proved by the solemn evidence of an official letter from the Secretary of State for the Foreign Department, to the Minister of that country whose subjects are principally interested in the question, informing him that the ships were released, & that orders were given by the Lords of the Admiralty, for that purpose (SIR W. SCOTT).—*THE ELSEBE* (1804), 5 Ch. Rob. 173; 165 E. R. 738.

Annotations:—*Refd.* *Alexander v. Wellington* (1831), 2 Russ. & M. 35; *The Parlement Belge* (1879), 4 P. D. 129; *The Derflinger, The Forde, The Leda, Re American Meat Packers Agreement, Re Certain Swedish Copper*, [1919] P. 264.

3539. Book kept at India House—Sworn register of passengers to India.]—A. book kept at the

of road.]—*R. v. STERLING* (1835), *Ber.* 33.—*CAN.*

b. Registrar's book—Evidence of registration—Of title.]—The production of the registrar's book in which a memorial is recorded, is good evidence of the title being a registered title.—*DOR D. PHINCE v. GIBBY* (1851), 9 U. C. R. 41.—*CAN.*

c. — — — — — Of deed.]—Where two deeds were written on the same

Sect. 12.—Public documents: Sub-sect. 22. Sect. 13: Sub-sect. 1, A. (a).]

India House, from returns given in on oath under East India Company Act, 1813 (c. 155), of the number of passengers going on board India ships, is evidence.—**RICHARDSON v. MELLISH** (1821), 2 Bing. 229; 1 C. & P. 241; 9 Moore, C. P. 435; Ry. & M. 66; 3 L. J. O. S. C. P. 265; 130 E. R. 291.

Annotations:—**Refd.** Grindell v. Brendon (1859), 6 C. B. N. S. 698; Nothard v. Pepper (1864), 17 C. B. N. S. 39. **Mentd.** Edwards v. Baugh (1843), 7 Jur. 697; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Re Moore & Thomas, Ex p. Beer (1868), 18 L. T. 418; Davies v. Davies (1887), 36 Ch. D. 359; Cleaver v. Mutual Reserve Fund Life Assocn. (1891), 66 L. T. 220; Mogul S.S. Co. v. McGregor, Gow, [1892] A. C. 25; Re Keceley, Tyson v. Keceley, [1899] 2 Ch. 530; Re Beard, Reversionary & General Securities Co. v. Hall, Re Beard, Beard v. Hall, [1908] 1 Ch. 383; Chaplin v. Hicks, [1911] 2 K. B. 786; Re Smith, Johnson v. Bright-Smith, [1914] 1 Ch. 937; Re Bowman, Secular Soc. v. Bowman (1915), 113 L. T. 1095; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 44; Montefiore v. Monday Motor Components Co., [1918] 2 K. B. 241; Naylor, Benzon v. Krahnische Industrie Gesellschaft (1918), 87 L. J. K. B. 1066.

3540. Minute by parish clerk—Recording baptism—Not evidence thereof.]—**DOE d. WARREN v. BRAY**, No. 3358, *ante*.

3541. Returns — To Royal commission—Admissibility.—Only if signed & sealed by commissioners.]—**SLANE PERRAGE**, No. 3733, *post*.

3542. — To Stamp Office—Of banking company—Evidence of existence of bank.]—The returns made to the Stamp Office under Country Bankers Act, 1826 (c. 46), are not the only evidence to prove the existence of a banking co. under that Act.—**R. v. JAMES** (1836), 7 C. & P. 553.

Annotations:—**Mentd.** R. v. Martin (1849), 2 Car. & Kir. 950; Chapman v. Milvain (1850), 5 Exch. 61.

—**See** BANKERS, Vol. III, p. 142, Nos. 144, 145.

3543. — To exchequer writ—Made by bishop—Evidence of collations, vacancies & presentations to livings.]—(1) Entries in the books kept at the First Fruits' Office, are admissible, to show the fact of a collation to a living made by the bishop at a particular time.

(2) Returns made by the bishop, in obedience to writs from the Exchequer, requiring him to state the vacancies & presentations & collations to the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty. Though such returns may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the inquiry in the writ.

(3) An original collation from the registry of the bishopric, & appearing on the face of it to be *pleno jure*, is admissible to show that the right claimed has in fact been exercised.—**IRISH**

sheet of paper & registered at the same time, but only one certificate of registry & one number were indorsed:—**Held:** the registry book was properly admitted in evidence to show that both deeds were registered.—**DOE v. McCULEY** (1855), 3 All. 194.—**CAN.**

d. — — — — —.]—The best evidence of the registry of a deed is the registry book.—**DOE d. SIMPSON v. FALLS** (1863), 5 All. 540.—**CAN.**

e. Protest under seal—Evidence of facts therein.]—**RUSSELL v. CROFTON** (1852), 1 C. P. 428.—**CAN.**

f. Minute book of city council—Admissibility.]—**HALIFAX CITY v. ROMANS** (1880), 1 R. & G. 265.—**CAN.**

g. Custom house voucher — Not

conclusive proof of—Loss of cargo.]—Custom house vouchers showing that on the return of a ship to her port of sailing, driven back by stress of weather, that the goods alleged to have been lost were not on board her, are not sufficient as even *prima facie* proof of the loss.—**KAMABHAI GIRDHARBHAI v. ALI AKBAR KAJRANI** (1863), 1 Bom. 6.—**IND.**

h. Ayakut accounts — Admissibility —As evidence of ownership.]—**SIVASUBRAMANYA v. SECRETARY OF STATE FOR INDIA** (1884), 1 L. R. 9 Mad. 285.—**IND.**

k. Record of Rolls Office — Evidence of former grant.]—An *inscriptum* of a grant contained in the Inrolment of a subsequent grant of confirmation

SOCIETY v. DERRY (BP.) (1846), 12 Cl. & Fin. 641 8 E. R. 1561, H. L.

Annotations:—**Consd.** Sturla v. Freccia (1880), 5 App. Cas. 623. **Refd.** Neill v. Devonshire (1882), 8 App. Cas. 135; Mercer v. Danno, [1905] 2 Ch. 538. **Mentd.** Hutchinson v. Ferrier (1852), 19 L. T. O. S. 116; Marilanski v. Cairns (1852), 19 L. T. O. S. 277; Reed v. Lamb (1860), 6 H. & N. 75; Milne v. Leisler (1862), 7 H. & N. 786; R. v. Colclough (1882), 15 Cox, C. C. 92.

3544. Order of Commissioners of Sewers—Evidence as adjudication—By competent court.]—Orders of the Comrs. of Sewers, requiring landowners to repair & alter sea walls, may be given in evidence as adjudications by a ct. of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time, as seventy years, the ct. will presume that such orders were executed.—**R. v. LEIGH** (1839), 10 Ad. & El. 398; 2 Per. & Dav. 357; 113 E. R. 152.

Annotations:—**Refd.** R. v. Bedfordshire (1855), 1 Jur. N. S. 208. **Mentd.** R. v. Duncan (1881), 44 L. T. 521; R. v. Essex Sewers Comrs. (1885), 14 Q. B. D. 561; Fobbing Sewers Comrs. v. R. (1886), 11 App. Cas. 449.

3545. Certificate of baptism—Not from any authorised register — Inadmissible.]—In a suit respecting a grant of administration to a deceased intestate, between the alleged widow & the brother, the widow pleaded, in proof of the marriage, a certificate of baptism of a child, as the lawful child of her & deceased, written & signed by the officiating minister, since deceased, & attested by three persons, one of whom was alleged to be deceased, another to be in New South Wales, & the third was not accounted for. The certificate did not purport to be an extract from any register kept by public authority, or otherwise:—**Held:** such certificate could not be received.—**PARLBY v. PARLBY** (1851), 15 Jur. 973; *subsequent proceedings* (1852), 2 Rob. Eccl. 418.

3546. Minute book of turnpike trustees—Evidence of order made.]—The minute, entered in the minute-book of turnpike trustees, under Turnpike Roads Act, 1822 (c. 126), s. 72, signed by the chairman, confirming an order made at a previous meeting & entered in the minute-book, but not signed by the chairman, is good & sufficient evidence of the order.—**R. v. IFFELD (INHABITANTS)** (1856), 27 L. T. O. S. 63; 20 J. P. 262; 4 W. R. 458.

3547. Proceedings of commissioners — Under Tithe Commutation Acts—Evidence of matters therein stated.]—The proceedings, properly authenticated, of the Comrs. acting under the Tithe Commutation Acts, are public evidence of the matters therein stated, & to be received as such.—**GEFFARD v. WILLIAMS** (1869), as reported in 38 L. J. Ch. 597; 18 W. R. 56; *reversd.* on other grounds (1870), 5 Ch. App. 546, L. C.

Annotations:—**Consd.** A.-G. v. Antrobus, [1905] 2 Ch. 188.

Mentd. Moore v. Kempston (1870), 18 W. R. 803.

3548. Statistical returns of meteorological office

of the preceding grant, produced from the records of the Rolls Office:—**Held:** to be good evidence of the former grant.—**A.-G. v. CASHIEL CORPN.** (1842), 2 Con. & Law. 1.—**IR.**

1. Kirk sessions' minute book — Deposition of witnesses.]—**STURROCK v. GREIG** (1849), 12 Duul. (Ct. of Sess.) 166.—**SCOT.**

m. Meteorological returns — Proof of stormy weather.]—Observed meteorological returns from a class of evidence which is quite legitimate in such an inquiry as this.—**WILLIAMS v. DOBBIE** (1884), 11 R. (Ct. of Sess.) 982; 21 Sc. L. R. 667.—**SCOT.**

n. Shorthand writer's notes.]—The shorthand notes of the shorthand writer employed by the ct. to take down

—Based on returns of voluntary observers—Not evidence of facts stated therein—In suit for salvage.]—The statistical returns of the Meteorological Office, which are based upon information supplied by volunteer observers in different districts, are not public records which can be accepted as evidence of the statements therein contained.—*BURROWS v. BEDFORD SCHOOL BOARD* (1902), 18 T. L. R. 292, N. P.

Presentation of homage of manor—Evidence of boundaries.]—See *BOUNDARIES*, Vol. VII., p. 318, No. 390.

Estate book of dean & chapter—Evidence of boundaries.]—See *BOUNDARIES*, Vol. VII., p. 317, Nos. 377–378.

SECT. 13.—PRIVATE DOCUMENTS.

SUB-SECT. 1.—ANCIENT PRIVATE DOCUMENTS

A. Admissibility and Proof.

(a) Age of Document.

3549. General rule—No proof of execution required.]—(1) The substance of a deed cannot be proved but by the deed itself unless it is burnt or lost or in the possession of pltf. himself (*HOLT, C.J.*).

(2) An old deed is good evidence without any witness to swear that it was executed (*HOLT, C.J.*).

(3) Wherever an original is of a public nature & would be evidence, if produced, an immediate sworn copy will be evidence, but where an original is of a private nature, a copy is not evidence, unless the original is lost or burnt (*HOLT, C.J.*).—*LYNCH v. CLERKE* (1697), 3 Salk. 151; *Holt, K. B.* 293; 91 E. R. 718.

*Annotation:—*As to (3) *Apprvd. Reed v. Lamb* (1860), 6 H. & N. 75.

3550. Over fifty years—Receipt.]—A receipt, even of more than fifty years old, offered to be put in to prove a money payment, purported by it to have been received in lieu of tithes is not admissible evidence of the fact of such customary payment having been acted on, so as to establish the defence of a *modus*; unless it can be also proved who the parties to the receipt were, & in what character they stood; & unless proof be given of the handwriting, or death of the party giving it.—*MABY v. CURTIS* (1815), 1 Price, 225; 145 E. R. 1384.

Annotations:—Distd. Bertie v. Beaumont (1816), 2 Price, 303. *Consd. Short v. Lee* (1821), 2 Jac. & W. 464.

3551. Forty years—Deed.]—(1) A deed 40 years old proves itself, & pltf. need not prove where he had it, or how he came by it. (2) A deed 35 years old does not prove itself.—*BENSON v. OLIVE* (1780), 14 B. 284; 1 Barn. K. B. 348; 2 Gwill. 701; 145 E. R. 675.

Annotations:—Generally, Mentd. Bury St. Edmund's Corp'n. v. Evans (1739), 2 Com. 643; *Nagle v. Edwards* (1796), 3 Anst. 702; *Bullen v. Michel* (1816), 2 Price, 399; *Meade v. Norbury* (1816), 2 Price, 338; *Barker v. Birch* (1843), 7 Scott, N. L. 380.

3552. — Books of deceased overseer—Proof

the evidence were not extended in his handwriting, but were signed by him:—*Held: the notes of evidence could not be objected to.*—*MEGANTIC ELECTION, COTE v. GOULET* (1884), 9 S. C. R. 279.—*CAN.*

—*J.*—The ct. will not look at the transcript of a shorthand writer's note of a judge's charge unless incorporated in the judge's report or adopted by him.—*FLANAGAN v. FAHY*, [1918] 2 I. R. 361.—*IR.*

PART IV. SECT. 13, SUB-SECT. 1.—A. (a).

3549 i. General rule—No proof of

of death & handwriting.]—In an action against the overseers of a parish the books of a deceased overseer [dated 1791] are not admissible for defendants without proof of his death. Or whether his handwriting must be proved.

This is not the same as if the book were eighty or ninety years old. I can't presume that every one who was alive in 1780 or 1790 is dead now. It might be different if the entry were earlier, in 1694 for instance. The defendants have proved neither the death nor the handwriting of the party making the entry; the first is clearly necessary, the other is questionable (*PARKE, B.*).—*DOE d. ROBINSON v. HINDE* (1843), 2 Mood. & R. 441; 1 L. T. O. S. 58.

Annotation:—Mentd. Doe d. Edney v. Benham, Doe d. Edney v. Billett (1845), 7 Q. B. 976.

3553. Thirty-five years—Deed.]—*BENSON v. OLIVE*, No. 3551, *ante*.

3554. Thirty years—No proof of attestation required—Although subscribing witness living.]—*ANON.* (prior to 1798), cited 2 Esp. 666.

3555. — — — — —.]—A will more than thirty years old may be read in evidence, without proof of its execution, although testator has died within thirty years, & some of the subscribing witnesses are proved to be still living. After the lapse of a period of more than a hundred years:—*Held: in the absence of evidence to the contrary, the death of a party without issue might be presumed.*

The rule of computing the thirty years from the date of a deed is equally applicable to a will. The principle upon which deeds after that period are received in evidence, without proof of the execution is that the witnesses are presumed to have died (*LOVE TENTERDEN, C.J.*).—*DOE d. OLDHAM v. WOLLEY* (1828), 8 B. & C. 22; 108 E. R. 951; *sub nom. DOE d. OLDNALL v. DEAKIN*, 2 Man. & Ry. K. B. 195; 3 C. & P. 402; *sub nom. DOE d. OLDNALL v. WOOLLEY*, 6 L. J. O. S. K. B. 286.

Annotations:—Refd. Grenaves v. Greenwood (1877), 2 Ex. D. 289; *Jones v. Hughes* (1887), 4 T. L. R. 37.

3556. — — — Parish certificate of settlement.]—An allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate, & signed by two justices, is alone sufficient proof of the certificate, where such certificate is above thirty years old; notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the execution & attestation of the certificate according to 3 Geo. 2, c. 29. *Qu: whether an allowance of a certificate written in the margin, & signed by two justices, which allowance does not certify any affidavit made by one of the witnesses, according to 3 Geo. 2, c. 29, can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of 3 Geo. 2,*

*execution required.]—*Where the judge is satisfied that a document is more than thirty years old & that it has come from proper custody, he may, as a rule, dispense with proof of its execution.—*LALDAS RAMDAS v. KASHIRAM* (1867), 4 Bom. A. C. 60.—*IND.*

3549 ii. — — — — —.]—With regard to the proof of ancient documents, the proper rule is that, if they are more than thirty years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer reasonable presumption that they were honestly & fairly obtained & preserved for use, & are

free from suspicion of dishonesty.—*VITHAL MAHADEV v. DAUDMUMHAMMED HUSEN* (1869), 6 Bom. A. C. 90.—*IND.*

p. Over fifty years.] On general principles it would be extremely undesirable, after a document had stood more than fifty years, to allow evidence to be led to show that the document is not what appears on the face of it.—*GANPATRAS APAPAI v. BAPU BIN TUKARAM* (1919), 1 L. R. 44 Bom. 710.—*IND.*

*q. Fifty years—Deed.]—*Deft. in ejectment filed a bill to restrain the action, alleging that the deed under which pltf. claimed, was a forgery.

Secl. 13.—Private documents: Sub-secl. 1, A. (a) & |

s. 29.—*R. v. FARRINGTON (INHABITANTS) (1788), 2 Term Rep. 466; 100 E. R. 251.*

Annotation:—Mentd. R. v. Stainforth (1847), 3 New Sess. Cas. 53.

3557. ———.—[—The parties producing [from the parish chest] on an appeal at the sessions a parish certificate [of settlement] of thirty years date need not give any account of it; the bare production of it is sufficient.—*R. v. RYTON (INHABITANTS) (1793), 5 Term Rep. 259; Nolan, 237; 101 E. R. 146.*

3558. ———.—**Bond.**—[—Bond of thirty years' standing cannot be read in evidence; if no payment of interest or other marks of authenticity.—*FORBES v. WALE (1764), 1 Win. Bl. 532; 96 E. R. 308.*

3559. ———.—[—Where a bond is of thirty years' standing, & found among the papers of a public co., or of the obligee who is deceased, it shall be admitted without proof by the subscribing witness.—*CHELSEA WATERWORKS (GOVERNOR & CO.) v. COWPER (1795), 1 Esp. 275, N. P.*

Annotation:—Mentd. Norman v. Baldry (1831), 6 Sm. 621.

3560. ———.—**Will.**—[—It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it, because the ct. cannot know how the will directs the possession to go, till it is made acquainted with the contents of the will, by its being read.—*DOE d. LLOYD v. PASSINGHAM (1826), 2 C. & P. 440.*

3561. ———.—**Time computed from date of will.**—[—*DOE d. OLDHAM v. WOLLEY, No. 3555, ante.*

3562. ———.—[—A will thirty years old, produced from the proper custody, proves itself. The thirty years are to be computed from the date of the will, & not from the death of testator, & are calculated as at the time of its production.—*MAN v. RICKETTS (1814), 7 Beav. 93; 13 L. J. Ch. 194; 8 Jur. 159; 49 E. R. 998; sub nom. MANN v. RICKETTS, 2 L. T. O. S. 456.*

Annotations:—Mentd. Boyse v. Colclough, Boyse v. Rossborough (1854), 1 K. & J. 124; Orange v. Pickford (1858), 4 Jur. N. S. 649; Stacey v. Spratley (1858), 2 De G. & J. 94.

3563. ———.—[—The will being more than thirty years old: *Held:* the fact of the attestation was sufficiently proved, although one witness was still alive & was not called.—*DOE d. SPILSBURY v. BURDETT (1835), 4 Ad. & El. 1; 1 Har. & W. 591; 6 Nev. & M. K. B. 259; 6 L. J. K. B. 73; 111 E. R. 687; on appeal, sub nom. BURDETT v. SPILSBURY, SKYNNER v. SPILSBURY (1843), 10 Cl. & Fin. 340, H. L.*

Annotations:—Mentd. Curteis v. Kenrick (1838), 3 M. & W. 461; George v. Rieley (1839), 2 Curt. 1; Ricketts v. Loftus (1841), 4 Y. & C. Ex. 519; Hudson v. Parker (1844), 1 Rob. Eccl. 14; Barnes v. Vincent (1845), 3

Notes of Cases 628; Vincent v. Sodor & Man. (Bp.) (1849), 8 C. B. 905; Vincent v. Sodor & Man. (Bp.) (1850), 5 Exch. 683; Roberts v. Phillips (1855), 4 E. & B. 450; Newton v. Ricketts (1861), 9 H. L. Cas. 263; Shamu Patter v. Abdul Kadir Ravuthan (1912), 28 T. L. R. 583.

3564. ———.—**Deed.**—[—*ANON.* (prior to 1708), cited 2 Esp. 666.

3565. ———.—[—*DOE d. NEALE v. SAMPLES, No. 3611, post.*

3566. ———.—[—A deed thirty years old, a link in the chain of deft.'s title to property to recover possession of which the action was brought, was produced by a witness who received it from deft.'s attorney:—*Held:* there was sufficient evidence of proper custody.—*JOHNSON v. TYRRELL (1860), 2 L. T. 429.*

3567. ———.—[—Deeds, which being more than thirty years old prove themselves, used at the hearing of a motion for decree, should be inserted in the list of evidence in the decree, although not included in the list of evidence to be read, & not referred to in any affidavit.—*BOYD v. PETRIE (1870), 19 W. R. 221.*

3568. ———.—**Entries in steward's book.**—[—Entries in a steward's book above thirty years old, & coming from the proper custody, are admissible in evidence, without proving the handwriting of the steward. *Semble:* the rule extends to all written documents coming from the proper custody.—*WYNNE v. TYRWITT (1821), 4 B. & Ald. 376; 106 E. R. 975.*

3569. ———.—**Letters.**—[—*R. v. BATHWICK (INHABITANTS), No. 3611, post.*

3570. ———.—[—(1) Letters more than thirty years old, produced from the proper custody, prove themselves.

(2) Deft. produced letters thirty years old, purporting to be addressed to her mother, & proved that she was living with her mother at the time of her death, when her papers and keys were given up to her:—*Held:* the custody was proper.—*DOE d. THOMAS v. BEYNON (1840), 12 Ad. & El. 431; 4 Per. & Dav. 193; 9 L. J. Q. B. 359; 113 E. R. 875.*

Annotation:—Generally, Mentd. Grant v. Grant (1870), L. R. 5 C. P. 380.

3571. ———.—**Accounts.**—[—In support of the claim of E. to receive dues at T., two flying sheets, more than thirty years old, purporting to be the account of dues received at T. by W., who was proved to be dead & who had not been a servant of the corpn. of E., but which papers were connected by reference with the book of the receiver-general of E. & other vouchers, were produced from the proper office, were shown to be in attendance with the course of business in that office & were admitted in evidence:—*Held:* they were properly admitted.—*EXETER CORPN. v. WARREN (1844), 5 Q. B.*

The deed was dated about fifty years before the bill was filed, & the witnesses to it were dead before the validity was impeached in any way. The ct. dismissed the bill with costs. *FICK v. McMICHAEL (1857), 5 Gr. 616.—CAN.*

35601. Thirty years — Will.—[The fact that a will bears date thirty years before action is not alone sufficient under all circumstances to prove that that is the real age of the writing, even if it comes from the proper custody, but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years.—*DOE d. STEVENS v. CLEMENT (1852), 9 U. C. R. 650.—CAN.*

r. — Memorial of deed.—A memorial more than thirty years old of a lost deed, is good evidence upon its bare production, without calling or accounting for the subscribing witness.

— *DOE d. MACLEM v. TURNBULL (1848), 1 U. C. R. 129.—CAN.*

s. — — — — ——[—*R. v. G (1877), 41 U. C. R. 148.—CAN.*

t. — — — — ——[—*R. v. McDONELL (1877), 41 U. C. R. 157.—CAN.*

a. — Effect of new evidence.—[A new trial was ordered before a jury as to the genuineness of a deed more than thirty years old, produced by one of the parties, when evidence was adduced which was a surprise upon defts.—*CHAMBERLAIN v. TORRANCE (1868), 14 Gr. 181.—CAN.*

b. — Presumption of due execution.—Authority to sign.—[*UBILACK RAI v. DALLIAL RAI (1878), 1 L. R. 3 Calc. 557.—IND.*

c. — Daughter's custody of pottah.—[*TRAILOKIA NATH NUNDI v. SHURNO CHUNGONI (1885), 1 L. R. 11 Calc. 539.—IND.*

d. — From what date period reckoned.—[In applying the presumption allowed by Evidence Act, s. 90, the period of thirty years is to be reckoned, not from the date upon which the document is filed in ct., but from the date on which it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof.—*MINNU SIKKAR v. BIEDDOY NATH ROY (1879), 5 C. L. R. 135.—IND.*

e. — Copy of document.—[In a suit to recover possession of land, deft. relied principally on a document which was filed in the *munsif's* ct. in support of his title. According to the evidence, this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, although it was admitted in existence, nor was it shown that it could not have been produced. The *munsif* decreed in pltf.'s

773; 6 State Tr. N. S. 1103; 1 Dav. & Mer. 524; 1 L. T. O. S. 254; 8 J. P. 181; 8 Jur. 441.

Annotations.—**Beld.** A.-G. v. Stephens (1855), 1 K. & J. 724. **Mentid.** Whitstable Free Fishers v. Foreman (1863), L. R. 3 C. P. 578.

3572. ——— **Schedule of parish payment.]**—**FOSTER v. PLUMBERS' Co.** (1900), 44 Sol. Jo. 211.

3573. ——— **Lease.]**—On the trial of an ejectment, in order to account for an apparently adverse possession by deft., the lessor of pltf. proposed to prove that deft. had held under a lease granted by a party through whom lessor of pltf. claimed, dated seventy years back, which had expired three years back. The lease was offered in evidence; & it appeared that it had been seen in the hands of the land agent of the lessor of pltf., that the agent was in the assize town the day before the trial, but had left it & had not yet returned; & that his bag was cut open in etc., & the lease taken from it, by pltf.'s attorney. The judge having rejected the evidence, & nonsuited pltf.:—*Held*: the evidence ought to have been received.

Most of the reported cases are decisions in favour of receiving documents on the ground that they have come from proper custody, & the etc. ought, I think, to be liberal in this respect (**DENMAN, C.J.**).—**DOE d. SURRESBURY (EARL) v. KEETING** (1848), 11 Q. B. 884; 3 New Pract. Cas. 99; 17 L. J. Q. B. 199; 11 L. T. O. S. 87, 174; 12 Jur. 433; 116 E. R. 701.

3574. ——— **Appointment under power—Executed by attorney of donee—No presumption as to authority of attorney.]**—Where a deed, more than thirty years old, purports to be an appointment under a special power & to be executed by the attorney of the donee, of the power, although by reason of the antiquity of the deed, the execution of it by the attorney as such ought to be presumed, yet there is no rule of law which requires or justifies the presumption by the ct. that the attorney was duly authorised to execute the power.—*Re AIREY, AIREY v. STAPLETON*, [1897] 1 Ch. 161; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286; 11 Sol. Jo. 128.

(b) Proper Custody.

i. In General.

3575. General rule—Proof of execution.]—(1) A

favour. On appeal, a copy of the earlier document was produced filed:—*Held*: although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, & inasmuch as the exhibit was a copy & not the original, the presumption which, under Evidence Act, s. 90, may be made where a document over thirty years old is produced, ought not to be made.—**APPATHA PATTAR v. GOPALA PANIKKAR** (1901), 1 L. R. 25 Mad. 674.—**IND.**

1. Over twenty years—Presumption rebuttable.]—The production of an original mte., which was more than twenty years old, proves its truth unless shown to be untrue.—**ALLAN v. McTAVISH** (1881), 28 Gr. 539; 8 A. R. 440.—**CAN.**

PART IV. SECT. 13, SUB-SECT. 1.—**A. (b) i.**

3575 i. General rule—Proof of execution.]—Where a deed thirty years old purporting to be executed by attorney, is produced from the proper custody, it proves itself *prima facie*, & may be put in evidence without proof of the existence of the power of attorney.—**CLIBSOLD v. McMAHON** (1884), 2

terrier found in the archdeacon's registry is admissible.

(2) A terrier, although not signed by the impropriate rector, nor by any person for him, is evidence against him as to tithes due to him in the parish.

(3) In general an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place in which such an instrument ought properly to be. It is true that where a connection can be established so as reasonably to account for the custody in which the instruments are found, the etc. have somewhat relaxed the rule, & admitted them to be read though not coming from exactly the most proper repository. In **Miller v. Foster**, No. 3243, *ante*, in granting a new trial, proceeded upon the ground of the connection between the terrier & the custody in which it was; & a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But where the custody is merely private & wholly unconnected with the subject matter, the etc. have never gone the length of admitting such papers in evidence (*per CUR.*).—**POTTS v. DURANT** (1796), 3 Anst. 789; 115 E. R. 1010.

Annotation.—As to (3) **Consd.** Lake v. Skinner (1819), 1 Jac. & W. 9.

3576. ——— **]**—**DOE d. NEALE v. SAMPLES**, No. 3611, *post*.

3577. ——— **Proof of handwriting.]**—**WYNNE v. TYRWHITT**, No. 3568, *ante*.

3578. ——— **]**—**DOE d. THOMAS v. BEYNON**, No. 3570, *ante*.

3579. ——— **]**—**EXETER CORPN. v. WARREN**, No. 3571, *ante*.

3580. ——— **]**—**FOSTER v. PLUMBERS' Co.** (1900), 44 Sol. Jo. 211.

ii. Particular Documents.

3581. Parish certificate—Poor law settlement—Parish chest.]—**R. v. RYTON (INHABITANTS)**, No. 3557, *ante*.

3582. ——— **Overseer.]**—Where a parish certificate of more than thirty years date acknow-

N. S. W. L. R. 61.—**AUS.**

3575 ii. ——— **]**—The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon or brought from such place as to offer a reasonable presumption that they were honestly & fairly obtained & preserved for use, & are free from suspicion of dishonesty.—**HARI DHANGAR v. BIRU DASRU** (1868), 5 Bom. A. C. 135.—**IND.**

3577 i. ——— **Proof of handwriting.]**—An article of agreement to demise lands, executed upwards of thirty years, & produced out of the proper custody:—*Held*: admissible in evidence as an ancient instrument by proving, not by the subscribing witnesses, the signatures of the parties.—**AYLMARD v. KEARNEY** (1814), 2 Ball. & B. 463.—**IR.**

3. ——— **Presumption of due execution.]**—Evidence Act, 1872, s. 90, admits a presumption of the genuineness of documents purporting to be thirty years old, if produced from proper custody proved to have had a legitimate origin, or an origin the legitimacy of which the circumstances of the case render probable. It is not necessary that the documents shall be found in the best & most proper place of deposit. The sect. insists only on a satisfactory account of the origin of the custody, & not on the

history of its continuance.—**SHARFUDIN v. GOVIND** (1902), 1 L. R. 27 Bom. 452.—**IND.**

h. ——— **Mutilated deed.]**—The mutilation of a deed is no reason against its admissibility in evidence, if it came out of the proper custody, where there is enough to show that it had been a deed, that it had been executed, & that it had conveyed an estate.—**THIMLESTOWN (LORD) v. KEMMIS** (1842), 5 L. R. 380.—**IR.**

k. ——— **Value as evidence.]**—Although ancient documents are admissible in evidence on proof that they have been produced from proper custody, their value as evidence when admitted must depend in each case upon the corroboration derivable from external circumstances, *e.g.*, from the documents having been produced on previous occasions upon which they would naturally have been produced if in existence at the time or from acts having been done under them.—**BOIKENT NATH KUNDU v. LUKHUN MAJHI** (1881), 9 C. L. R. 425.—**IND.**

PART IV. SECT. 13, SUB-SECT. 1.—**A. (b) ii.**

Private map.]—**BURFORD SCHOOL TRUSTEES v. BURFORD CORPN.** (1889), 18 O. R. 546.—**CAN.**

m. Conveyance relating to land—Found amongst papers of testator.]—

Sect. 13.—Private documents: Sub-sect. 1, A. (b) ii.]

ledging the pauper's grandfather & father to belong to the appellant parish was produced by a rated inhabitant who was overseer of the respondent parish:—*Held*: to be evidence though it was objected that some account should be given of it, & that the witness was not competent to give that account; & it seemed that if necessary he might be examined as to the custody.—*R. v. NETHERTHONG (INHABITANTS)* (1814), 2 M. & S. 337; 105 E. R. 407.

Parish books & documents.—See Sect. 12, sub-sect. 19, A., *ante*.

3583. Private map—Bishop's registry.—In an action for breaking flood-gates deft. justified as the lessee of a mill, which he held of the Bishop of W. For deft., old leases of the mill granted by the Bishop of W. were produced from the Bishop's registry, & read in evidence; & it was proposed, on the part of deft., to put in an old map of the place in question, also brought from the Bishop of W.'s registry:—*Held*: the map was not admissible in evidence.—*WAKEMAN v. WEST* (1836), 7 C. & P. 479, N. P.

3584. — Purchased by magistrate.—Pltf. at the trial, in order to show that the house in question was situate in Norfolk, tendered in evidence an old map, printed on paper from an engraved copper-plate, & having on the face of it the following words: "A new map of the county of Suffolk, taken from the original map published by Mr. J. K. in 1736, who took an actual & accurate survey of the whole county; now republished, with corrections & additions by J. & W. K., sons of the author, 1766, & engraved by J. R." This map was produced by a witness, who was a magistrate of both counties, & had bought the map twelve years before the trial, & during the time it had been in his possession, it had not been altered:—*Held*: the map was not admissible in evidence.—*HAMMOND v. BRADSTREET* (1851), 10 Exch. 390; 2 C. L. R. 1195; 23 L. J. Ex. 332; 23 L. T. O. S. 271; 2 W. R. 625; 156 E. R. 496, Ex. Ch.

Annotations:—*Expld.* *R. v. Berger*, [1894] 1 Q. B. 823; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Refd.* *Coleman v. Kirkaldy*, [1882] W. N. 103; *Fowke v. Burlington*, [1914] 2 Ch. 388.

3585. Tithe map & apportionment—Local Government Act, 1894 (c. 73), s. 17 (8).—A parish council had passed a resolution that the tithe apportionment & map should be placed in the custody of the parish council. The incumbent in whose possession they were refused to give them up. The parish council applied to the county council under the Local Government Act, 1894 (c. 73), s. 17 (8), & the county council thereupon made an order that the custody of the documents should be in the hands of the persons designated by the parish council. Applt., the chairman of the parish council, applied to the justices under the Tithe Commutation Act, 1860 (c. 93), s. 28, for an order to be made against resp., the incumbent, to deliver up the documents. The justices refused on the ground that they had no power to make the order:—*Held*: the justices had power to make the order.—*LEWIS v. POOLE*, [1898] 1 Q. B. 164; 67 L. J. Q. B. 73; 77 L. T.

369; 61 J. P. 776; 40 W. R. 93; 14 T. L. R. 15; 42 Sol. Jo. 14, D. C.

Annotation:—*Consd.* *Fox v. Pett*, [1918] 2 K. B. 196.

3586. ——*]*—A county council made an order under Local Government Act, 1894 (c. 73), s. 17, that the tithe apportionment map of a parish should be deposited in the parish school. The map was in the possession of the incumbent of the parish, & the order not having been complied with, an application was made to justices in petty sessions, under Tithe Act, 1860 (c. 93), s. 28, for an order that the map should be removed from the custody of the incumbent & deposited in accordance with the directions contained in the order of the county council. On the hearing of the application the incumbent tendered evidence to prove that the order of the county council did not provide for the security & due preservation of the map, nor for the convenience of the persons interested therein. The justices ruled that the order of the county council was final & that the evidence tendered, therefore, could not be received, & they made the order for the removal of the map as asked for:—*Held*: Tithe Act, 1860 (c. 93), s. 29, has not been impliedly repealed by Local Government Act, 1894 (c. 73), s. 17 (8), & the justices had jurisdiction to hear & consider the evidence, & while giving due weight to the directions contained in the order of the county council, to make such order as, having regard to the evidence, they thought proper in the circumstances.—*FOX v. PETT*, [1918] 2 K. B. 196; 87 L. J. K. B. 929; 119 L. T. 187; 82 J. P. 252; 16 L. G. R. 671, D. C.

3587. Receipts for payments in lieu of tithes—Defendant of same name as ancestor.—(1) An old receipt of a former rector, in the hands of a deft. for a money payment in lieu of tithes, where there was a probability that it had come to him from an ancestor of the same name, is admissible evidence to support a modus.

(2) A valuation of tithes, made by a surveyor at the instance of the rector, with reference to certain money payments reputed to have been always made in lieu of such tithes, not evidence to fix the rector with an acknowledgment of such money payments unless it be distinctly proved that the surveyor was expressly required by the rector to make the valuation with reference to such payments.

(3) Reasonable evidence of proper custody is all that can be required (*THOMSON, C.B.*).—*BERTIE v. BEAUMONT* (1816), 2 Price, 303; 145 E. R. 105.

Annotations:—*As to* (1) *Refd.* *Meath (Bp.) v. Winchester* (1836), 10 Bll. 330. *Generally*, *Mentd.* *Layng v. Yarrowburgh* (1817), 4 Price, 383; *Davies v. Moseley* (1824), M'Cle. 143.

3588. — Defendant being successor in title.—Ancient receipts of a payment as a modus for hay, accompanied by rector's books, in which were contained entries of receipts for hay of persons, who, from deft.'s title-deeds, appeared to have been the then owners of the estate, considered good evidence of the payment of a farm modus.—*BRAZIER v. MYTTON* (1825), M'Cle. & Yo. 613; 148 E. R. 557, Ex. Ch.

3589. — Solicitor of purchaser of tithe.—*FOSTER v. PLUMBERS' CO.* (1900), 44 Sol. Jo. 211.

3590. List of tithes—Parishioner.—*MADDISON v. NUTTALL*, No. 3650, *post*.

3591. Sequestrator's accounts — Bishop's

Pltf. claimed from the patentee under a deed executed in 1843. Deft. relied on a former deed executed in 1813 by the patentee, a married woman, on which was indorsed a certificate of her separate examination. This deed was

produced by the son of the exor. of the grantee of the patentee, & proved to have been found among testator's papers:—*Held*: (1) a proper custody in point of law, so as to render its mere production evidence; (2) the

deed under which pltf. claimed, rather than the ancient deed, carried with it the imputation of fraud, & the production & proof of it did not necessitate the calling of the subscribing witness to the old deed if living, or proving their

registry.—The bishop's registry is the proper place of custody for the sequestrator's receipts, accounts, etc., with reference to their admissibility as legal evidence in questions of disputed right to tithes.—*PULLEY v. HILTON* (1823), 12 Price, 625; 147 E. R. 829.

3592. Letter of head of family—With title deeds at family seat.—*BERE v. WARD* (1821), 2 Phillpotts & Arnold on Evidence, 10th ed., p. 246, n., N. P.

Annotations.—**Apprvd. & Fold.** Doe d. Thomas v. Beynon (1840), 12 Ad. & El. 431. **Mentd.** Johnson v. Lawson (1824), 2 Bing. 86; *Re Manchester Gas Act, Ex p. Hasell* (1839), 3 Y. & C. Ex. 617; *Ramsbotham v. Senior* (1869), L. R. 8 Eq. 575; *Re Holmes, Re Electric Power Co.* (1877), 25 W. R. 603; *Rakusen v. Ellis, Munday & Clarke*, [1912] 1 Ch. 831.

3593. Letters to deceased mother—Custody of daughter.—*DOE d. THOMAS v. BEYNON*, No. 3570, *ante*.

3594. Document of grandfather—Custody of grandson—Documents received indirectly.—An account book of a former vicar produced by a witness who deposed that he had received it from his aunt, who resided with his father, who was the son of the vicar; & that he had frequently seen the book in his aunt's possession, & had heard her say it belonged to his grandfather:—*Held*: it was not admissible evidence.—*THOMPSON v. PERRYMAN* (1832), 1 You. 598; 159 E. R. 1130. *Annotation*.—**Mentd.** Barnes v. Stuart (1834), 1 Y. & C. Ex. 119.

3595. ———.—*GARRETT v. LISTER* (1661), 1 Lev. 25; 83 E. R. 279.

Annotation.—**Mentd.** Cox v. Allingham (1822), Jac. 514.

3596. Documents of father—Custody of son.—*DOE d. NEALE v. SAMPLES*, No. 3641, *post*.

3597. Family Bible—Custody of descendant of family.—*HUBBARD v. LEES & PURDEN*, No. 3731, *post*.

3598. Expired lease—Lessee.—*R. v. NORTH BEDBURN (INHABITANTS)* (1781), Cald. Mag. Cas. 452.

Annotations.—**Refd.** Hall v. Ball (1841), 3 Scott, N. R. 577. **Mentd.** R. v. Minworth (1802), 2 East, 198.

3599. ———.—*In trespass*, where the question is as to the right to the possession of a certain close, the party who has demised it to deft. is a competent witness for him.

W. occupied land under W., who was lessee of it, & paid the rent reserved by the lease. Upon the expiration of the term, W. obtained the lease from J., who claimed no interest in it, & delivered it to W., from whose custody it was produced at the trial:—*Held*: sufficient.—*REES v. WALTERS* (1838), 3 M. & W. 527; 150 E. R. 1254; *sub nom.* REECE v. WALTERS, 1 Horn & H. 110; 7 L. J. Ex. 138; 2 Jur. 378.

Annotation.—**Refd.** Doe d. Shrewsbury v. Keeling (1848), 11 Q. B. 884.

3600. ———.—*WAKEMAN v. WEST*, No. 3583, *ante*.

3601. — Lessor.—The muniment chest of the lessor & his assigns is the proper custody for an expired term.—*PLAXTON v. DARE* (1829), 10 B. & C. 17; 5 Man. & Ry. K. B. 1; 8 L. J. O. S. K. B. 98; 109 E. R. 357.

Annotations.—**Expld.** Hall v. Ball (1841), 3 Man. & G. 242. **Fold.** Doe d. Shrewsbury v. Keeling (1848), 11 Q. B. 884. **Mentd.** Mercer v. Denno (1905), 74 L. J. Ch. 723.

3602. ———.—*HALL v. BALL*, No. 1847, *ante*.

3603. — Solicitor of lessors.—A deed more than thirty years old, creating a term to attend

the inheritance, was produced from the custody of plff.'s attorney. Plff. was administrator to the trustee of the term. There was evidence that the attorney had acted for the family of defts., who were beneficially interested in the premises to which the deed related, & it was not shown for whom the attorney held the deeds:—*Held*: there was sufficient *prima facie* evidence of proper custody.—*DOE d. JACOBS v. PHILLIPS* (1845), 8 Q. B. 158; 15 L. J. Q. B. 47; 10 Jur. 34; 115 E. R. 835; *previous proceedings* (1844), 4 L. T. O. S. 132A.

Annotations.—**Fold.** Johnson v. Tyrrell (1860), 2 L. T. 429. **Refd.** Doe d. Shrewsbury v. Keeling (1848), 11 Q. B. 884.

3604. — Land agent of lessor.—*DOE d. SHREWSBURY (EARL) v. KEELING*, No. 3573, *ante*.

3605. Conveyance relating to land—Some one connected with estate.—Ancient grants are not to be received in evidence, unless they can be accounted for, as coming from the hands of some one connected with the estate to which they relate.—*SWINNERTON v. STAFFORD (MARQUIS)* (1810), 3 Taunt. 91; 128 E. R. 37; *subsequent proceedings*, 3 Taunt. 232.

Annotations.—**Consd.** Bidder v. Bridges (No. 2) (1885), 34 W. R. 514. **Refd.** Meath (Bp.) v. Winchester (1836), 2 N. C. 183. **Mentd.** Steel v. Foster (1837), 6 L. J. C. P. 265.

3606. — Owner of land.—(1) Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage, whether perfect or not, are good evidence *quantum valent* of their subject-matter; although such entries be mixed with extraneous memoranda, & the book be not confined or appropriated to subjects *eiusdem generis*. Being admitted, they may be read throughout, for the purpose of proving anything which is material to the issue, provided it is relevant, although it go to affect third persons who were not privy to it, & could have had no cognisance of the matters to which it relates.

(2) Such a book held to have been found in the proper custody to make it evidence, where it is in the possession of an owner who is so far connected with the abbey as to be possessed of some part of the former estates of the monastery; although no part of such estate be situated in the parish in which the question between the parties to the suit arises.

(3) Inquisition on writ *ad quod damnum*, in the 37th Edward III. . . . was admitted as evidence that at that time the reputation was that the value of so many acres of land was so much in that district (LORD REDESDALE).

(4) Admitting that the Taxation & Survey are admissible in evidence, still they are very distinguishable from the document in question. They are public acts of state, made under authority & known to all men (WOOD, B.).

(5) The entries had been properly received in evidence, the custody being proper, the entries being authentic copies of instruments of which the originals would have been good evidence.—*BULLEN v. MICHEL* (1816), 4 Dow, 297; 3 Rag. & Y. 757; 2 Price, 399; 3 E. R. 1171, H. L.

Annotations.—*As to* (1) **Refd.** Short v. Lee (1821), 2 Jac. & W. 464; Tucker v. Wilkins (1831), 4 Sim. 241; Knight v. Waterford (1841), 4 Y. & C. Ex. 283; Doe d. Kinglake v. Beviss (1849), 7 C. B. 456. *As to* (2) **Refd.** Meath (Bp.) v. Winchester (1836), 3 Bing. N. C. 183; R. v. Mytton (1860), 2 E. & E. 557. *As to* (4) **Refd.** Knight v. Waterford (1841), 4 Y. & C. Ex. 283. *As to* (5) **Refd.** Meath (Bp.)

signatures if dead.—*ORSER v. VERNON* (1864), 14 C. P. 573.—**CAN.**

n. — Executed under power of attorney.—The production of a deed thirty years old, purporting to be

executed under a power of attorney does not prove the power. In this case the only proof of authority was the production of a paper professing to be a copy of an unsealed power of attorney, dated in 1824, & received by

plff.'s attorney from the son of the person appointed by it, since dead:—*Held*: clearly insufficient.—*JONES v. McMULLEN* (1866), 25 U. C. R. 542.—**CAN.**

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v. Winchester (1836), 3 Bing. N. C. 183; R. v. Mytton (1860), 2 E. & E. 557. *Generally, Mentd.* White v. Lisle (1820), 3 Swan. 342; Wolley v. Brownhill (1824), M'Cle. 317; Barnes v. Stuart (1835), 1 Y. & C. Ex. 119; Raine v. Cairns (1841), 4 Hare, 327; Waters v. Waters (1848), 2 De G. & Sm. 591.

3607. — Steward of estate.]—ROE d. TRIMLESTOWN (LORD) v. KEMMIS, No. 2892, *ante*.

3608. — Solicitor of defendant.]—JOHNSON v. TYRRELL, No. 3566, *ante*.

3609. Rating agreement.—Relating to particular estate—Title deeds of estate.]—Under a rate for the relief of the poor of the parish of T., made on May 3, 1858, applt. was assessed as occupier of an estate in that parish called N. From the year 1698 down to the time the rate was made, N. had maintained its own poor, & had never been charged with the support of the poor of any other place. On Apr. 1, 1858, P., the owner of a large estate in the parish of T., found, among the title deeds of that estate in his possession, an agreement dated Jan. 12, 1698, purporting to be made between the then owner of N. of the one part, & six persons therein named & described as of T., as well on behalf of themselves as of all the rest of the inhabitants of T., of the other. On an appeal against the assessment, on the ground that N. was not in the parish of T.:—*Held*: (1) this agreement was admissible in evidence, as being an ancient document relating to the interest of all the estates in T., & which might naturally & reasonably be expected to be found among the title deeds of a large estate in T., & so, came from the proper custody; (2) it was decisive evidence to show that N. was a part of T. parish, & how N. came to maintain its own poor; & was also evidence of reputation as to the extent of the parish, being a declaration by the deceased owner of N. & the other inhabitants of T. to that effect.—R. v. MYTTON (1860), 2 E. & E. 557; 121 E. R. 209; *sub nom.* MYTTON v. THORNBURY (CHURCHWARDENS & OVERSEERS), 29 L. J. M. C. 109; 2 L. T. 12; 24 J. P. 180; 6 Jur. N. S. 311; 8 W. R. 275.

3610. Bond—Deceased obligee—Public company.]—CHIESEA WATER-WORKS (GOVERNOR & Co.) v. COWPER, No. 3559, *ante*.

3611. Ordination letters of archbishop—Widow of clergyman.]—Where the question was, whether a deceased person who had celebrated a marriage was a clergyman, authorised to celebrate it; papers appearing to be letters of the archbishop, ordaining him, & dated more than thirty years before, produced from among his papers by his widow:—*Held*: to be admissible in evidence, without proof that the seal they bore was the seal of the archbishop.—R. v. BATHWICK (INHABITANTS) (1831), 2 B. & Ad. 630; 3 Bott. 6th ed. 138; 9 L. J. O. S. M. C. 103; 109 E. R. 1280.

Annotations:—Mentd. R. v. Mills (1844), 10 Cl. & Fin. 534; Stapleton v. Crofts (1852), 18 Q. B. 367.

3612. Account books—Corporation documents.]—(1) A book in the handwriting of A. purporting to contain account of tithes collected by him seventy years ago, cannot be received in evidence, without proof that A. was collector of tithes at that time.

(2) In a suit for tithes by the lessee of an ecclesiastical corpn. aggregate, to whom the rectory belonged, ancient documents in their possession, purporting to be accounts furnished by some of their members employed to collect the tithes, & appearing to be approved and settled are admissible in evidence.

(3) The statutes of the body enjoining the appointment of collectors, together with the internal evidence of the documents, & their coming out of the proper custody, held sufficient proof that the accounting parties were really collectors.—SHORT v. LEE (1821), 2 Jac. & W. 461; 37 E. R. 705.

Annotations:—As to (2) Refd. Gladow v. Atkin (1833), 1 Cr. & M. 410; Orrett v. Corser, Corser v. Orrett (1855), 21 Beav. 52; Ward v. Pitt, [1913] 2 K. B. 130. *Generally, Mentd.* Holwell v. Blake (1824), M'Cle. 559; Fisher v. Graves (1825), M'Cle. & Yo. 362; Tomlinson v. Lymer (1831), 4 Sim. 467.

3613. Tithe collector—Personal representative.]—In a suit for tithes by an ecclesiastical rector against the occupiers, a terrier signed by the vicar, churchwardens & inhabitants, & which was tendered by defts., was rejected. Old accounts found in the custody of the personal representative of a deceased tithe collector of a former rector, were received, although there was no evidence to show by whom they were made out.

His [the Rector's] signature ought not to be dispensed with (SHADWELL, V.-C.).—HARCOURT v. PETERSON (1832), 5 Sim. 368; 58 E. R. 374

3614. — Relating to estate—Muniments of owner.]—In order to prove the title of a lessor of pltf. in ejectment, a book headed "Account of J. V., sen., receiver of the rents of the Earl of A.," was produced from a proper custody. The book contained for several years up to 1795 successive entries of balances due to J. V., sen., at the foot of which was, in a different handwriting & signed by Lord A. & J. V., jun., a reference to a general statement of account in 1795. The entry in 1795 was as follows: "Balance to J. V., sen., £76 19s. 7d. Feb. 18, 1795. The above account was this day settled and the balance £76 19s. 7d. due thereon to J. V., sen., was paid by the Earl of A. to the undersigned J. V., jun., & the vouchers delivered up. A.—J. V., jun." No evidence was given of J. V., jun.'s death or handwriting, or of his ever having been a receiver:—*Held*: these entries were admissible in evidence as being made by a person accounting with Lord A. for money which he acknowledges to have received.—DOE d. ASHBURNHAM (LORD) v. MICHAEL (1851), 17 Q. B. 276; 20 L. J. Q. B. 480; 17 L. T. O. S. 151; 15 Jur. 677; 117 E. R. 1286.

3615. Advowson documents—Among bishop's private papers.]—A case touching the right of presentation to a living by the bishop of M. stated for the opinion of counsel, by a bishop of M. in 1695, & found in the family mansion of the D.'s, descendants of that bishop:—*Held*: evidence against a subsequent bishop of the same see on a question touching the right of presentation to the same living.

These documents were found in a place in which & under the care of persons with whom papers of Bishop D. might naturally & reasonably be expected to be found; & that is precisely the custody which gives authenticity to documents found within it; for it is not necessary that they should be found in the best & most proper place of deposit. If documents continue in such custody there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit that the investigation commences, whether it was reasonable & natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious that whilst there can be only one place of deposit strictly & absolutely proper, there may be various, & many that are

reasonable & probable, though differing in degree, some being more so, some less; & in those cases the proposition to be determined is, whether the actual custody is so reasonably & probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine (TINDAL, C.J.).—**MEATH (Bp.) v. WINCHESTER (MARQUESS)** (1836), 4 Cl. & Fin. 445; 3 Bing. N. C. 183; 10 Bli. N. S. 330; 3 Scott, 561; 7 E. R. 171, H. L.

Annotations:—**Refd.** Wright d. Tatham v. Doe (1837), 7 Ad. & El. 313; Doe d. Neale v. Samples (1838), 8 Ad. & El. 151; Croughton v. Blake (1843), 12 M. & W. 205; Doe d. Jacobs v. Phillips (1845), 8 Q. B. 158; R. v. Kenilworth (1845), 7 Q. B. 642; Doe d. Shrewsbury & Allen v. Keeling (1848), 17 L. J. Q. B. 199; Potez v. Glossop (1848), 2 Exch. 191; Carr v. Mostyn (1850), 19 L. J. Ex. 249; Doe d. Arundel v. Fowler (1850), 14 Q. B. 700; Doe d. Gutteridge v. Sowerby (1860), 7 C. B. N. S. 599; R. v. Mytton (1860), 2 E. & E. 557; Calcraft v. Guest (1898), 78 L. T. 283. **Mentd.** Sturgeon v. Wingfield (1846), 15 M. & W. 224; Cooke v. Blake (1847), 1 Exch. 220; Vigers v. St. Paul's (1849), 14 Jur. 1017; Parry v. Thomas (1850), 5 Exch. 37; R. v. St. Mary, Islington Overseers (1852), 16 J. P. 760; Carlisle v. Whaley (1867) L. R. 2 H. L. 391.

3616. Case for opinion of counsel—Papers of descendant—Of person submitting case.]—MEATH (Bp.) v. WINCHESTER (MARQUESS), No. 3615, *ante*.

3617. Marriage settlement of mortgagor—Among mortgagor's papers.]—DOE d. NEALE v. SAMPLES, No. 3641, *post*.

3618. Documents of corporation—Chest kept by clerk.]—The chest of a co., kept by the clerk of the co., is proper custody for old documents relating to the co. But the private house of a deceased clerk of the co. is not proper custody for a convention *temp.* Edward IV. between the Prince of Wales & the co.—**SHREWSBURY (WARDEN, ETC. OF MERCERS, ETC.) v. HART** (1823), 1 C. & P. 113, C. P.

3619. — Not private residence of clerk.]—SHREWSBURY (WARDEN, ETC. OF MERCERS, ETC.) v. HART, No. 3618, *ante*.

—**J—Sec, further, CORPORATIONS**, Vol. XII., p. 318, Nos. 861–868.

3620. Will—Beneficiary.]—A will was thirty years old from the date of execution, & came from the custody of the person in whose favour it was executed:—**Held**: this was sufficient evidence of the fact of due execution.—**ORANGE v. PICKFORD** (1858), as reported in 27 L. J. Ch. 808; 4 Jur. N. S. 649; 6 W. R. 738.

Annotation:—**Mentd.** Taylor v. Meads (1865), 34 L. J. Ch. 203.

3621. — — —.]—A will, about seventy years old, executed under seal, & published & attested as a sealed instrument, was proved to have been in the keeping of the person entitled under it as tenant for life, & he was shown to have treated it as his title deed, & shortly before his death, to have desired to read it over in order to see whether he was empowered by it to dispose of the property by his will:—**Held**: it was properly received in evidence, as a document coming from a custody where it might reasonably be expected to be found—notwithstanding its appearance was calculated to lead to a suspicion which, however, the jury negatived, that it had been cancelled by testator after its execution.—**ANDREW v. MOTLEY** (1862), 12 C. B. N. S. 526; 32 L. J. C. P. 128; 142 E. R. 1248.

3622. Minute book—Society's documents.]—LAUDERDALE PEERAGE, No. 3148, *ante*.

Court Rolls—Lord of manor—Or steward.]—

See COPYHOLDS, Vol. XIII., pp. 37, 39, 40, Nos. 392–404, 448–450, 463, 461.

iii. By Particular Persons.

See Sub-sect. 1, A. (b) ii., *ante*.

iv. What Places constitute Proper Custody.

3623. British Museum—Ancient grants.]—SWINNERTON v. STAFFORD (MARQUIS) (1810), 3 Taunt. 91; 128 E. R. 37; *subsequent proceedings*, 3 Taunt. 232.

Annotations:—**Consd.** Bidder v. Bridges (No. 2) (1885), 34 W. R. 514. **Refd.** Meath (Bp.) v. Winchester (1836), 3 Bing. N. C. 183. **Mentd.** Steel v. Foster (1837), 6 L. J. C. P. 265.

3624. — Private maps.]—(1) In an action to establish commonable rights over a piece of land on behalf of all the proprietors & occupiers of lands or tenements in a certain parish, the chief questions raised by the evidence were: whether the land in question was within the parish; & if so, whether plffs. had any right to maintain the action. The Ordnance map, & several other maps, some of which had been kept in the British Museum, were tendered in evidence for the purpose of showing the position of the boundaries of the parish:—**Held**: the maps were not admissible in evidence.

(2) Plffs. founded their claim upon an action of novel disseisin brought in 23 Hen. 3, the records in which were missing. It was submitted that the proceedings could be proved by (a) a notebook in the British Museum containing a note of the case, which was submitted as being a copy of the record; (b) a document forming part of the Cottonian MSS. in the British Museum, purporting to be a register of a priory interested in the action, containing an account of the action; and (c) a note of the action in an entry in the church-book of a parish, the parson of which was a deft. in the action, made four hundred & thirty-eight years after the date of the action:—**Held**: (a) & (b) were not admissible, but that (c) was receivable in evidence *quantum valuit*, as an entry of an historical fact in which the parish was interested, it being probably taken from the record which might then have been in existence.—**BIDDER v. BRIDGES** (1885), 51 L. T. 529; 31 W. R. 514; 2 T. L. R. 6.

3625. — Case notes temp. Henry III.]—BIDDER v. BRIDGES, No. 3624, *ante*.

3626. — Notes of action—Part of MSS. collection.]—BIDDER v. BRIDGES, No. 3624, *ante*.

3627. Bodleian Library Oxford—Ancient grants.]—MICHELL v. RABBETTS (1810), cited in 3 Taunt. at p. 91; 128 E. R. 37.

Annotations:—**Apld.** Swinnerton v. Stafford (1810), 3 Taunt. 91. **Refd.** Meath (Bp.) v. Winchester (1836), 3 Bing. N. C. 183. **Mentd.** Prevost v. Bonett (1815), 1 Price, 236; Bearblock v. Tyler (1820), 1 Jac. & W. 225; Day v. Drake (1825), 3 Sim. 64.

3628. — Rules & regulations of mining company.]—Documents from the Bodleian Library & Rolls Chapel, are not admissible as evidence for the purpose of proving the existence of certain insulated facts.—**BANK OF ENGLAND v. ANDERSON** (1837), 3 Bing. N. C. 589; 2 Hodg. 294; 4 Scott, 50; 6 L. J. C. P. 158; 1 Jur. 9, 12; 132 E. R. 538.

Annotations:—**Mentd.** Booth v. Bank of England (1840), 6 Bing. N. C. 415; Macle v. Sutherland (1854), 3 E. & B. 1; Lucas v. Roberts (1855), 3 C. L. R. 987.

3629. Rolls chapel—Deed of partnership of

(1857), 6 C. P. 208.—**CAN.**

p. Family mansion.]—MEATH (Bp.) v. WINCHESTER (MARQUIS) (1833), Alc. & N. 508.—**IR.**

PART IV. SECT. 13, SUB-SECT. 1.—

A. (b) iv.

c. Registry office.]—Memorials of

registered deeds are secondary evidence only, if produced & proved, or if thirty years old without proof, coming from the registry office.—**MARVIN v. HALES**

Sect. 13.—Private documents: Sub-sect. 1, A. (b)

bank.]—*BANK OF ENGLAND v. ANDERSON*, No. 3628, *ante*.

Herald Office.]—See Sect. 12, sub-sect. 5,

v. Proof of Proper Custody.

3630. No general rule—Each case judged by particular circumstances.]—*DOE d. ARUNDEL (LORD) v. FOWLER*, No. 3343, *ante*.

3631. Necessity for.]—*R. v. NETHERTHONG (INHABITANTS)*, No. 3582, *ante*.

3632. —.]—A document produced by a party as evidence in his behalf must be accompanied by proof of the custody when he derived it, to satisfy the ct. of its authenticity; & if no such proof is given, his own possession not being sufficient, it will not be permitted to be read, for want of its being shown to have come from such proper custody as would make it evidence.—*RANDOLPH v. GORDON* (1818), 5 Price, 312; *Dan.* 88; 146 E. R. 618.

3633. —.]—Where an ancient manor book is offered in evidence the custody must be proved by a sworn witness. It is not enough that the book is produced in ct. by the counsel or steward of the lord of the manor, nor, as it seems, by the lord of the manor in person.—*EVANS v. REES* (1839), 10 Ad. & El. 151; 2 Per. & Dav. 626; 113 E. R. 58.

*Annotations:—*Refd. *Andrew v. Motley* (1862), 12 G. B. N. S. 514. *Mentd.* *Wenman v. Mackenzie* (1855), 5 E. & B. 447.

3634. Sufficiency of—Strictly proper custody not essential.]—*POTTS v. DURANT*, No. 3575, *ante*.

3635. —.]—*MEATH (BP.) v. WINCHESTER (MARQUESS)*, No. 3615, *ante*.

3636. —.]—*DOE d. NEALE v. SAMPLES*, No. 3641 *post*.

3637. —.]—*CROUGHTON v. BLAKE*, No. 3248, *ante*.

3638. —.]—*DOE d. JACOBS v. PHILLIPS*, No. 3603, *ante*.

3639. — Reasonable evidence.]—*BERTIE v. BEAUMONT*, No. 3587, *ante*.

3640. — Statement by plaintiff's attorney—Consent of other party to admission.]—A will fifty years old was produced by plff.'s attorney, who stated that he received it from B., & that when this very cause was before an arbitrator, deft.'s attorney, in the presence of deft., consented to this will being admitted in evidence, it being then produced by B.:—*Held*: this was such evidence of proper custody as would allow the will to be read as evidence for plff.—*DOE d. BOWDLER v. OWEN* (1839), 8 C. & P. 751.

3641. — No suspicion of fraudulent possession.]—(1) Where a mtgee. proved his title under a

conveyance in fee in 1821, a prior deed, above thirty years old, by which the estate in question was settled by mtgor. on himself for life, remainder to his son, found among the papers of mtgor. after his death, is admissible in evidence without proof of execution.

(2) The rule as to the proof of custody which entitled ancient deeds to be so read, is satisfied by proof of their coming out of the possession of any one so connected with them as not to raise any suspicion of fraud.—*DOE d. NEALE v. SAMPLES* (1838), 8 Ad. & El. 151; 3 Nev. & P. K. B. 254; 1 Will. Woll. & H. 228; 7 L. J. Q. B. 140; 2 Jur. 841; 112 E. R. 794.

*Annotation:—*As to (2) *Refd.* *Parker v. Carter* (1845), 4 Hare, 400.

3642. — No evidence of history prior to possession.]—*SLATER v. HODGSON*, No. 3341, *ante*.

3643. — Will be liberally constructed.]—*DOE d. SHREWSBURY (EARL) v. KEELING*, No. 3573, *ante*.

3644. — Document in wrong custody—Admissibility of explanation thereof.]—*DOE d. ARUNDEL (LORD) v. FOWLER*, No. 3343, *ante*.

B. For What Purposes Admitted.**(a) In General.**

3645. Pedigree—Map of pedigree—From Herald's Office.]—*KING v. FOSTER* (1682), T. Jo. 224; 84 E. R. 1228.

3646. Right to tithes—Receipt for payment—Modus in lieu of tithes.]—*MANBY v. CURTIS*, No. 3550, *ante*.

3647. —.]—*ATKINS & HURST v. DRAKE*, No. 3247, *ante*.

3648. — Abstract of endowment of vicarage.]

—The book of extracts of endowments *temp.* Archbishop Wells, received in evidence.—*HERDEN v. FREEMAN* (1810), 4 Price, 420; 146 E. R. 509.

*Annotation:—*Refd. *Leonard v. Franklyn* (1817), *Dan.* 34.

3649. —.]—The abstract of an endowment of the vicarage of N. in the diocese of L., contained in an ancient book in the registry of that diocese called Bishop Wells's collection, was received as evidence in a suit by the vicar for small tithes, though the book was without date, & it did not appear by whom or for what purpose it was compiled.—*LEONARD v. FRANKLIN* (1817), 4 Price, 264; *Dan.* 34; *Wils. Ex.* 128; 146 E. R. 459, *Ex. Ch.*

*Annotation:—*Refd. *Tucker v. Wilkins* (1831), 4 Sim. 241.

3650. — Statement by the rector—Admissible against succeeding rector.]—An ancient statement concerning the payment of the tithes of a parish by a modus, signed by the rector for the time being, is evidence against a succeeding rector as an admission by his predecessor, although found

PART IV. SECT. 13, SUB-SECT. 1.—A. (b) v.

3631 i. Necessity for.]—A document thirty years old does not prove itself, in the absence of evidence, that it has come from the proper custody.—*GURU DAS DEV v. SAMBHU NATH TY* (1869), 3 B. L. R. A. C. 258.—**IND.**

a. Sufficiency of—Without proof of execution.]—Where a document of date 1831, purporting to have been executed by father & son, was produced from the custody of a grandson of the former, & as having been kept with title papers in a box formerly in the custody of the grandson's brother, & now in the grandson's custody, & where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, & as having been kept by him with other papers

in a chest now in the nephew's custody:—*Held*: both documents were admissible in evidence without proof of execution.—*PATTERSON v. PATTERSON* (1905), 25 C. L. T. 91; 3 N. B. Eq. Rep. 106.—**CAN.**

f. — Proof by interrogatory.]—Plff.'s title being evidenced by an instrument more than thirty years old, & plff. having produced it at the hearing, & also a witness who was examined *vis à vis* to it as an ancient deed, but who failed in making the necessary proofs as from what custody it came, the decree was made with a preliminary direction that plff. should be at liberty to exhibit interrogatories to prove the deed before the master.—*LAWRENCE v. SHARPE* (1828), 1 Mol. 252.—**IR.**

g. — Foundation deed of charity—In custody of governor.]—An extract of the foundation deed of a

charity, purporting to be signed by the founder, which had been hung up in the board-room of the charity for many years, & on its cessation was given into the care of one of the governors & secretary of the charity, was admitted as evidence of its trusts.—*Re HOSPITAL FOR INCURABLES* (1884), 13 L. R. Ir. 361.—**IR.**

t. In court records—Necessity for regular filing.]—No legal presumption can arise as to the genuineness of document more than thirty years old, merely upon proof that it was produced from the records of a ct. in which it had been filed at some time previous. It must be shown that the document had been so filed in order to the adjudication of some question of which that ct. had cognisance, & which had come under the cognisance of such ct.—*GUDADHER PAUL CHOWDHRY v. BHURBU CHUNDER BHUTTACHARJI* (1880), 1 L. R. 5 Calc. 918.—**IND.**

among the title deeds of a landowner in the parish & not in the bishop's registry.—**MADDISON v. NUTTALL** (1829), 6 Bing. 226; 3 Moo. & P. 544; 8 L. J. O. S. C. P. 27; 130 E. R. 1266.

3651. — **Decree in former suit.**—**CROUGHTON v. BLAKE**, No. 3248, *ante*.

3652. **Endowment of vicarage—Entries in Abbey books—Admissible quantum valeant—Extraneous matter contained in entry.**—**BULLEN v. MICHEL**, No. 3606, *ante*.

3653. **Reputation as to value of land—Old leases.**—**BULLEN v. MICHEL**, No. 3606, *ante*.

3654. **Character of office—Antiquity—Method of devolution—Ancient grant.**—An ancient grant may be given in evidence to show that an office was ancient & grantable in reversion.—**YOUNG v. STOBELL** (1632), Cro. Car. 279; 79 E. R. 844; *sub nom.* **YONGE v. STOWELL**, W. Jo. 310.

Annotations :—**Mentd.** **Hidley v. Pownell** (1675), Freem. K. B. 394; **R. v. Kempe** (1694), 1 Ld. Raym. 49; **Kiddleston v. Collins** (1832), 10 Haro. 99; **R. v. Wako** (1857), 4 Jur. N. S. 68.

3655. **Tenure of office—Collector of tithes—Account book.**—**SHORT v. LEE**, No. 3612, *ante*.

3656. — **Statutes of corporation—Enjoining appointment of collector.**—**SHORT v. LEE**, No. 3612, *ante*.

3657. — **Whether more than one holder—Churchwarden.**—Where a parish certificate was granted by two persons, who described themselves on the face of it to be, "the only churchwarden & the only overseer of the poor of the parish":—**Held**: after a lapse of sixty-three years, in the absence of evidence to the contrary, the ct. would intend that the parish had by custom but one churchwarden.—**R. v. CATESBY (INHABITANTS)** (1824), 2 B. & C. 814; 4 Dow. & Ry. K. B. 434; 2 Dow. & Ry. M. C. 278; 107 E. R. 585.

Annotations :—**Folld.** **R. v. Earl Shilton** (1825), 6 Dow. & Ry. K. B. 104. **Consd.** **It. v. Upton Gray** (1830), 10 B. & C. 807. **Mentd.** **R. v. Hewett** (1828), 7 L. J. O. S. M. C. 3; **R. v. Fenton** (1841), 1 Gal. & Dav. 17.

3658. — **Overseer.**—Where a parish certificate, thirty-five years old, was granted by two persons who described themselves on the face of it to be "the major part of the churchwarden & overseer" & there was evidence on one side, that both before & ever since the certificate was granted, but one overseer had acted in the parish, & on the other that in two instances, at least, two overseers had been appointed, though only one had acted:—**Held**: the sessions might reasonably intend, as a question of fact, that there had never been more than one overseer appointed & consequently the certificate was valid.—**R. v. EARL SHILTON (INHABITANTS)** (1825), 6 Dow. & Ry. K. B. 105; 2 Dow. & Ry. M. C. 525.

3659. — **Surveyor of highways—Entries in parish book.**—**R. v. PEMBRIDGE (INHABITANTS)**, No. 1804, *ante*.

3660. **Right to tolls—Entry in corporation book.**—**BRETT v. BEALES**, No. 3531, *ante*.

3661. **Knowledge of particular facts—Regarding certain family—Letters.**—**DOE d. THOMAS v. BEYNON**, No. 3570, *ante*.

3662. **Payment of rent—Entries in account book.**—**DOE d. ASHBURNHAM (LORD) v. MICHAEL**, No. 3614, *ante*.

3663. **Method of poor relief—Employed by parish—Rating agreement.**—**R. v. MYTTON**, No. 3609, *ante*.

3664. **Commission of certain acts—As stated in the document—Memorandum in church register.**—**LAUDERDALE PEERAGE**, No. 3448, *ante*.

Parish books & register.—*See* Sect. 12, subsect. 19, A., *ante*.

Boundaries.—*See* BOUNDARIES, Vol. VII., pp. 319–321, Nos. 391–412.

— **Extent of manor.**—*See* COPYHOLDS, Vol. XIII., pp. 11, 12, Nos. 21–33.

Court rolls.—*See* COPYHOLDS, Vol. XIII., pp. 39, 40, Nos. 451–462.

Corporation books.—*See* CORPORATIONS, Vol. XIII., pp. 348, 349, Nos. 869–874.

Objects of charitable trusts.—*See* CHARITIES, Vol. VIII., pp. 304, 305, Nos. 835–838.

(b) Title to Land.

3665. **Old rent rolls—Grant of fee farm rents.**—Old rent rolls admitted as evidence to prove fee-farm rents; there having been an unity of possession for above thirty years, & being so ancient it could not be imagined they were fabricated to serve the present purpose. But an inquisition *post mortem* is not evidence, unless it is proved that a commission was ever issued to warrant it.—**NEWBURGH v. NEWBURGH** (1712), 3 Bro. Parl. Cas. 553; 1 E. R. 1491.

3666. **Pedigree—Recited in deed of conveyance—Necessity for corroborative evidence.**—A conveyance to a purchaser in 1793, from persons residing in Bermuda, of lands then in their possession, & to which, subject to an outstanding but satisfied mtge. term, they claimed title under an entail created in 1732, through a descent recited in the deeds, a subsequent assignment of the mtge. term from the mtgee. to the purchaser, & uninterrupted enjoyment under his conveyance, will not enable him to make a good title; if unsupported by extrinsic evidence of the pedigree recited in the deeds, or of possession, prior to 1793, conformable to that pedigree.—**PORT v. CLARKE** (1826), 1 Russ. 601; 38 E. R. 231.

3667. **Lease—Counterpart—Against third party not claiming under lease.**—The counterpart of an old lease, purporting to be executed by the tenant, & produced from the muniment room of the estate, is admissible to prove seisin in the grantor of the lease, in ejectment against a third person not privy to or claiming under the lease.—**DOE d. EGREMONT (EARL) v. WILLIAMS** (1842), 6 Jur. 1122.

3668. — — — — — **To prove the seisin of**

PART IV. SECT. 13, SUB-SECT. 1.— B. (b).

3666 i. **Pedigree—Recited in deed of conveyance—Necessity for corroborative evidence.**—**McK.**, having an order in council for 100 acres, executed in Feb. 1827, to S., a bond for a deed. The petition for a location & the bond were executed by mark, & in the bond the obligor was described as of Y., labourer. In May, the patent issued to McK., & was in the possession of S. shortly after its date. S. went into possession in 1828, cleared about seven acres, & after three years left the land in the possession of plffs., who had the benefit of it up to within a short period of the death of S. in

1849. Plffs., claiming as heirs at law of S., filed their bill to obtain a conveyance of the land, & produced the patent. Defts., B. & C. produced a conveyance purporting to have been made by, & signed "J. McK.," now of N., yeoman, to J. D., dated Sept. 7, 1833, & a conveyance from D. to B., dated in May, 1849, both registered. No oral testimony was given of the identity of the grantor in the deed to D., with the locattee of the Crown, & evidence of its custody during the thirty years.—**Held**: the deed from McK. to D. did not come within the rule that an ancient document proves itself.—**ROGERS v. SHORTIS** (1863), 10 Gr. 243.—**CAN.**

a. — — — — — **A document, ancient & genuine, purporting to be a family pedigree, was produced in evidence in a mutation case by one J. The record was brought before the civil ct. in a suit in which plff.'s relationship to one H., the last male owner of certain property, was in question. J. stated that he had received the pedigree from his grandfather. It was not proved who had prepared the pedigree:—**Held**: it was not necessary to show who had made the statements mentioned in the pedigree & it was admissible in evidence.**—**JAJAGOH v. SHEORAJ SINGH** (1915), 1 L. R. 37 All. 600.—**IND.**

b. **Lease—Life estate.**—The lease

Grant of copyhold.]—See COPYHOLDS, Vol. XIII., p. 50, No. 589.

Easements & profits à prendre.]—See EASEMENTS, Vol. XIX., pp. 61-67, Nos. 345-387; COMMONS, Vol. XI., pp. 29, 30, Nos. 367-371.

Fishing rights.]—See FISHERIES.

Highways.]—See HIGHWAYS.

Rights of markets & fairs.]—See MARKETS.

Mines & minerals.]—See MINES.

Water rights.]—See EASEMENTS, Vol. XIX., pp. 145-162, Nos. 995-1136, & WATERS & WATER-COURSES.

SUB-SECT. 2.—ACCOUNT BOOKS.

A. Admissibility.

3679. General rule.]—MARIANSKI v. CAIRNS, No. 2881, *ante*.

3680. Shop books.]—Shop books read as an evidence at the hearing.—BOURN v. DEBEST (1639), Toth. 90; 21 E. R. 132.

3681. ——— Entries not made by clerk.]—Shop books in testator's hand, not evidence.—GLYNN v. BANK OF ENGLAND (1750), 2 Ves. Sen. 38; 28 E. R. 26, L. C.

*Annotations:—*Refd. *Gleadow v. Atkin* (1833), 1 Cr. & M. 410; *Briggs v. Wilson* (1854), 5 De G. M. & G. 12.

3682. ——— ———.]—To prove the delivery of goods in the shop of a trader, an entry made in his books, though not by the witness, under what circumstances it may be evidence.—DIGBY v. STEDMAN (1795), 1 Esp. 327, N. P.

3683. ——— ———.]—(1) Where a book was kept privately by deft., & was made up from certain slips of paper, on which the daily transactions of his business were entered, & there was no proof that these were accurately copied by him:—*Held*: the book was not admissible as evidence for deft.

(2) Books kept openly in a shop, & to which the shopmen have access, & in which entries are originally made, or even into which items are copied from other books, may be admitted as evidence, although they were written by a party to the action.—*ELLIS v. COWNE* (1849), 2 Car. & Kir. 719, N. P.

3684. Books kept by deceased party.]—On an inquiry into very remote transactions, accounts kept by a deceased party at the time, directed to

be taken as *prima facie* evidence, throwing on the other side the *onus* of impeaching them.—*CHALMER v. BRADLEY* (1819), 1 Jac. & W. 51; 37 E. R. 294. *Annotations:—*Refd. *Wedderburn v. Wedderburn* (1838), 4 My. & Cr. 41. *Mentd.* *Hearn v. Wells* (1844), 1 Coll. 323; *A. G. v. Murdoch* (1852), 1 De G. M. & G. 86; *Soar v. Ashwell*, [1893] 2 Q. B. 390.

Statements by deceased persons generally, see Part II., Sect. 5, *ante*.

3685. Book kept by collector of tithes—Necessity for proof that declarant was collector when entries made.]—SHORT v. LEE, No. 3612, *ante*.

3686. Rent book kept by steward—Of landowner through whom both parties claim.]—

(1) Entries in a rent book made by the steward of a former owner through whom both parties claim, are admissible in evidence, though the party against whom they are produced does not claim under such owner.

(2) Assessments of Comrs. of the Land Tax, by which it appears, that at a certain time property was assessed in the name of S., the family surname only, are evidence to show, in connection with other facts, that at such time the property was occupied by a particular individual of the family.—*DOE d. STRODE v. SEATON* (1831), 2 Ad. & El. 171; 4 Nev. & M. K. B. 81; 4 L. J. K. B. 13; 111 E. R. 66.

*Annotations:—*As to (2) *Refd.* *Doe d. Hopley v. Young* (1845), 15 L. J. Q. B. 9; *Johnson v. Thompson* (1850), 15 L. T. O. S. 437. *Generally, Mentd.* *Weeks v. Argent* (1847), 16 M. & W. 817; *Sutcliffe v. James* (1879), 40 L. T. 875.

3687. Books kept by clerk—Acting as agent of all parties.]—Two proprietors of a stage coach, A. & B., dissolved their partnership in Nov. During their partnership, monthly accounts were made up, on each of which a balance was struck in favour of A. These balances were never carried forward from one account to another. B. had paid A. the balance on Nov. account, which was made up to the time of the dissolution:—*Held*: the accounts kept by a clerk, who was the agent of all the parties, were receivable in evidence, without his being called as a witness.—*BUTLER v. CRIPPS* (1836), 7 C. & P. 709, N. P.

*Annotation:—**Mentd.* *Dixon v. Wing* (1843), 1 L. T. O. S. 647.

See, also, Part II., Sect. 5, sub-sect. 3, D. (b) i., *ante*.

PART IV. SECT. 13, SUB-SECT. 2.—A.

3679 i. General rule.]—Entries in books of account are not conclusive against the person making them, but may be explained.—*RAYMOND v. CUMMINGS* (1877), 1 P. & B. 544.—**CAN.**

3679 ii. ———.]—(1) When books of account are tendered in evidence, the ct. must decide for itself, on such materials as are before it, whether or not they are regularly kept. Under Evidence Ord., s. 2, such books when admitted in evidence, "shall not alone be sufficient evidence to charge any person with liability":—*Held*: the corroboration must be *aliunde* the books. The provision is derived from the Roman law, by which books of account were *semiplena probatio*, a suppletory oath of the party being necessary to complete proof.—*WAKEMAN v. LI TSZ CHU* (1910), 5 Hong Kong L. R. 190.—**HONG KONG.**

3679 iii. ———.]—(1) Account books containing entries not made by nor at the dictation of a person who had a personal knowledge of the truth of the facts stated, if regularly kept in course of business, are admissible as evidence under Evidence Act, 1872, s. 34; (2) account books, though not proved to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for

that purpose, are relevant as admissions against the firm.—*R. v. HANMANTA* (1877), 1 L. R. 1 Bom. 610.—**IND.**

3679 iv. ———.]—Though a merchant's books may, by the law of Scotland, afford a *semiplena probatio* in his own favour, yet in order to have this effect they must be regularly kept.—*IVORY & Co. v. GOURLAY* (1816), 4 Dow, 467; 3 E. R. 1230.—**SCOT.**

3680 i. Shop books.]—Plffs. who resided & carried on business in the State of M., sought to recover in this province for goods sold to deft. & for the rental of a house occupied by him in the State where he was in plff.'s employ. The evidence, with the exception of deft.'s, was taken under commission in M. & depended largely upon the verification of items in plff.'s books, by their bookkeeper, who had no independent recollection of the matters testified to, apart from the books:—*Held*: while the books themselves were not evidence, & were not tendered as such it was competent to the witness to give evidence by drawing proper & obvious conclusions from entries made by him in plff.'s books in the ordinary course of business.—*CRABTREE v. MILNE* (1921), 54 N. S. R. 521.—**CAN.**

3680 ii. ———.]—Entries in a tradesman's books are not admissible in evidence in the absence of proof that

the person who made the entries was under whose directions they were made is not available to give evidence.—*VAN VRIEN v. BOUWHILL* (1913), T. P. D. 67.—**S. AF.**

g. Agent of public company.]—The books of the agent or clerk of a public co. during his lifetime are not good evidence against his surety, when sued on for a deficiency in the agent's accounts.—*FERGIE v. JONES* (1850), 8 U. C. R. 192.—**CAN.**

h. Merchant's books.]—In an action against exors. to account:—*Held*: entries in merchants' books regularly kept & unchanged during a term of years, with an annual rendering of accounts conforming to such entries to creditors, make proof against such merchants, particularly after the death of the creditors.—*DARLING v. BROWN* (1877), 21 L. C. J. 169; 2 S. C. R. 26.—**CAN.**

k. Books of loan society.]—A loan & savings society appointed G. their treasurer, & plffs. & deft. by two separate bonds became sureties for the due discharge of the duties of such officer:—*Held*: in such case the entries of G. in the books of the society were not evidence against the sureties during the lifetime of G.—*MURRAY v. GIBSON* (1880), 28 Gr. 12.—**CAN.**

l. Books of railway company.]—Certain books of the co. containing

Sect. 13.—*Private documents: Sub-sect. 2, A. & B.]*

3688. Books kept by agent—No proof that books kept in course of employment.]—A book in the handwriting of an agent of the co., but not shown to have been kept by him in the course of his employment as agent, or to have come to the hands or knowledge of the directors until after he had ceased to be their agent, & after the alleged cause of action had arisen, was offered in evidence for the purpose of fixing them with a knowledge that the state of the concern, a mine, was other than as publicly represented by them:—*Held*: not admissible.—*SHREWSBURY v. BLOUNT* (1841), 2 Man. & G. 475; Drinkwater, 70; 2 Scott, N. R. 588; 133 E. R. 836.

See, also, Part II., Sect. 5, sub-sect. 3, D. (b) ii., *ante*.

Corporation book.]—*Sec, also*, No. 3715, *post*.

3689. Where account directed to be taken.]—The meaning of 15 & 16 Vict. c. 86, s. 54, is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the ct. may give special directions. But such directions will not be given unless it appears that the ordinary evidence cannot be had or merely to save expense.

Semble: by the ordinary rules of the ct. partnership books are admissible in evidence for & against all the partners & their estates.—*LODGE v. PRICHARD* (1853), 3 De G. M. & G. 906; 1 Sm. & G. App. VII.; 1 W. R. 211; 43 E. R. 354, L. J.J.

Annotations:—**Consd.** *Ewart v. Williams, Williams v. Ewart* (1854), 3 Eq. Rep. 171; *Cookes v. Cookes* (1863), 8 L. T. 532.

3690. ———.]—Where, under a decree directing accounts to be taken, no order was obtained under statute 15 & 16 Vict. c. 86, s. 54, that the books of account should be taken as *primâ facie* evidence, but the judge's chief clerk so admitted them & granted his certificate, the ct. of appeal, upon a motion to discharge the certificate, refused the same, but without costs.—*NEWBERRY v. BENSON* (1854), 23 L. J. Ch. 1003; 2 W. R. 648, L. J.J.

3691. ———.]—15 & 16 Vict. c. 86, s. 54, empowers the ct. to give special directions as to the mode of taking an account, including directions as to books of account being taken as *primâ facie* evidence, in a case in which the account, though not yet taken, had been directed by a decree pronounced several years before the passing of the Act.—*EWART v. WILLIAMS, WILLIAMS v. EWART* (1855), 7 De G. M. & G. 68; 3 Eq. Rep. 476; 24 L. J. Ch. 414; 25 L. T. O. S. 4; 1 Jur. N. S. 409; 3 W. R. 348; 44 E. R. 27, L. J.J.

3692. ———.]—In taking accounts under a decree, books of account cannot be admitted as *primâ facie* evidence, under 15 & 16 Vict. c. 86, s. 54, without the special direction of the judge in every case.—*COOKES v. COOKES* (1863), 3 New Rep. 97.

statements of repairs required on engines were properly admitted in evidence without calling the persons by whom the entries were made.—*CANADA ATLANTIC RY. CO. v. MOXLEY* (1888), 15 S. C. R. 145.—**CAN.**

m. Private bank account.]—*R. v. MINCHIN* (1913), 26 W. L. R. 633.—**CAN.**

n. Books of rate-collector.]—A rate-collector's bond executed by him & sureties, was upon the conditions that the collector should collect the rates, & pay the amount so collected to the treasurer, that the collector should deliver true & proper accounts, & should, when required, deliver up his books & pay to the treasurer such money as upon the balance of any accounts should appear to be in his hands. The rate-collector absconded,

& an action was commenced against the sureties. The only evidence of the receipt by the collector of this sum, was the entries made by him in his accounts:—*Held*: these entries were admissible in evidence against the sureties.—*ABBREY v. GUARDIANS v. SUTCLIFFE* (1891), 25 L. R. Ir. 332.—**IR.**

o. Entry in bank pass-book.]—An entry in a pass-book, duly initialed by the officers of a bank, to the credit of a depositor who had an account-current with it, is merely *primâ facie* evidence against the bank, & may be rebutted *ope exceptionis* by evidence *probat de jure*.—*COMMERCIAL BANK v. HURD* (1860), 22 Durl. (Ct. of Sess.) 2; 3 Macq. 643; 32 Sc. Jur. 283, H. L.—**SCOT.**

p. Books of assignee.]—To a claim

3693. ———.]—Circumstances under which books of account were allowed to be taken as *primâ facie* evidence under 15 & 16 Vict. c. 86, s. 54.—*HARDWICK v. WRIGHT* (1867), 15 W. R. 953.

3694. Partnership books.]—*LODGE v. PRICHARD*, No. 3689, *ante*.

See, generally, PARTNERSHIP.

3695. Books kept by purchaser of business—Right of repurchase by vendor—Vendor with access to books.]—O., a cotton spinner, being under advances from B., a cotton broker, for which B. held an equitable mtge. of the mills & premises, came to a general composition with his creditors in July, 1850, paying them the amount of their compositions by means of promissory notes, in which B. joined, & which B. had ultimately to pay. B. got no composition, but the whole spinning mills & business, as a going concern, was sold to B. by O., with a proviso, that if within ten years O. should repay B. principal & interest, or if the profits of the business, after deductions for necessities & repairs, should within ten years repay the principal & interest, then B. should reconvey to O. It was further agreed, that if at any period of the ten years the result of six months' business, on an account thereof being taken, should be that there was not enough net profit to pay interest on the whole principal moneys advanced by B., B. might give O. two months' notice to bar the right of repurchase; & if within that period of two months O. should not pay up to B. all principal & interest then due, all the right & equity of redemption should be barred. B. further agreed to continue to employ O. as manager at £3 per week. In Nov. 1850, stock was taken, & showed sufficient profit. In Sept. 1851, an account was taken, which showed, as B. alleged, a loss of £3,000. Thereupon B. sent a notice dismissing O. from his situation as manager, on the ground of disobedience, & calling on him to pay up in two months the amount of principal & interest, or to stand barred.

The books being kept by B. while O. was manager:—*Held*: not binding on O.; but O. having free access to the books, they were to be taken as *primâ facie* evidence, with liberty to O. to surcharge & falsify.—*OGDEN v. BATTAMS* (1855), 1 Jur. N. S. 791.

B. For what Purposes Admitted.

3696. Against declarant.]—*CROUCH v. DRURY* (1661), 1 Keb. 27; 83 E. R. 790.

3697. ———.]—*SMART v. WILLIAMS* (1694), Comb. 247; 3 Lev. 387; Bull. N. P. 283, n.; 90 E. R. 457; *sub nom. SMARTLE d. NEWPORT v. WILLIAMS*, 1 Salk. 280; *sub nom. ANON.*, 1 Ld. Raym. 745.

Annotations:—**Mentd.** *Stanyngnought v. Cosins* (1746), Barnes, 456; *Birch v. Wright* (1786), 1 Term Rep. 378; *Tinkler v. Walpole* (1811), 14 East, 226; *Hall v. Doe d. Surtees* (1822), 5 B. & Ald. 687.

against an assigned estate it was pleaded that the transaction relied on had been entered into *fraudem creditorum*. At the hearing of the action the books of the assignee were tendered in evidence without production of, or information as to, the person who had kept them. The evidence having been objected to:—*Held*: since the books were relevant to show the state of mind of the assignor, as against third parties, they were admissible.—*WIENER v. MCKENZIE'S ESTATE*, [1923] C. P. D. 562.—**S. AF.**

PART IV. SECT. 13, SUB-SECT. 2.—**B.**

q. Against declarant's surety.]—In a joint action against a principal & surety on a bond conditioned for the fidelity of the principal as a clerk, entries of the receipt of sums of money

3698. —.]—*REEVE v. WHITMORE*, No. 279, *ante*.

3699. —.]—H., who employed Messrs. P. as his solrs., was in the habit of leaving moneys of his in their hands for investment for his benefit. In 1878, Messrs. P., who had lent money of their own to V. & E., an engineering firm, on a mtge. of their works at C., repaid themselves £11,000, part of the debt, out of moneys of H. in their hands & in their books entered the transaction as a "loan" by H. to V. & E., of £11,000 at 5 per cent., the interest being paid to him during his life by Messrs. P. In 1879 H. died intestate, & Messrs. P. then continued to act as solrs. to his administratrix. In 1881, V. & E. bought additional property at C. for their works, & executed a mtge. of that property in fee for £750, which mtge. subsequently became vested in the W. Bank. In 1882, D. became a partner in the firm of V. & E., D. purchasing & taking a conveyance of all the partnership property, & undertaking to pay the partnership debts. D. thereupon granted a lease of the property to the firm. Shortly afterwards D. mtged. the property to Messrs. P. for £50,000 & interest, reserving power to create a charge in priority to that mtge. Under that power D. charged the property with £8,000 in favour of the W. Bank, who thus became entitled to a prior charge for £8,750 on the whole property. D. then retired from his partnership with V. & E., & in Feb. 1883, conveyed the equity of redemption in the property to Messrs. P. In July, 1883, the firm of V. & E. was, through Messrs. P.'s instrumentality, converted into a limited co., & in Dec. 1883, the firm joined with Messrs. P. in conveying the property & goodwill of the firm to the co., subject to the mtge. to the W. Bank, in consideration of paid-up shares allotted to Messrs. P., & to V. & E., who thus became substantially the only shareholders in the co. The legal estate was then outstanding in the bank as to that part of the property which was comprised in their mtge. for £750. Early in 1884 Messrs. P. absconded, & in Mar. 1884, they were adjudicated bkpts. Neither H. nor his administratrix had any knowledge of the transactions entered into by Messrs. P. In June, 1884, the co. was ordered to be wound up. A summons was then taken out by H.'s administratrix, in the winding-up, claiming (a) that subject to the bank's mtge., she became, under "declarations of trust" by Messrs. P., sub-mtgee. for £11,000 & interest, or part owner to that extent, of the £50,000 mtge. to Messrs. P.; (b) priority over the co.; & (c) that subject to the bank's mtge., the securities might be marshalled. Messrs. P. were not represented on the summons, but an order had been made by CAVE, J., in their bkpcy., on the application of H.'s administratrix, the co. not being a party, declaring that, as against the trustees in the bkpcy., £11,000, part of the £50,000 mtge., formed part of H.'s estate, & that appct. was entitled to stand

as first mtgee. of the mtged. premises for the £11,000. As evidence in support of the summons the claimant relied on the above-mentioned entry in Messrs. P.'s books; on entries in a cash account furnished to her by them of half-yearly payments of interest on the £11,000; on a tabular statement of "mtges." in the residuary account of H.'s estate prepared by them in 1880 on her behalf for the Legacy Duty Office, one of the items being expressed to be a mtge. on "V. & E.'s property at C. for £11,000 at 5 per cent."; & on a letter written in 1883 by Messrs. P. to her, containing a similar tabulated statement of "mtges." forming part of H.'s estate:—*Held*: although the entries, etc., so relied on were not evidence as against third parties such as the co., yet as against Messrs. P., they established a declaration of trust of a mtge. for £11,000 & interest extending to all the property at C. belonging to V. & E. at the date of the letter of 1883, & not merely to their property as existing in 1878.—*Re VERNON, EWENS & Co.* (1886), 32 Ch. D. 165; 51 L. T. 365; 31 W. R. 606; *affd.* 33 Ch. D. 402, C. A.

Annotations:—*Mentd.* Hartopp v. Huskisson (1886), 55 L. T. 773; *Carritt v. Real & Personal Advance Co.* (1889), 58 L. J. Ch. 658; *Taylor v. Russell*, [1891] 1 Ch. 8; *Taylor v. London & County Banking Co.*, *London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231; *Walker v. Lanom*, [1907] 2 Ch. 104; *Hill v. Peters*, [1918] 2 Ch. 273.

Not in favour of declarant.—*See* Nos. 279, 3081, 3696, 3697, *ante*.

3700. — — **Except in special circumstances.**—Under special circumstances, accounts between master & servant, tradesmen & shopmen, banker & customers, are, from the necessity of the case and the convenience of mankind, admitted as evidence in favour of the party writing them; but the master ought not to receive such evidence without stating the special circumstances under which he conceives them receivable in evidence.—*SYMONDS v. GAS LIGHT & COKE CO.* (1848), 11 Beav. 283; 50 E. R. 825; *sub nom.* *GAS LIGHT & COKE CO. v. SYMONDS*, 12 L. T. O. S. 238.

3701. To prove disposal of stock by client.—**Books of deceased stockbroker.**—*STOCKDALE v. SOUTH SEA CO.* (1740), Barn. Ch. 363; 27 E. R. 680, L. C.

3702. As evidence of claim made in declarant's lifetime.—A man's own entry in book of accounts allowed as evidence, on inquiry before the master, where all papers, etc., to be produced, not as original evidence of the demand, but as a claim in his life.—*JEFFERIE v. WORDEN* (1750), 2 Ves. Sen. 54; 28 E. R. 36, L. C.

Statements of deceased persons generally, *see* Part II., Sect. 5, *ante*.

3703. To prove no allowance made in rent.—**Action for money lent.**—In an action for money lent, evidence was given of an admission by deft. that he had had the money, accompanied with a statement that it had been "allowed in the rent." The rent was due from pltf.'s brother to deft.'s

made by the clerk in books kept by him in the course of his duty, are evidence against the surety of the receipt of the money.—*MECHANICS' WHARF FISHING CO. v. KIRBY* (1848), 1 All. 223.—*CAN.*

r. —.]—Entries made by treasurer of a school district in accounts kept by him as such treasurer are admissible as evidence against his sureties, the principle apparently being that it is part of the contract of a surety in such a case that the accounts kept in public books by the officer guaranteed will be correct.—*JORDAN HILL SCHOOL DISTRICT v. GAETZ* (1915), 8 W. W. R.

658; 32 W. L. R. 202; 23 D. L. R. 739; 8 Alta. L. R. 433.—*CAN.*

a. Attorney's fees.—In an action by an attorney for his fees, proof by a copy made up from his books after delivery to deft., is sufficient.—*HALL v. SHANNON* (1829), 3 Ont. Dig. 6540.—*CAN.*

t. To prove balance of lumber due.—P. entered into an agreement with A. to get out lumber for him, & also to take charge of supplies furnished by A., & other operators under contracts with A. All supplies were to be charged against P., & he was to be credited with what he delivered to A.'s

other operators. A book was kept by P. in which he entered all supplies delivered by him to the other operators, & A. settled with them according to the entries in his book. In an action by P. for a balance due to him on account of the lumber:—*Held*: the book was evidence of the supplies delivered by him to deft.'s operators, the settlement by deft. with them according to the entries in the book being an admission by him of their correctness.—*PHENEY v. AIKEN* (1883), 22 N. B. R. 635.—*CAN.*

a. To prove satisfaction of legacy.—A memorandum & certain balance sheets of a testator were admitted in

Sect. 13.—Private documents: Sub-sect. 2, B.; sub-sects. 3, 4 & 5.]

mother-in-law. Pltf. then tendered the mother-in-law's rent-book, produced by deft. in obedience to a notice, in order to show that no allowance had been made in the rent:—*Held*: admissible evidence for that purpose.—*HILL v. HAYWOOD* (1846), 7 L. T. O. S. 82.

3704. To prove amount of profits—Dispute between employer & employee—As to share of profits to which employee entitled.]—Pltf. entered into the service of deft. at a weekly salary, & it was verbally agreed that he should also have a share of the profits; but he was to take deft.'s word as to the amount of profits made, & was, in no case, to examine or investigate the books of the business. In a suit to recover pltf.'s share of the profits, the parties contradicted each other as to the proportion to which pltf. was entitled:—*Held*: deft. must produce the books in order to determine the point in dispute.—*TURNER v. BAYLEY* (1864), 34 Beav. 105; 55 E. R. 573.

SUB-SECT. 3.—BANKERS' BOOKS.

Bank books generally.]—See *BANKERS*, Vol. III., pp. 305–309.

Books of Bank of England.]—See *BANKERS*, Vol. III., p. 133, Nos. 81–88.

SUB-SECT. 4.—BOOKS OF COMPANIES AND CORPORATIONS.

3705. Books of companies—For what purposes admitted—Against company—Erroneous entries.]—Although entries in the books of the co. are *prima facie* evidence against the co., still, if they can be shown to have been made erroneously or improperly, then the evidence which they would otherwise supply will be rejected.

Entries in books of the co. are evidence against the co. in respect of the matters to which those entries relate, in the same way as the books kept by a tradesman are. Although they are not admissible in evidence in his favour they are clearly admissible as evidence against him (*LOPES, L.J.*).—*Re BRANKSEA ISLAND CO., Ex p. BENTINCK* (No. 1) (1888), 1 Meg. 12, C. A.

Generally.]—See *COMPANIES*, Vol. IX., pp. 192, 193, Nos. 1207–1213; Vol. X., pp. 891, 898, 899, 983, 984, 1155, 1156, 1192, Nos. 6061–6063, 6132–6138, 6796, 6808, 8182–8185, 8459–8462.

Register of members.]—See *COMPANIES*, Vol. IX., pp. 207–209; Vol. X., pp. 1126–1128.

Transfer book.]—See *COMPANIES*, Vol. X., p. 1142, Nos. 8075, 8076.

Minutes.]—See *COMPANIES*, Vol. IX., pp. 325, 581, 582, Nos. 2050, 3886, 3896.

3706. Insurance company—For what purposes admitted—Evidence of occupation of insured.]—*DOE d. SMITH v. CARTWRIGHT*, No. 3274, *ante*.

3707. Books of corporations—Admissibility.]—What copies of corporate acts may be given in

evidence.—*R. v. GWYN* (MAYOR OF CHRIST CHURCH) (1720), 1 Stra. 401; 93 E. R. 593.

3708. ———.]—*R. v. HEAD* (1762), Peake's Law of Evidence, 5th ed., p. 84, n.

3709. ———.]—*BRETT v. BEALES*, No. 3531, *ante*.

3710. ———.]—In an action of debt by the lessee of the corpn. of N. for toll traverse for a waggon, & a market toll for cattle:—*Held*: (1) an information *quo warranto* by the A.-G. of Queen Elizabeth against the corpn., in respect of the customs they claimed & used, was not receivable in evidence, as it did not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there be the finding of a jury upon it; (2) an exemplification of a judgment in an action of trespass by the corpn., for setting up a stall in a market, with a justification pleaded of such right without paying toll, was not inadmissible, as it might connect itself with the issue in the progress of the same; (3) a counterpart of a feoffment by the corpn. to an individual of land, etc., in the town of N., produced from among the corpn. muniments, was inadmissible, it appearing that no rent was received in respect of the property.

It was proved that it had been the practice, as long as the witness who was conversant with the subject could remember, for the town treasurer to furnish the town clerk with information, from which he made out his, the treasurer's, accounts, & also for the treasurer to attend before the auditors, unless prevented by illness or accident, & produce vouchers verifying the town clerk's statement. Entries in books of that description, commencing with the year 1766, were tendered in evidence. Some of them were signed by the auditors as allowed, & to some of them appeared only an unsigned entry of their having been examined:—*Held*: (4) those which were signed by the auditors were admissible without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing, charging himself; partly on the ground that there was reasonable evidence of his having made the town clerk his agent for the making out of the accounts.

Deft. in evidence read a part of a record roll of presentments before justices in eyre, & it appearing that there was one for each hundred, & that reference was made in one part to another part of the same roll:—*Held*: (5) pltf. was entitled to have read such parts as he thought proper.—*LANCUM v. LOVELL* (1832), 6 C. & P. 437; *subsequent proceedings* (1833), 9 Bing. 465.

3711. ——— How proved.]—*COLLINS v. CARNEGIE*, No. 3147, *ante*.

3712. ——— For what purposes admitted—To prove admission of freeman.]—In a case of pedigree an entry in the books of the Merchant Tailor's Co. that T. C. was admitted a freeman of that co. by the description of "T. C. of S. street, son of J. C., deceased," is receivable in evidence not only to prove the fact that T. C. was admitted a freeman, but that the co. received him by that description; & entries of admission to the freedom of the city of London are also evidence in like manner.

Semble: an examined copy of an entry in the

evidence to prove his intention that a legacy bequeathed by his will should be held to be satisfied by payments made by him during his lifetime to his legatee.—*JOHNSTON v. HAVILAND* (1896), 23 R. (Ct. of Sess.) 6; 33 Sc. L. R. 311; 3 S. L. T. 279, H. L.—*SCOT*.

PART IV. SECT. 13, SUB-SECT. 4.

3707 i. Books of corporations—Admissibility.]—The corpn. of W. had immemorably appointed a schoolmaster, & supplied him with the means of discharging the trust imposed upon him. Deft. having been appointed

to the office, & having been put in possession of a house, the taxes & repairs of which it was the duty of the corpn. to liquidate:—*Held*: entries in the corpn. books were not admissible in evidence by the corpn. to prove their own rights.—*WATERFORD CORPN. v. PRICE* (1846), 9 I. L. R. 310.—*IR*.

3725 i. — *Religious books—Family bible.*—Entries in a bible, or other family record, by deceased members of a family, are not evidence to prove where a member of a family was born. —CURRIE v. STANES (1885), 25 N. B. R. 4.—CAN.

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son of T. T. being at that time dead, N., after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a Bible, in which Bible T. has made such entry in his own handwriting, that N. was his eldest son, born in lawful wedlock from J., the wife of T., on May 1, 1778, & signed by T. himself. It was proved in evidence on the trial that T. had declared that he, T., had made such entry for the express purpose of establishing the legitimacy, & the time of the birth of his eldest son N., in case the same should be called in question, in any case or in any cause whatsoever, by any person, after the death of him, T.:—*Held*: such entry in such Bible, or any other book, or on any other piece of paper, could be received to prove that N. was the legitimate son of T., as evidence of the declaration of T. in matter of pedigree, but with strong circumstances of suspicion on account of its particularity. *BERKELEY PEERAGE CASE* (1811), 4 Camp. 401, H. L.

Annotations:—*As to* (2) *Refd.* *Monkton v. A.-G.* (1831), 2 Russ. & M. 147. *Generally, Mentd.* *Allan v. Allan* (1808), 15 Ves. 130; *Helfast v. Chichester* (1821), 2 Jac. & W. 439; *Gordon v. Gordon* (1821), 3 Swan. 400; *Moseley v. Davies* (1822), 11 Price, 162; *Rosecommon's Claim* (1828), 6 Cl. & Fin. 97; *Davies v. Morgan* (1831), 1 Cr. & J. 587; *Walker v. Beauchamp* (1834), 6 Cl. & P. 552; *Moath v. Winchester* (1836), 10 Bl. 330; *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Sussex Peerage* (1844), 11 Cl. & Fin. 85; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812; *Geo. v. Ward* (1857), 7 E. & B. 509; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170.

3727. ————*]*—A Bible, produced by a woman aged sixty-seven, who said that it was given to her when seven years old by her father, who told her that it belonged to her grandfather, is evidence of itself to be left to the jury to say, whether an entry in it, by which it appears that her grandfather was the son of a certain person, is true.—*DOE d. CRACKNEL v. HEAD* (1823), 1 L. J. O. S. K. B. 79.

3728. ————*]*—*TRACY PEERAGE* (1813), 10 Cl. & Fin. 154; 1 L. T. O. S. 310; 8 E. R. 700, H. L.

3729. ————*]*—The entry in a family Bible of the births of children, made by their mother shortly after such births, held to be good evidence, in the absence of other & better testimony, such children having been neither baptised nor registered.—*ASHCROFT v. POWELL* (1861), 9 L. T. 638; 12 W. R. 301.

3730. ————*]*—In the absence of a higher class of testimony, the records in a family Bible will be received in evidence of date & place of birth.—*BANBURY BOROUGH CASE* (1866), 11 L. T. 308.

3731. ————*]*—(1) Entries of pedigree in a family Bible or Testament, which is produced from the proper custody, are admissible as evidence, without proof of their handwriting or authorship.

The book was produced by a witness who was niece of F. W. . . . F. W. was a granddaughter of the common ancestor. . . . It was therefore a family Bible & the witness was its proper custodian (*MARTIN, B.*).

(2) Certain letters were put in relating to family matters forming part of a correspondence between A. L. & F. W. in which they addressed one another as aunt & niece. The handwriting

of A. L.'s letters was not proved, but they had been preserved by F. W. & been handed by her to witness, who had produced them:—*Held*: the letters had been rightly received in evidence.

Semble: even if there had been no evidence *aliunde* of the relationship between A. L. & F. W., the letters would have been admissible as the dealing of F. W. with them afforded *prima facie* evidence of the existence of relationship of niece & aunt between herself & A. L.—*HUBBARD v. LEES & PURDEN* (1866), L. R. 1 Exch. 255; 4 H. & C. 418; 35 L. J. Ex. 169; 14 L. T. 442; 30 J. P. 663; 14 W. R. 694.

3732. ————*Prayer-book.*—The case of a claimant to a peerage depending on the genuineness of entries written in an old prayer-book, dated 1728 & 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages, that they could take on themselves to name the period in which any manuscript previous to the year 1700 was written, were all of opinion that the entries were written in the early part & before the middle of the last century, & at or about the period of their dates:—*Held*: such evidence was but small testimony, hardly entitled to any weight, especially as the book containing the entries was not satisfactorily identified.—*TRACY PEERAGE* (1843), 10 Cl. & Fin. 154; 1 L. T. O. S. 310; 8 E. R. 700, H. L.

3733. ————*Missal.*—(1) A return to a Royal commission not signed nor sealed by the comrs. is not admissible to prove any matter stated therein.

(2) Entries in a family missal are admitted as evidence of births, deaths, & marriages of members of the family just like similar entries in a family Bible.—*SLANE PEERAGE* (1835), 5 Cl. & Fin. 23; 10 Bl. N. S. 1; 7 E. R. 311.

Annotation:—*Generally, Mentd.* *Barnardiston v. Soame* (1876), 6 State Tr. 1063.

3734. ————*]*—Pltfs., in order to prove that the person under whom they claimed was descended from H. J., produced an old religious book containing the following entry: "E. J., her book, June 15, 1680, the gift of H. J. her father." It did not appear by whom the entry was made; but the book contained, in other parts of it, entries of the births of other members of the family which were proved to be in their father's handwriting; & moreover the book had been preserved by the family:—*Held*: the first-mentioned entry was admissible in evidence.—*HOOD v. BEAUCHAMP* (1836), 8 Sim. 26; 59 E. R. 11.

Annotation:—*Refd.* *Shields v. Boucher* (1846), 1 D. G. & Sm. 40.

For what purposes admitted—Pedigree cases.—*See Nos. 3717, 3719–3734, ante.*

To prove age of testator—At time of making will.—*See No. 3718, ante.*

SUB-SECT. 6.—LETTERS GENERALLY.

A. Admissibility.

3735. General rule—In actions of contract.—The action was founded on contract, & any letter from one of the parties to the other, whether answered or not answered, if proved to have been

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• In actions of contract.—Letters between solicitors of parties.—A., whose wife owned a certain freehold property, wrote to B., the owner of a certain

leasehold property, with reference to the properties, as follows: "If you will assume my mtge., & pay me in cash, \$3,700, I will assume your mtge. of \$5,000 on the leasehold." B. replied "Your offer of this date,

for the exchange of my property on K. Street for your property on St. G. Street, I will accept on your terms":—*Held*: in an action by B., for specific performance of the contract, correspondence between the solrs. of the

sent & received is evidence (MARTIN, B.).—*GORE v. HAWSEY* (1862), 3 F. & F. 509, N. P.

3736. Letter written by wife to husband—Spouses living apart.—In an action for adultery, letters written by the wife to the husband, while living apart from each other, proved to have been written at the time they bore date, & when there was no reason to suspect collusion, are admissible evidence, without showing distinctly the cause of their living apart.—*TRELAWNEY v. COLEMAN* (1817), 1 B. & Ald. 90; 2 Stark. 191; 106 E. R. 33.

Annotations:—**Apld.** *Willis v. Bernard* (1832), 8 Bing. 376. **Refd.** *Scholey v. Goodman* (1823), 8 Moore, C. P. 350.

3737. —[In an action for criminal conversation, the letters of the wife to her husband & others are admissible in evidence to show the state of the wife's feelings, although they may also state a fact which would not strictly be evidence.—*WILLIS v. BERNARD* (1832), 8 Bing. 376; 1 Moo. & S. 584; 1 L. J. C. P. 118; 131 E. R. 439.

3738. Necessity for proof of handwriting.—*SHEPPARD v. RADFORD*, No. 2025, *ante*.

3739. —[S., the managing clerk of pltf.'s attorney, wrote a letter to deft., addressed to him at his residence, which letter was proved to have been put into the post. S. proved that he received an answer to his letter:—*Held*: that the letter thus received in answer was admissible in evidence without proof of the defendant's handwriting.

It was proved by S. that he received a letter of earlier date, & in the same handwriting as the letter last before mentioned:—*Held*: this letter was also admissible in evidence without proof of deft.'s handwriting; & also a copy of a letter written by S. of still earlier date, to which the last-mentioned letter was an answer, might be given in evidence, the original not having been produced after a notice to produce, without any proof that the original had been put into the post or had reached deft.—*OVENSTON v. WILSON* (1845), 2 Car. & Kir. 1, N. P.

3740. —[Letter in handwriting of sender's son.]—Where deft. was in the habit of employing his son to write letters in his name, & a letter without signature, but in the son's handwriting, & bearing a postmark, was tendered in evidence:—*Held*: it was inadmissible.—*BARTON v. HUTCHINSON* (1819), 2 Car. & Kir. 712, N. P.

Annotation:—**Mentd.** *Taylor v. Crowland Gas Co.* (1854), 10 Exch. 288, n.

3741. —[R. v. NEILL (1892), 116 Q. C. Ct. Cas. 1417.

3742. Letter in answer to previous letter.—Deft. gave in evidence a letter of pltf. dated Feb. 17, which purported to be an answer to a letter written to pltf. by W. Pltf.'s counsel proved W.'s handwriting to a letter addressed to pltf., & dated Feb. 16, but which had no postmark, & wished to give this letter in evidence as being the letter to which that of Feb. 17 was an answer:—*Held*: the letter of Feb. 16 was not receivable in evidence, unless it were shown that

it was the letter to which pltf.'s letter was an answer, or, at least, that it was in existence before the date of pltf.'s letter.—*M'NAMARA v. GIBBS* (1842), Car. & M. 412, N. P.

3743. Letters in possession of deceased person.—*MONYPENNY v. MASCALL* (1815), 5 L. T. O. S. 388.

3744. Letter written by deceased solicitor.—A letter written by a deceased solr., proposing to act as the solr. of a particular individual:—*Held*: not receivable in evidence, as having been written by the authority of that individual, on proof merely that there was such a solr. in practice at the time, that the letter was in his handwriting, & that it came from the custody of the person to whom it purported to be addressed. In order to render the letter receivable, it must be proved *aliunde* that the writer had been duly authorised by the individual for whom he professed to act as solr.—*BRIGHT v. LEGGERTON* (1861), 2 De G. F. & J. 606; 30 L. J. Ch. 338; 3 L. T. 713; 7 Jur. N. S. 559; 9 W. R. 239; 45 E. R. 755, L. C.

Annotations:—**Refd.** *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Mussey v. Allen* (1879), 13 Ch. D. 558, *Mentd.* *Carey v. Cuthbert* (1874), 22 W. R. 249; *Re Cross*, *Harston v. Tenison* (1882), 20 Ch. D. 109; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

Statements by deceased persons generally, see Part II., Sect. 5, *ante*.

Letter unanswered.—See Sub-sect. 6, D.,

B. How Proved.

(a) Proof of Writing.

3745. Whether letter written—Conversations as to substance of letter.—*SEVEN BISHOPS' TRIAL*, No. 1649, *ante*.

3746. Time of writing—Whether date *prima facie* true.—In ejectment, by a mtgee. against the assignee, under Debtors' Imprisonment Act, 1759 (c. 28), of the mtgor.:—*Held*: a letter from the mtgor. to the mtgee., dated previously to the assignment, was evidence against deft., & would be presumed to have been written at the time of its date, until the contrary was shown.—(*GOODTITLE v. BAKER v. MILBURN* (1837), 2 M. & W. 853; *Murp. & H.* 207; 6 L. J. Ex. 209; 150 E. R. 1004.

Annotation:—**Mentd.** *Williams v. Eyton* (1858), 27 L. J. Ex. 176.

3747. —[Houlston v. SMYTH, No. 3800, *post*.

3748. —[The date a letter bears is *prima facie* its true date.—*POTEEZ v. GLOSSOP* (1848), 2 Exch. 191; 151 E. R. 460.

Annotations:—**Apld.** *Malpas v. Clements* (1850), 19 L. J. Q. B. 435. **Consd.** *Morgan v. Whitmore* (1851), 6 Exch. 716; *Butler v. Mountgarret* (1859), 7 H. L. Cas. 633. **Refd.** *Angell v. Worsley* (1849), 12 L. T. O. S. 428.

3749. —[The date which appears on the face of a document is *prima facie* its true date.—*MALPAS v. CLEMENTS* (1850), 19 L. J. Q. B. 435; 15 L. T. O. S. 313.

Annotation:—**Consd.** *Morgan v. Whitmore* (1851), 6 Exch. 716.

44 O. L. R. 427; 15 O. W. N. 250; 31 Can. Crim. Cas. 122.—**CAN.**

k. Letter written by trustee.—A letter from a trustee who is a party in the cause, & had been agent in another cause for the person interested in the trust, is not evidence.—*SCOTT v. WILSON* (1825), 3 Murr. 518.—**SCOT.**

l. Letters of third parties.—An objection was taken to the production of a letter from B. & Co., third parties, to J. & W.:—*Held*: the letter was not producible in evidence not being on oath, & it was also incompetent under the issue.—*WRIGHT v. LIDDEL* (1829), 5 Murr. 35.—**SCOT.**

parties of date subsequent to the date of the letters, as also the requisitions respecting titles which passed between the solrs., were inadmissible in evidence.—*MCCLEUNG v. MCCracken* (1883), 3 O. R. 596.—**CAN.**

1. Letters written with a view to settlement.—The correspondence between the parties with a view to a settlement was admissible, there being no express or implied agreement that the correspondence was to be without prejudice.—*STEWART v. MUIRHEAD* (1890), 29 N. B. R. 273.—**CAN.**

g. —[A correspondence, which has been carried on with a view

to a compromise, & without prejudice to the rights of the parties, cannot be given in evidence to take a claim out of the operation of Stat. Limitations, even though there had never been any controversy as to the existence & validity of the claim.—*Re MONSIELL* (1857), 6 I. Ch. R. 245.—**IR.**

h. Letters between husband & wife.—The correspondence between the husband & wife was admissible as evidence of the status of the parties, though not relevant upon the question of deft.'s knowledge that H. was a married man.—*ft. v. DEBARO* (1918),

Sect. 13.—Private documents: Sub-sect. 6, B. (a), (b) i. & ii. & (c).]

3750. ———. —[*Qu.*: whether the date a letter bears is *prima facie* its true date.—*BUTLER v. MOUNTGAIRET* (1859), 7 II. L. Cas. 633; 11 E. R. 252, H. L.]

Annotation:—*Mentd.* *R. v. Fanning* (1866), 10 Cox, C. C. 411.

3751. ———. *Secondary evidence.*—[On an issue whether deft., a certificated bkpt., had given a written promise signed by him after his bkpcy., so as, under 6 Geo. 4, c. 16, s. 131, to revive a claim barred by the certificate, the following letter was produced, written by him: "Mr. S. begs to inform" plffs. "that he will take an early opportunity of settling their account; but Mr. S. objects to give his bill. Mr. S. regrets that he has been prevented from answering" plffs. "letter before. Crescent. Saturday." Evidence of the amount due was given:—*Held*: parol evidence might be given of the time at which it was written.—*LOBB v. STANLEY* (1844), 5 Q. B. 574; 1 Dav. & Mer. 635; 13 L. J. Q. B. 117; 2 L. T. O. S. 285, 366; 8 Jur. 462; 114 E. R. 1366.]

Annotations:—*Mentd.* *Holmes v. Mackrell* (1858), 3 C. B. N. S. 789; *Bennett v. Brumitt* (1867), L. R. 3 C. P. 28; *Caton v. Caton* (1867), L. R. 2 H. L. 127.

3752. Place of writing—Date.—[The date of a letter is evidence against the writer that the letter was written where dated.—*ANON.* (1816), 2 Chit. 191.]

(b) *Posting.*

i. *In General.*

3753. Copy made in letter-book.—[Plff. gave deft. notice to produce certain specified letters written by deft. to his partner, & a letter-book kept by him, containing copies of the above letters; & deft. consented to admit copies of the letters, saving just exceptions, etc., & undertook to produce the letter-book in proof of them:—*Held*: (1) the book, when produced by deft., was good secondary evidence against him of the letters specified in the notice; (2) supposing proof of the sending of the letters to be material the fact of their being transcribed in such a book was evidence against deft.—*STURGE v. BUCHANAN* (1839), 10 Ad. & El. 598; 2 Per. & Dav. 573; 8 L. J. Q. B. 272; 113 E. R. 228; *previous proceedings* (1838), 2 Mood. & R. 90, N. P.]

———[*Compare* No. 3759, *post*.]

3754. By person under duty to post.—[To prove the posting of letters, the party whose duty it was to post them should be called.—*IRELAND v. STIFF* (1858), 1 F. & F. 340, N. P.]

3755. ———. —[A letter was presumed to have been posted, which a witness remembered to have copied & said he would have posted.—*TROTTER v. MACLEAN* (1879), 13 Ch. D. 574; *sub nom.* *TROTTER v. MACLEAN, TROTTER v. VAUGHAN, TROTTER v. FLETCHER*, 49 L. J. Ch. 256; 42 L. T. 118; 28 W. R. 214.]

Annotations:—*Mentd.* *Rains v. Buxton* (1880), 14 Ch. D. 537; *Jolcey v. Dickinson* (1881), 45 L. T. 643; *Re Astley & Tyldesley Coal & Salt Co., & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 252; *Bull Coal Mining Co. v. Osborne*, [1899] A. C. 351.

3756. Letter handed to servant to post.—[A letter allowed to be proved which had been given to a servant to be posted, without any direct evidence that it had been posted or received; it being shown that at the time at which, if posted, it would have arrived, a letter did reach the house to which it had been addressed.—*SMITH v. OSBORN* (1858), 1 F. & F. 267, N. P.]

3757. Ordinary course of business—Letter placed

on table cleared by porter.—[It is not sufficient *prima facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, & put down upon a table for the purposes of being carried from thence to the post office, & that by the course of business in the counting-house, all letters deposited on this table are carried to the post office by a porter.—*HETHERINGTON v. KEMP* (1815), 4 Camp. 193, N. P.]

Annotations:—*Refd.* *Hawkes v. Salter* (1828), 4 Bing. 715; *Skilbeck v. Garbett* (1845), 7 Q. B. 846.

3758. ———. —[Where the practice of deft.'s counting-house was that the clerk, after copying a letter into the letter-book, returned it to deft. to seal, & that he or another clerk carried all letters to the post office, but there was no particular place of deposit in the office for such letters, & neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry:—*Held*: the entry in the clerk's writing in the letter-book of a letter to plff. could not be read as proof of such letter having been sent to plff.—*TOOSEY v. WILLIAMS* (1827), Mood. & M. 129, N. P.]

3759. ———. —[Plffs.' clerk proved that the letter giving notice of the dishonour of a bill was copied by him into a book kept for that purpose, & said, that, by the course of business at their house, all letters copied into that book were sent to the post office in the evening of the day on which they were so copied, but that he himself did not carry the letter in question to the post, it being the duty of one of the other clerks to do so:—*Held*: not sufficient evidence that the letter was sent.—*HAWKES v. SALTER* (1828), 4 Bing. 715; 1 Moo. & P. 750; 6 L. J. O. S. C. P. 180; 130 E. R. 944.]

Annotation:—*Refd.* *Skilbeck v. Garbett* (1845), 7 Q. B. 846.

3760. ———. *Letter placed in box cleared by postman.*—[To prove the sending of a letter by plff. to deft., a clerk of plff. deposed that he made up the letters, of which this was one, & placed them in a box in the room where he sat, & that the public postman invariably called every day & took the letters from that box:—*Held*: such delivery to the postman was evidence for the jury that the letters had gone to the post office.—*SKILBECK v. GARRETT* (1845), 7 Q. B. 846; 14 L. J. Q. B. 338; 5 L. T. O. S. 265; 9 Jur. 939; 115 E. R. 706.]

3761. ———. *Letter placed in basket cleared by office boy.*—[*PERCY SUPPER CLUB v. WHYTE* (1899), 106 L. T. Jo. 308, D. C.]

3762. ———. *Entry in postage book—Entry by deceased person.*—[Neither proof of an entry made by a deceased person in the ordinary course of business in a postage book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage.—*ROWLANDS v. DE VECCHI* (1882), 1 Cab. & El. 10, N. P.]

Statements by deceased persons generally, *see* Part II., Sect. 5, sub-sect. 3, *ante*.

Postmark.—*See* Nos. 3763–3765, *post*.

Effect of posting—Contracts made through post.—*See* CONTRACT, Vol. XII., pp. 75–79, Nos. 434–470.

———*Equitable assignment of chose in action.*—

See CHOSSES IN ACTION, Vol. VIII., p. 452, No. 259.

———*Right of sender to recover letter.*—*See* BILLS OF EXCHANGE, Vol. VI., p. 213, No. 1320.

Breach of contract—Jurisdiction of court.—*See* COUNTY COURTS, Vol. XIII., p. 461, Nos. 110–114; PRACTICE.

ii. *Postmark.*

3763. How proved.]—The date in the postmark upon a letter is *primâ facie* evidence that the letter existed at the time of that date; but it should be proved that the letter bears the genuine postmark used by the office whose stamp it purports to bear at the time.—*FLETCHER v. BRADYLL* (1821), 3 Stark. 64, N. P.

*Annotation:—***Refd.** *Abbey v. Lill* (1829), 5 Bing. 299.

3764. —.]—*Semble*: a postmark may be proved by any one in the habit of receiving letters by the post.—*ABBEY v. LILL* (1829), 5 Bing. 299; 2 Moo. & P. 534; 7 L. J. O. S. C. P. 96; 130 E. R. 1076.

*Annotation:—***Refd.** *Woodcock v. Houldsworth* (1846), 16 M. & W. 124.

3765. —.]—*Semble*: if the postmark of a letter be given in evidence, it ought to be proved, either by persons from the post office, or by persons who are in the habit of receiving letters from that post office.—*WOODCOCK v. HOULDSWORTH* (1846), 16 M. & W. 124; 1 New Pract. Cas. 575; 16 L. J. Ex. 49; 8 L. T. O. S. 215; 153 E. R. 1126.

3766. What postmark is evidence of—Date of letter passing through post office.]—*R. v. CANNING* (1754), 19 State Tr. 281.

*Annotations:—***Mentd.** *R. v. Dowlin* (1793), 5 Term Rep. 311; *R. v. Kinnear* (1819), 2 B. & Ald. 462.

3767. —.]—The post office marks, in town or country, proved to be such, are evidence that the letters on which they are were in the office to which those marks belong at the date those marks specify.—*R. v. PLUMER* (1814), Russ. & Ry. 264.

3768. — Posting of letter.]—*R. v. JOHNSON* (1805), 7 East, 65; 29 State Tr. 81; 3 Smith, K. B. 94; 103 E. R. 26.

*Annotations:—***Mentd.** *Kensington v. Inglis* (1807), 8 East, 273; *Jannokee Doss v. Bindabun Doss* (1836), 1 Moo. Ind. App. 67.

3769. — Not place of publication of letter.]—In an indictment for a libel, the postmark of a particular place within the county in which the venue is laid, upon a letter containing the libel, is not sufficient evidence of a publication there by deft.—*R. v. WATSON* (1808), 1 Camp. 215.

*Annotations:—***Conrd.** *R. v. Burdett* (1820), 4 B. & Ald. 95.

Refd. *Woodcock v. Houldsworth* (1846), 16 M. & W. 124.

3770. — Ship postmark—Identity of addressee.]—The production of a letter dated abroad & addressed to J. S. in England with the English ship letter postmark upon it which directed a policy to be effected is sufficient to prove that J. S. was the person residing in Great Britain who received the order for & effected such policy.—*ARCANGELO v. THOMPSON* (1811), 2 Camp. 620.

*Annotation:—***Mentd.** *Cory v. Burr* (1882), 9 Q. B. D. 463.

3771. — Existence of letter at date of postmark.]—*FLETCHER v. BRADYLL*, No. 3763, *ante*.

3772. — Place of posting.]—The postmark on a letter is evidence of the letter having been posted at the place named on the postmark.—*PERKINS' CASE* (1826), 1 Lew. C. C. 99; 2 Lew. C. C. 150.

PART IV. SECT. 13, SUB-SECT. 6.—
B. (b) ii.

3773 1. What postmark is evidence of—Time of posting.]—A foreign postmark on a letter is *primâ facie* evidence of the time when the letter was mailed.—*O'NEIL v. PERRIN* (1840), 3 Ont. Dig. 5421.—**CAN.**

PART IV. SECT. 13, SUB-SECT.*6.—
B. (c).

3776 1. Posting letter—Primâ facie evidence of delivery—Unless delivery denied by addressee.]—In the absence of evidence to the contrary, a letter properly addressed & posted will be presumed to have reached the person to whom it is addressed, in the ordinary course of post.—*M'KENZIE v. SWAN HILL* (1878), 4 V. L. R. 399.—**AUS.**

3777 1. —.]—The posting of a letter properly stamped is evidence of the fact of its having been received.—*CANADIAN DRUGGISTS v. THOMPSON* (1911), 19 O. W. R. 401; 2 O. W. N. 1213; 24 O. L. R. 401.—**CAN.**

m. — Not sufficient—Without proof of receipt.]—An affidavit of deft.'s attorney, that he did not receive any notice of trial, is not sufficiently answered by showing that a letter containing such notice, directed to the attorney, was put in the post office in due time, it not appearing to have been received by the attorney.—*FRASER v. HARDING* (1844), 2 Kerr, 375.—**CAN.**

n. — —.]—A condition indorsed on a fire policy provided that any subsequent mtge. of the property insured "must be notified to the secretary in writing forthwith, otherwise the policy shall be void." *Pitt.*

3773. — Time of posting.]—*LAWRENCE v. THATCHER*, No. 3803, *post*.

3774. — —.]—The post office mark is not conclusive of the time when a letter is posted.—*STOCKEN v. COLLINS* (1841), 9 C. & P. 653; 7 M. & W. 515; 10 L. J. Ex. 227; 151 E. R. 870.

*Annotations:—***Refd.** *Woodcock v. Houldsworth* (1846), 8 L. T. O. S. 189; *Dunlop v. Higgins* (1848), 1 H. L. Cas. 381. **Mentd.** *British & American Telegraph Co. v. Colson* (1871), L. R. 6 Exch. 108; *Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 587; *Household Fire Insce. v. Grant* (1879), 4 Ex. D. 216.

3775. — That writer of letter alive.]—On issue taken on a plea of coverture, it is no proof of the husband being alive at a particular time, that a letter in his handwriting bears a foreign postmark of a certain date; but if it be proved, in addition, that a witness, shortly before the date of the postmark, wrote to him, & received this letter, which is in answer to that written by the witness, that will be sufficient.—*REED v. NORMAN* (1837), 8 C. & P. 65.

(c) *Delivery.*

3776. Posting letter—Primâ facie evidence of delivery—Unless delivery denied by addressee.]—Where a registered letter containing a notice requiring the trustee [in Bkpey.] to disclaim had been posted, but the trustee denied having ever received it:—**Held:** some evidence of the delivery of the letter to the trustee or at his office must be given to affect the trustee with notice, under Bkpey. Act, 1869 (c. 71), s. 24.—*REED v. HARVEY* (1880), 5 Q. B. D. 184; 49 L. J. Q. B. 295; 42 L. T. 511; 44 J. P. 471; 28 W. R. 423, D. C.

*Annotations:—***Mentd.** *Re Turner, Ex p. Ladbury* (1881), 17 Ch. D. 532; *Re Hann, Ex p. Foreman* (1887), 18 Q. B. D. 393.

3777. — —.]—*BARRY v. BARRY* (1902), 46 Sol. Jo. 500.

3778. — —.]—*Re STRUVE'S TRUSTS* (1912), 56 Sol. Jo. 551.

3779. — Duly addressed.]—A letter containing a libel was proved to be in the handwriting of deft. to have been addressed to a party in Scotland, to have been received at the post office at C. from the post office at H. & to have been then forwarded from C. to London to be forwarded to Scotland, & it was produced at the trial with the proper postmarks, & with the seal broken:—**Held:** sufficient *primâ facie* evidence that it reached the person to whom it was addressed, & of a publication to him.—*WARREN v. WARREN* (1834), 1 Cr. M. & R. 250; 4 Tyr. 850; 3 L. J. Ex. 294; 149 E. R. 1073.

*Annotations:—***Refd.** *Shipley v. Todhunter* (1836), 7 C. & P. 680. **Mentd.** *Wilson v. Robinson* (1845), 14 L. J. Q. B. 196; *Nevill v. Fine Arts & General Insce.*, [1895] 2 Q. B. 156; *McQuire v. Western Morning News Co.*, [1903] 2 K. B. 100; *Adam v. Ward*, [1917] A. C. 309.

3780. — —.]—A press copy of a letter proved to have been posted with the right address, admitted as *primâ facie* evidence that the letter containing a notice actually reached the party.—*FUTCHER v. HINDER* (1858), 1 F. & F. 357.

3781. — —.]—*Semble:* the sending of

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notice of appeal by letter duly posted with a right address under 14 & 15 Vict. c. 109 is conclusive, & if it is set up that the address is wrong, evidence must be offered to show that it is so, as, in case of ambiguity, to show that there were in fact different parties who would be understood by the address adopted, & that therefore there was a misdirection, & misdescription likely to mislead.—*R. v. WHITTLESEA OVERSEERS* (1863), as reported in 11 W. R. 310.

3782. ———.]—*GRESHAM HOUSE ESTATE Co. v. ROSSA GRANDE GOLD MINING Co.*, [1870] W. N. 119.

3783. ———.]—A claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), s. 2, is not "made" by a workman until it has been communicated to the employers; but when a letter making a claim has been properly addressed, stamped, & posted, a presumption arises that it has been delivered, which it is for the employers to rebut.

On & prior to Sept. 18, 1915, a munition worker met with accidents arising out of & in the course of her employment whereby one of her eyes was injured, & after working on for about a fortnight became incapacitated until the following July. On Mar. 22, 1916, the employers received notice of claim for compensation under the Workmen's Compensation Act, 1906 (c. 58), but refused to accept it, as it was not made within six months of the accident as required by sect. 2. The worker, however, alleged that she had posted a notice of claim to the works manager on Dec. 29, 1915. The employers called evidence to show that all letters were received by their correspondence department & sorted & remitted to the various departments, & proved that no such letter had been received by the claims department. No one was called from the correspondence department. The county ct. judge held that a notice of claim had been duly posted to the employers on Dec. 29, 1915, & made an award in favour of the worker without making it clear by the judgment whether he was of opinion that the letter had been received & lost in the correspondence department or lost in the post. He also took the view that in any case the failure to give notice within six months was occasioned by reasonable cause.—*Held*: (1) there was no ground on which the failure to give notice of claim within six months could be held to be occasioned by reasonable cause; (2) the County Ct. Judge must be taken to have decided that the letter had reached the employers' correspondence office & been lost there.—*WATTS v. VICKERS, LTD.* (1916), 86 L. J. K. B. 177; 116 L. T. 172; 33 T. L. R. 137; 10 B. W. C. C. 126, C. A.

3784. ———.]—The overseers of a parish raised the gross & ratable value of a hereditament above the value stated in the valuation list for the time being in force. Immediately after the deposit of the list they sent to the occupier of the hereditament notice of the altered values contained in a letter, which, prepaid & properly addressed, was put into the post. The occupier did not receive the notice, & therefore raised no objection to the

valuation within the time specified by the valuation (Metropolis) Act, 1869 (c. 67). On the hearing of a rule nisi for a *mandamus* directed to the assessment committee, ordering them to hear & determine the objection:—*Held*: as a letter containing the notice had been properly addressed & prepaid & put into the post, by Valuation (Metropolis) Act, 1869 (c. 67), s. 65, a service of the notice was to be presumed, although in fact it had never been received by the occupier.—*R. v. WESTMINSTER UNIONS ASSESSMENT COMMITTEE, Ex p. WOODWARD & SONS*, [1917] 1 K. B. 832; 86 L. J. K. B. 698; 116 L. T. 601; 81 J. P. 93; 15 L. G. R. 199.

——— **Containing notice of dishonour.**—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 267–270.

3785. ——— **Prepaid—Public Health Act, 1875 (c. 55), s. 267.**—Under above sect. in order to prove service of a notice by letter through the post it is necessary to show that the letter was "prepaid" & an affidavit containing no statement to that effect is insufficient as evidence of service.—*WALTHAMSTOW URBAN DISTRICT COUNCIL v. HENWOOD*, [1897] 1 Ch. 41; 66 L. J. Ch. 31; 75 L. T. 375; 61 J. P. 23; 45 W. R. 124; 41 Sol. Jo. 67.

——— **Presentment for payment of negotiable instrument.**—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 234, Nos. 1476, 1477.

3786. **Subsequent letter sent by addressee—No evidence that such letter sent in reply to previous letter.**—On the trial of an appeal against an order of maintenance of a lunatic pauper, applts. to prove an application for copies of the depositions so as to bring themselves within 11 & 12 Vict. c. 31, s. 9, showed that their overseer wrote a letter to the clerk of the justices who made the order, & that three days afterwards he received by post copies of the depositions which he produced. The letter was not produced & secondary evidence of its contents was rejected. The sessions having dismissed the appeal on the ground that there was no sufficient evidence of an application for the depositions; the ct. refused to grant a *mandamus* to them to hear the appeal.—*R. v. WEST RIDING JJ.* (1851), 2 L. M. & P. 651; 16 J. P. 38; *sub nom.* *R. v. WEST RIDING OF YORKSHIRE JJ.*, *SPOTLAND v. HANFAX*, 18 L. T. O. S. 79; 15 Jur. 1132.

Annotation:—*Mentd.* *R. v. Glamorganshire JJ.* (1858), 8 E. & B. 694.

3787. ——— **In reply to previous letter.**—A notice given to an employer under Employers' Liability Act, 1880 (c. 42), ss. 4 & 7, omitted to give the address of the person injured, or to state the cause of the injury, & the date at which the injury was sustained was wrongly given. The accident occurred on Aug. 9. The letter giving notice was served on defts. by post by an unregistered letter on Sept. 19, & to this letter defts. replied on Sept. 23:—*Held*: it having been proved that the letter containing the notice was posted on Sept. 19 & a reply to it having been received from defts. there was sufficient evidence that the notice had been received by the defendants within the time specified in sect. 4 of the Act, although the letter containing the notice was not registered.—*PREVIDI v. GATTI & Co.* (1888), 58 L. T. 762; 52 J. P. 646; 36 W. R. 670; 4 T. L. R. 487, D. C.

mortgaged part of the property insured to one M., who mailed a letter to defts.' secretary, notifying him, as required by the condition, but the letter did not reach him.—*Held*: the mere posting, without showing that it reached the secretary, was not a compliance with the condition.—*MCCANN v. WATERLOO COUNTY MUTUAL FIRE INSURANCE Co.* (1874), 34 U. C. R.

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o. Letter given to messenger—Whether delivery presumed.—The mere fact of a letter having been given to a messenger to deliver in the ordinary course is not, *per se*, presumptive evidence of the delivery of the letter to the addressee.—*ADAMS v. MOWBRAY MUNICIPAL COUNCIL* (1906), 16 C. T. R.

371.—S. AF.

p. Letter found in defendant's office—Corresponding entries in books.—The finding of a letter in deft.'s office, & entries in his books corresponding with the instructions, are evidence that the letter was addressed to deft. & that he accepted the proposals contained in it.—*It. v. GRANT* (1902), 21 N. Z. L. R. 122.—*N.Z.*

(d) Contents.

3788. Secondary evidence—Copy—Made by deceased clerk.]—Where defts. had acknowledged they had received a letter of a particular date from pltf., which upon notice they did not produce at the trial:—*Held*: an entry by a deceased clerk of pltf. in a letter book, professing to be a copy of a letter of the same date from pltf. to defts., was admissible evidence of the contents of the letter, on proof that according to pltf.'s course of business the letters which he wrote were copied by this clerk, & then sent off by the post, & that in other instances the copies so made by the clerk had been compared with the originals, & always found correct.—*PRITT v. FAIRCLOUGH* (1812), 3 Camp. 305.

Annotations:—*Refd.* Doe d. Pattershall v. Turford (1832), 3 B. & Ad. 890; Doe d. Padwick v. Skinner (1848), 3 Exch. 84.

3789. —.]—*COOPER v. MARSHALL* (1848), 11 L. T. O. S. 379; 12 J. P. 508; *subsequent proceedings*, 12 L. T. O. S. 131.

3790. —.]—*Conflicting evidence of sender & addressee—Letter not produced.]*—Where a witness swears to the contents of a letter sent by him to a deft., which was received, but deft. denies that such were the contents, but does not produce the letter, the ct. will assume the contents to have been as stated by the witness.—*LUMLEY v. WAGNER* (1852), 1 De G. M. & G. 604; 21 L. J. Ch. 898; 19 L. T. O. S. 261; 16 Jur. 871; 42 E. R. 687, L. C.

Annotations:—*Mentd.* Johnson v. Shrewsbury & Birmingham Ry. (1853), 3 De G. M. & G. 914; Dolfus v. Pickford (1854), 2 W. R. 220; South Wales Ry. v. Wythes (1854), 5 De G. M. & G. 880; Paris Chocolate Co. v. Crystal Palace Co. (1855), 3 Sm. & G. 119; Stevens v. Benning (1855), 6 De G. M. & G. 223; Hope v. Hope (1857), 8 De G. M. & G. 731; Stocker v. Wedderburn (1857), 3 K. & J. 393; De Mattos v. Gibson (1859), 4 De G. J. 276; Ogden v. Fossick (1862), 4 De G. F. & J. 426; Pechter v. Montgomery (1863), 33 Beav. 22; Gladstone v. Ottoman Bank (1863), 1 Hem. & M. 505; Messageries Imperiales Co. v. Baines (1863), 7 L. T. 763; Peto v. Brighton Uckfield & Tunbridge Wells Ry. (1863), 1 Hem. & M. 468; Brett v. East India & London Shipping Co. (1864), 2 Hem. & M. 404; Adamson v. Hill (1868), 17 L. T. 464; Daggett v. Tynan (1868), 16 W. R. 302; Caff v. Tourie (1869), 4 Ch. App. 654; Merchants Trading Co. v. Banner (1871), L. R. 12 Eq. 18; Cornwall v. Hawkins (1872), 20 W. R. 653; Wilkinson v. Clements (1872), 8 Ch. App. 102, n.; Crosbie v. Duckers (1873), 21 W. R. 287; Fothergill v. Rowland (1873), L. R. 17 Eq. 132; Montague v. Fleeton (1873), L. R. 16 Eq. 189; Wolverhampton & Walsall Ry. v. L. & N. W. Ry. (1873), L. R. 16 Eq. 433; Leech v. Schweder (1874), 9 Ch. App. 465, n.; Warner v. Routledge (1874), L. R. 18 Eq. 497; Bowen v. Hall (1881), 6 Q. B. D. 333; Donnell v. Bennett (1883), 22 Ch. D. 835; Iperne v. Harmond (1886), 3 T. L. R. 219; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Lamer v. Palace Theatre, Eccarius & Armstrong (1893), 9 T. L. R. 162; Ryan v. Mutual Tontine Westminster Chambers Assn., [1893] 1 Ch. 116; Silver v. Gatti (1893), 37 Sol. Jo. 776; "Star" Newspaper v. O'Connor & Wetton (1893), 9 T. L. R. 526; Davis v. Foreman, [1894] 3 Ch. 654; Keith, Prowse v. National Telephone Co., [1894] 2 Ch. 147; Cochran v. Exchange Telegraph Co. (1896), 65 L. J. Ch. 334; Mutual Reserve Fund Life Assn. v. New York Life Insce. & Harvey (1896), 75 L. T. 528; Ehrman v. Bartholomew, [1898] 1 Ch. 671; Robinson v. Heuer, [1898] 2 Ch. 451; Alexander v. Mansions Proprietary (1900), 16 T. L. R. 431; Manchester Ship Canal Co. v. Manchester Racecourse Co., [1901] 2 Ch. 37; Metropolitan Electric Supply Co. v. Ginder, [1901] 2 Ch. 799; Formby v. Barker, [1903] 2 Ch. 539; Yorkshire Miners' Assn. v. Howden, [1905] A. C. 256; Kirchner v. Gruban, [1909] 1 Ch. 413; Chap-

man v. Westoby (1913), 58 Sol. Jo. 50; Mortimer v. Beckett, [1920] 1 Ch. 571.

3791. Admission—Effect—Party estopped from disputing authenticity of postscript.]—An admission of original letters in the ordinary form, as in the handwriting of the party admitting, precludes an objection to the authenticity of any part, even an addition to a postscript, obviously in a different handwriting.—*HAWK v. FREUND* (1858), 1 F. & F. 294.

Admissions generally.]—See Part II., Sect. 4, sub-sect. 2; Part III., Sect. 2, *ante*.

C. For what Purposes Admitted.

(a) In General.

Admissibility of evidence generally.]—See Part II., *ante*.

3792. Against party writing letter.]—All evidence is according to the matter to which it is applied, & the person against whom it is used. Against a third person there might be some reason for the objection; but as against the man himself, his own letters are decisive (*LORD MANSFIELD, C.J.*).—*BEVAN v. WILLIAMS* (1776), 3 Term Rep. 635, n.; 100 E. R. 775, n.

Annotations:—*Refd.* Smith v. Taylor (1805), 1 Bos. & P. N. R. 196; *Mentd.* Radford v. McIntosh (1790), 3 Term Rep. 632; Pounce v. Whale (1826), 5 B. & C. 38.

3793. —.]—*Letter written to third party.]*—Pltf. was not called as a witness in support of his case:—*Held*: defts. were entitled to put in evidence letters written by pltf. to a person not a party to the action, & containing admissions by pltf. material to the questions in issue; but pltf. must have, if he desired it, an opportunity of explaining the letters.—*STUART v. GLADSTONE* (1878), 10 Ch. D. 626; 47 L. J. Ch. 423; 38 L. T. 557; 26 W. R. 657.

Annotations:—*Mentd.* Cox v. Willoughby (1880), 13 Ch. D. 863; Hunter v. Dowling, [1895] 2 Ch. 223; Scott v. Scott (1903), 89 L. T. 582; Hill v. Fearis, [1905] 1 Ch. 466; Smith v. Nelson (1905), 92 L. T. 313; Green v. Howell, [1910] 1 Ch. 495.

3794. —.]—*Pltfs. sued a firm of W. Brothers for the price of goods supplied between June, 1893, & Jan. 1894. A. defended & denied that he was a partner. No notice of the dissolution of the firm of W. Brothers had ever appeared. At the trial pltfs. produced a letter written in Feb. 1893, by A. in reply to one from the manager of the bank at which W. Brothers kept an account, as follows: "I have not banked any money this last eight months, as I have dissolved partnership with my brother B. last April . . ."*—*Held*: the implied admission of partnership was separable from the statement that it had been dissolved; & the letter contained evidence which ought to be left to the jury, & from which an existing partnership, & liability on the part of A. at the time the cause of action arose, might be presumed.—*BROWN v. WREN BROTHERS*, [1895] 1 Q. B. 390; 64 L. J. Q. B. 119; 72 L. T. 109; 43 W. R. 351; 15 Ir. 239.

3795. Whether in favour of party writing letter.]—A letter written by a party is not admissible in evidence in his own favour, except as a

under compulsion:—*Held*: letters from the attorney of the party who had obtained judgment, threatening to enforce the same in case of non-payment, was evidence of compulsion.—*STRANGE v. PHELAN* (1849), 2 Ir. Jur. 84.—*IR.*

3795 i. Whether in favour of party writing letter.]—Where part of the alleged consideration for an assignment of goods was interest money due on a bond to a creditor in N. S., & a bill of exchange drawn by him on pltf.

PART IV. SECT. 13, SUB-SECT. 6.—B. (d).

3788 i. Secondary evidence—Copy.]—A copy of a circular letter sent by the clerk of the peace, if sworn to as correct may be given in evidence.—*TYTLER v. MACINTOSH* (1823), 3 Murr. 236.—*SCOT.*

g. — Identifying document referred to in letter.]—Parol evidence is admissible to identify a mtge. as the instrument enclosed in a letter mentioning it.—*WARD v. HAYES* (1872), 19 G. 239.—*CAN.*

PART IV. SECT. 13, SUB-SECT. 6.—C. (a).

3792 i. Against party writing letter.]—In an action for wages due the intestate, as master of a ship, a letter written to him by the owner, offering to employ him at a certain rate, is evidence of the rate of wages; it will be presumed that the offer was accepted & acted on by the master.—*DORMAN v. ANDERSON* (1861), 5 All. 215.—*CAN.*

3792 ii. —.]—Issue having been joined on the question of payment

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notice or a demand.—*RICHARDS v. FRANKUM* (1810), 9 C. & P. 221.

3796. Against party receiving letter—Letter sent by third party.]—A letter received from a third person, & given by pltf. to deft., is not evidence against pltf.—*COTTE v. CHAMPION* (1795), Peake, Add. Cas. 45, N. P.

3797. ———.]—*MEYER v. SEFTON*, No. 2048, ante.

3798. ———.]—*DICKSON v. MALCOLM*, No. 3827, post.

3799. In favour of party receiving letter—Letter unanswered.]—In ejectment, to try the validity of a will, the question turned upon the sanity of the deviser, arising from general imbecility. Letters of various dates & upon various subjects, written to him by persons of respectability, since dead, in which he was addressed as a person of sound mind, found shortly after his death in his library, with the seals broken, were tendered & received in evidence, without any proof of answers being returned, or any other act done by the deviser in relation to them:—*Held*: on the ground of the improper reception of evidence the letters were not admissible. If evidence had been given of any act done in relation to them by the deviser, the letters would have been admissible.—*WRIGHT v. TATHAM* (1838), 5 Cl. & Fin. 670; 2 Jur. 461; 7 E. R. 559; *sub nom.* *WRIGHT v. DOE d. TATHAM*, 4 Bing. N. C. 489; 6 Scott, 58; 7 L. J. Ex. 363, H. L.; *affg.* S. C. *sub nom.* *WRIGHT v. DOE d. TATHAM* (1837), 7 Ad. & El. 313, Ex. Ch.; *affg.* S. C. *sub nom.* *DOE d. TATHAM v. WRIGHT* (1836), 1 Har. & W. 729.

*Annotations:—**Reid. Marston v. Roe* (1837), 2 Nev. & P. K. B. 504. *Mentd.* *Wolton v. Russell* (1838), 1 Will. Woll. & H. 196; *McGregor v. Topham* (1844), 3 Hare, 488; *It. v. O'Connell* (1844), 5 State Tr. N. S. 1; *Kinnib v. Buchanan* (1850), 15 L. T. O. S. 305; *Cleave v. Jones* (1852), 7 Exch. 421; *Thellusson v. Rendlesham* (1859), 7 H. L. Cas. 429; *Heath v. Creaklock* (1874), 23 W. R. 95.

3800. Affectionate letters between husband & wife—To rebut presumption that wife left husband on ground of cruelty—Necessity for proof of time of writing.]—(1) If, to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms are offered in evidence it must be proved at what time they were written, or they are not admissible in evidence, & the dates of them are not sufficient proof of the times at which they were written.

(2) The minute book of the Consistorial Ct. is sufficient evidence of a decree for alimony pronounced in that ct., without such decree being drawn up in form.—*HOULISTON v. SMYTH* (1825), 2 C. & P. 22, N. P.

3801. Letters from wife to husband & third parties—To show state of wife's feelings.]—*WILLIS v. BERNARD*, No. 3737, ante.

3802. To prove facts stated in letter.]—*FAIRLIE v. DENTON*, No. 3824, post.

3803. ———.]—A. having assigned his stock in trade & business to two trustees, one of them directed pltf. to go to Brussels to procure the liberation of A., who was detained there as a prisoner for debt, & it was arranged that L. should remit pltf. money while there. Pltf. went there, & L. sent a letter to him there announcing that he had done so. In an action by pltf. against the trustees for a compensation for going that

journey:—*Held*: the statements in L.'s letter were not evidence.

If L. remitted money, that is an act done: & if this letter is properly postmarked, it is evidence that he sent a letter at that time, but I do not think his letter is proof of the facts stated in it (*LORD DENMAN, C.J.*).—*LAWRENCE v. THATCHER* (1834), 6 C. & P. 669, N. P.

3804. ——— Letter of apology.]—(1) If, in a case of assault, pltf.'s attorney has written a letter to deft. asking an apology, pltf. is only entitled to have so much of the letter read as simply asks the apology, & not any part of it in which pltf.'s attorney extols the respectability of his own client; (2) & if in the letter the writer state that he writes "without prejudice," no part of it can be given in evidence.—*HEALEY v. THATCHER* (1838), 8 C. & P. 388, N. P.

3805. ———.]—A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated.—*THE SOLWAY* (1885), 10 P. D. 137; 54 L. J. P. 83; 34 W. R. 232; *sub nom.* *BURT v. LIVINGSTONE*, *THE SOLWAY*, 53 L. T. 680; 5 Asp. M. L. C. 482.

To show mental capacity.]—*See LUNATICS.*

Of testator.]—*See LUNATICS; WILLS.*

3806. Agency—Renunciation of agency.]—The captain of a ship was instructed to apply for a cargo to A.; & in the event of A. not being on the spot, then to apply to B., both being agents of the charterers, for the same purpose. He applied to both accordingly, & was refused a cargo by both. An action was brought by the owners to recover the freight; & in order to do away with the effect of the proof as to B.'s refusal, a letter from B. to defts. was tendered in evidence, to show that, prior to such refusal, B. had renounced their agency:—*Held*: to be inadmissible.—*HASSELL v. WATSON* (1815), 2 Car. & Kir. 141.

3807. ——— Want of authority—Absence of ratification.]—Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorised to make it, & that the principal never knew of nor ratified it.

Although the alleged agreement was verbal only, & the agent afterwards, & after the writing of the letters, signed a written agreement confirming the verbal one, the letters are inadmissible to prove that the agent was not authorised to sign the written agreement.

It makes no difference that the agent is dead, unless the letters were written at the time of the conversations detailed, & it was the agent's duty to communicate them to his principal at that time.—*TURNER v. HUTCHINSON* (1861), 3 L. T. 815; 25 J. P. 149; *previous proceedings* (1860), 2 F. & F. 185.

*Annotation:—**Mentd. Re Pearson & T'Anson* (1899), 81 L. T. 289.

3808. ———.]—In an action against brokers for entering into a contract with pltf., as agents for sellers, without authority, it appeared that the broker had been at first put into communication with them as to the sale of a particular cargo of wool, & had learnt what their terms were, except as to price, which was to be afterwards agreed upon, & as to which he had been referred to their agent to complete the matter. The agent, as the

was given in evidence:—*Held*: a contemporaneous letter written by the

creditor, which specified that the bill was drawn for such interest, was

admissible in evidence.—*KINNEAR v. WHITE* (1843), 2 Kerr, 235.—*CAN.*

broker was aware, received letters from time to time from the sellers, insisting on adherence to the terms they had required, & he was more or less aware of the effect of these letters. Ultimately, however, deft., acting as broker for both parties, concluded with the agent a contract upon different terms, & including other ships, which was at once repudiated by the sellers:—*Held*: the sellers' letters to their agent were admissible for pltf. to show the want of authority.—*HUGHES v. GREAME* (1863), 3 F. & F. 885, N. P.

—[See, generally, *AGENCY*, Vol. I., pp. 290, 291, 609, 610.

3809. Libel—To explain libellous placard.]—*R. v. SLANEY*, No. 1689, *ante*.

3810. To prove guilty knowledge—Between principal & receiver.]—*R. v. HINLEY*, No. 1973, *ante*.

3811. To prove that letter constituted official record of transaction.—In an action for a liquidated sum, as a stipulated reason for obtaining the restoration of a pension from the East India Co., the official letter of the directors announcing the restoration, it being shown that no minute existed of the transaction, & that the letter formed the official record of it, was received as evidence of the fact; & it being shown that pltf. composed all deft.'s letters to the Co. on the subject, & it not appearing that any other means had been used to obtain the pension except those which pltf. had employed:—*Held*: this was not sufficient evidence that he had obtained it, until aided by an admission of deft. to that effect.—*ABDOOLAH v. COORG* (*RAJAH*) (1858), 1 F. & F. 265, N. P.

To contradict witness.—See Part V., Sect. 8, sub-sect. 1, C., sub-sect. 2, C., *post*.

(b) *As Admissions.*

3812. Of tenancy.—Where a deft. takes possession of premises on the death of a former tenant & an action of ejectment is brought against him without giving notice to quit; if, to defend himself from that action, he produces a letter from pltf. treating him as tenant & claiming rent, that will be conclusive evidence of his tenancy to pltf. in an action for use & occupation, though he alleged that he produced it only for the purpose of showing that he was tenant in possession.—*TOWNSEND v. DAVIS* (1801), For. 120; 145 E. R. 1132.

3813. Of character in which debt contracted.—*MURRAY v. SOMERVILLE* (1809), 2 Camp. 99, n.

3814.—[Where payment into ct. was made generally on a declaration containing one count charging deft. for the produce of sales as a factor on a *del credere* commission, & another charging him with having negligently sold pltf.'s flour to an insolvent person; deft., in order to show the transaction in question to be one which was not admitted by the payment into ct. on the first count, gave letters in evidence to show that pltf. had admitted the sale in question to be his own affair, & not guaranteed by deft. The jury found a verdict for deft., & the ct. did not disturb it on the ground that this evidence was improperly received.—*DRAKE v. LEWIN* (1834), 4 Tyr. 730.

3815.—[A. & B. in partnership together, had an account at a bank where B. also kept a private account. The bank having a balance against the firm, applied to B. for payment, when B. returned for answer, that the debt was his own, & had nothing to do with the partnership accounts. B. afterwards gave the bank a promissory note, signed in the partnership name, for the amount of the balance. The bank afterwards sued A. upon the note, & recovered the amount of it from him:—*Held*: A. might maintain an action against B. for money paid to B.'s use, as B. had admitted that the debt for which the note was given was his own, & was not connected with the partnership accounts.—*CROSS v. CHESHIRE* (1851), 7 Exch. 43; 21 L. J. Ex. 3; 18 L. T. O. S. 65; 15 Jur. 993.

3816. Of ownership of property—*Ship*.—A letter written by an agent, though not known to be such by the party to whom the letter was written, speaking of a ship, as his own ship, is not conclusive against him in an action on a policy of insurance, in which the question of ownership is raised. He may still prove that he is only an agent, & that others are, in fact, the owners of the vessel.—*TULLOCH v. BOYD* (1816), Holt, N. P. 487.

3817. Of liability.—As against the master of a vessel in an action for not safely conveying goods to a foreign port consigned to pltf.s, evidence that the goods were seized in another foreign port by the govt. coupled with a letter of deft.'s, in which he acknowledges that he is accountable for the goods, is sufficient to warrant the jury in finding for pltf.s, without any further proof of the cause of seizure.—*CULLEN v. MACALPINE* (1819), 2 Stark. 552.

3818. — Authorship denied.—Where, in proof of an acceptance alleged to have been forged by the drawer, a letter purporting to have been signed by deft. is put in as an admission, & as part of pltf.'s case in chief, & its authorship was denied, it is left to the jury with the whole of the case. But a consent by deft. to a judgment in an action on a former bill drawn by the same person was held inadmissible as irrelevant.

How does the fact that she [def't.] admitted a former bill prove that she authorised the drawer to accept bills in her name, unless the former bill was accepted by his hand? & even if you showed that a single instance would be no evidence of a general authority (*COCKBURN, C.J.*).—*PHILPOT v. STOCK* (1860), 2 F. & F. 180.

3819. Of membership in company.—Where a pltf. sued the members of a joint-stock co. for goods sold & delivered, & the defence was, that he was himself a member of the co.:—*Held*: (1) his own letters, in which he spoke of himself as a member, were evidence to show that he was a member, although it was provided by the partnership deed, that none should be members who did not execute the deed & it did not appear that pltf. had executed it; (2) those letters were evidence of his being a member at the time at which they were written, although his shares had been entered in the books of the co. as transferred to another person; the provisions of the deed requiring the execution of a formal transfer, which it did not

Held: as it appeared from the evidence that pltf. allowed the judgment debtor to make other declarations with respect to the property, it might be presumed that he permitted him to make those contained in the letter, which was offered in evidence & rejected, & there being such a foundation laid at the trial as showed *prima facie* a joint interest, or an interest of some kind, between pltf. & the judgment debtor with regard to the goods

PART IV. SECT. 13, SUB-SECT. 6.— C. (b).

r. Of ownership of property.—In trespass for seizing pltf.'s goods, under an execution against the goods of A.:—*Held*: a letter written by A. before any third party had an interest in questioning the right to the goods, was evidence to show the footing on which pltf. & A. then stood with respect to the goods.—*ROBINSON v. RAPELJE*

(1848), 4 U. C. R. 289.—*CAN.*

s.—[M. by letter admitted that the property in dispute was in the hands of a third party, & afterwards sued deft. for it:—*Held*: such letter was evidence.—*MACDONALD v. WOOD* (1859), 8 C. P. 426.—*CAN.*

t.—[On the trial of an interpleader issue, defts. offered in evidence a letter from the judgment debtor to them, which was rejected:—

Sect. 13.—Private documents: Sub-sect. 6, C. (b) & D.; sub-sect. 7, A.]

appear had ever been executed.—**HARVEY v. KAY** (1829), 9 B. & C. 356; 7 L. J. O. S. K. B. 167; 109 E. R. 132.

3820. Of title.]—In an action by assignees of a bkpt., admissions of their title as assignees by deft. in letters addressed to the solr. to the commission & to one of the assignees, are *prima facie* evidence of title, so as to dispense with strict proof, though there is a plea denying the title of pltf. as assignees, & notice to dispute has been given.—**INGLIS v. SPENCE** (1834), 1 Cr. M. & R. 432; 5 Tyr. 8; 4 L. J. Ex. 11; 149 E. R. 1149.

3821. Of authorship of letter—Machine copy—Although not admissible as evidence of letter sent.]—A machine copy of a letter written by pltf. to a third party was allowed to be given in evidence as an admission on the part of pltf., though not admissible as a letter.—**NATHAN v. JACOB** (1859), 1 F. & F. 452.

3822. Of authorship of former letter—Letter signed by procuration.]—A letter signed by procuration is admissible, if unexplained, to prove an admission of the authorship of a former letter.—**GAUNTLETT v. WHITWORTH** (1849), 2 Car. & Kir. 720.

3823. Of existence of partnership—Statement in letter that partnership dissolved.]—**BROWN v. WREN BROTHERS**, No. 3794, *ante*.

Admissions generally.]—See Part II., Sect. 4, sub-sect. 2; Part III., Sect. 2, *ante*.

D. Effect of Not Answering Letter.

3824. Whether evidence—Against party receiving letter.]—Pltf. wrote a letter to deft., which deft. did not answer. At the trial, pltf.'s counsel called for it under a notice to produce, & wished to give evidence of its contents:—**Held**: such evidence was not admissible; but if, by the letter, pltf. demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded.

It is too much to say, that a man, by omitting to answer a letter at all events, admits the truth of the statements that letter contains.—**FAIRLIE v. DENTON** (1828), 3 C. & P. 103, N. P.

Annotation:—Consd. **Gaskill v. Skene** (1850), 14 Q. B. 664.

3825. — — —.]—A. & B. were tenants to pltf. of certain premises for a term of three years. B. never occupied the premises, but A., on the expiration of the term, held over. No assent of B. to the holding over was proved. An action for use & occupation having been brought by pltf. against A. & B., in which A. suffered judgment by default, pltf. tendered in evidence a letter written by his agent to B., after the expiration of the term, in which he demanded rent alleged to be due subsequently to the term. No answer was returned to this letter:—**Held**: as there was no evidence of B.'s assent in this case, deft. B. was not liable for the rent, & therefore the letter to him, although admissible, was not entitled to much weight.—**DRAPER v. CROFTS** (1846), 15 M. & W. 166; 15 L. J. Ex. 92.

3826. — — —.]—Letters containing a demand, written to a deft., & unanswered by him, & in reference to which he has afterwards made

unsatisfactory statements, are admissible in evidence against him, although they also state facts showing how the demand arises.—**GASKILL v. SKENE** (1850), 14 Q. B. 664; 19 L. J. Q. B. 275; 14 L. T. O. S. 374; 14 Jur. 597; 117 E. R. 256.

Annotation:—Apld. **Carne v. Steer** (1860), 5 H. & N. 628.

3827. — — —.]—Where, in an action for goods sold & delivered, the question is whether deft. or a third person was the purchaser, letters of the third party to pltf. are admissible evidence, although not acted upon or answered by pltf.—**DICKSON v. MALCOLM (BARONET)** (1853), 21 L. T. O. S. 199, N. P.

3828. — — —.]—A letter from pltf.'s attorney to deft., coupled with the fact that it has not been answered, may be evidence against him.—**KEEN v. PRIEST** (1858), 1 F. & F. 314.

3829. — — —.]—Pltf. sold a hogshead of cider to deft., by sample, as good draught cider. After the arrival of the cask, deft. on May 28 wrote to pltf. "The cider differs from the sample, & the little I have sold has been complained of in every instance; should this continue I shall be obliged to return it." Pltf. did not answer this letter till June 24. Deft. in trying to sell it used 20 gallons, but finding it unserviceable, refused to pay for the rest, which he returned to pltf. It was found as a fact that the 20 gallons were more than sufficient to enable the defendant to test the quality of the bulk:—**Held**: the omission of pltf. to answer the letter of May 28 was evidence from which a jury might presume that pltf. acquiesced in the further trial of the cider, & that deft. had not so accepted the bulk as to be bound to pay for the whole.—**LUCY v. MOUFLET** (1860), 5 H. & N. 229; 29 L. J. Ex. 110; 157 E. R. 1168.

Annotation:—Mentd. **Grimoldby v. Wells** (1875), L. R. 10 C. P. 391.

3830. — — —.]—Pltf. did the builder's work, & C. the carpenter's work to a house occupied by deft. An agent for pltf. & C. sent their separate bills to deft. in a letter signed by him "*per proc.*," requesting payment. Deft. wrote to C. in answer, that the pltf. had been expressly informed that the work was to be paid for by the landlord. Pltf. saw this letter shortly after it was written, & did not at the time deny the facts stated in it:—**Held**: the letter was admissible in evidence against pltf.—**CARNE v. STEER** (1860), 5 H. & N. 628; 29 L. J. Ex. 281; 2 L. T. 189; 157 E. R. 1330.

3831. — — —.]—It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, & that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded & the absurdity of acting upon it demonstrated. It may be otherwise where the relation between the parties is such that a reply might be properly expected (**WILLES, J.**).—**RICHARDS v. GELLATLY** (1872), L. R. 7 C. P. 127; 26 L. T. 435; 20 W. R. 630; 1 Asp. M. L. C. 277.

Annotations:—Apld. **Wiedemann v. Walpole**, [1891] 2 Q. B. 534. **Refd.** **Thomas v. Jones**, [1920] 2 K. B. 399.

3832. — — —.]—There are cases, business & mercantile cases, in which the cts. have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person

In question, the letter was admissible as evidence.—**HARDEN v. BANK OF TORONTO** (1864), 14 C. P. 496.—**CAN.**

a. — — —.]—Pltf. claimed a declaration that a certain piece of land purchased from the Dominion Govt. in the name of deft. J. was the property of his brother, deft. R., & should

be sold to realise pltf.'s registered judgment against R.

J., in a letter to R. written in 1889, had referred to the property as "your land":—**Held**: the proper conclusion upon the whole evidence was that the land was really R.'s property.—**MILLER v. MCCUAIG** (1900), 13 Man. L. R. 220.—**CAN.**

b. Of agreement—Letters vouching payment of rent.]—Pltf.'s receipts & letters, vouching the payment of the rent in full, & demanding it upon that basis, are evidence to sustain the agreement pleaded.—**LYSAGHT v. DELACOUR** (1859), 8 I. C. L. R. 453; 11 Ir. Jur. 205.—**IR.**

who receives that letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, & one writes to the other, "but you promised me that you would do this or that," if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the cts. will take notice, to answer such letters; & must it be taken, according to the ordinary practice of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write such letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary & wise practice is not to answer them—to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them (LORD ESHER, M.R.).—WIEDEMANN v. WALPOLE, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114; 7 T. L. R. 722, C. A.

Annotations:—*Apld.* Quirk v. Thomas, [1916] 1 K. B. 516; Thomas v. Jones, [1921] 1 K. B. 22.

3833. ———.—[—]—A firm of contractors tendered for the execution of certain work for the Comrs. of Works. The tender having been accepted, a contract in writing, to be signed & sealed on behalf of both parties, was prepared. Before the execution of this document by the Comrs. of Works the contractors wrote to say that they were sending the contract executed by them "on the assumption that in the event of the Bill dealing with workmen's insurance now before Parliament becoming law, the payments thereunder which will fall upon this co. as employers will be recouped to the co. under clause 15 of the contract." No reply was received to this letter, & the contract was executed by the Comrs. of Works. In an arbitration the arbitrator stated a case for the opinion of the ct. to ascertain whether the terms of the letter were binding on the comrs.:—*Held:* the comrs. were not bound by the terms of the letter, nor stopped from relying upon the true construction of the sealed contract.

No authority has been cited to me, nor, I am inclined to think could such an authority be cited, that persons are estopped from denying the true construction of a contract by failing to answer a letter, in which the other party to the contract says that he thinks that the contract means so & so

(SHEARMAN, J.).—*LESLIE & Co. v. WORKS* (1914), 78 J. P. 462.

3834. ———.—[—]—There may be circumstances in which there is a duty to answer letters, or in which the probability is so strong that a letter would be answered, that an inference may be drawn from silence. But the general rule is otherwise (PHILLIMORE, L.J.).—*QUIRK v. THOMAS*, [1916] 1 K. B. 516; 85 L. J. K. B. 519; 114 L. T. 308; 32 T. L. R. 197; 60 Sol. Jo. 174, C. A.

Annotations:—*Mentd.* Yorke v. Yorkshire Insee., [1918] 1 K. B. 662; The Adams (1919), 88 L. J. P. 129; Jackson v. Anglo-American Oil Co., [1923] 2 K. B. 601.

3835. ———.—[—]—The question of not immediately repudiating an accusation is one of very considerable difficulty, & is, in my view, entirely a question of degree. If a charge of outrageous conduct is made against a person in public, & he says nothing, I have always thought that a jury would be entitled to treat his silence as an admission, if it was the class of accusation in respect of which, & the people in the neighbourhood were the class of people from whom, a repudiation of an untrue charge would be expected. But I do not think the same principle applies to accusations made by private letter. Lunatics write all sorts of letters to all manner of people, & if the receiver of a letter from a lunatic making a charge were bound to write at once & deny it, the time of judges, at any rate, would be fully taken up by answering the letters. I quite agree that the mere fact of receiving a statement by letter is not enough to justify justices or a jury in finding corroboration (SCRUTTON, L.J.).—*THOMAS v. JONES*, [1921] 1 K. B. 22; 90 L. J. K. B. 49; 124 L. T. 179; 85 J. P. 38; 36 T. L. R. 872, C. A.

Whether corroboration—In action for breach of promise.—*See* HUSBAND & WIFE.

SUB-SECT. 7.—LETTERS WRITTEN "WITHOUT PREJUDICE."

A. In General.

3836. Meaning of "without prejudice."—*WOODARD v. EASTERN COUNTIES & LONDON & BLACKWALL RY. CO.*, No. 3855, *post*.

3837. ———.—[—]—Pltf. signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars & conditions; & the auctioneer signed "as agent for the vendor." Pltf. paid a deposit, & vendor's solr. forwarded to pltf.'s solrs. an abstract of title, & in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds, etc.," & after examining the abstract they forwarded requisitions,

PART IV. SECT. 13, SUB-SECT. 7.—A.

a. *General rule.*—[—]—In a letter by pltf.'s to deft. there was the following passage. "This letter is without prejudice to their legal position."—*Held:* inadmissible as evidence.—*ANDERSON v. WADEY* (1899), 20 N. S. W. L. R. 412; 16 N. S. W. W. N. 83.—*AUS.*

d. ———.—[—]—In trespass for an assault, the act was proved, but not that deft. committed it. To supply this, letters were put in which had passed between the attorneys on either side with a view of settlement, the first written expressly "without prejudice." Pltf.'s attorney, who produced the letters, also swore that deft. admitted it was he who struck pltf. The jury found for pltf. *Semle:* the letters should not have been received even for the purpose of proving the

identity.—*BURNS v. KERR* (1850), 13 U. C. R. 468.—*CAN.*

e. ———.—[—]—All communications expressed to be written without prejudice, & fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, which are not made with some other object in view & wrong motives, are not admissible in evidence.—*PIRIE v. WYLB* (1886), 11 O. R. 422.—*CAN.*

f. ———.—[—]—Overtures of pacification & any other offers or propositions between litigating parties, expressly or impliedly made "without prejudice," are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at.—*YORK COUNTY v. TORONTO GRAVEL ROAD & CON-*

CRETE CO. (1882), 3 O. R. 584; *affd.* 11 A. R. 765; 12 S. C. R. 517.—*CAN.*

g. ———.—[—]—In a suit for Rs.465, deft. pleaded limitation. In reply pltf. relied on an acknowledgment of the debt on a postcard sent by deft. to pltf. written in Gujarati but bearing the words "without prejudice" in English. This evidence was declared to be inadmissible & the suit was dismissed.—*MADHAVRAV v. GULABHAI* (1898), 1 L. R. 23 Bom. 177.—*IND.*

3838. *i. Meaning of without prejudice.* [—]—A letter containing an offer written "without prejudice," means "I make you an offer, if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed.—*OMNIUM SECURITIES CO. v. RICHARDSON* (1884), 7 O. R. 182.—*CAN.*

Sect. 13.—Private documents: Sub-sect. 7, A., B. & C.]

writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." Pltf. subsequently repudiated the contract, on the ground (*inter alia*) that the contract did not disclose the name of the vendor, & brought an action to recover the deposit:—*Held*: the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.—*THOMAS v. BROWN* (1876), 1 Q. B. D. 714; 45 L. J. Q. B. 811; 35 L. T. 237; 24 W. R. 821.

Annotations:—*Mentd.* *Rossiter v. Miller* (1877), 25 W. R. 890; *Chillingworth v. Esche* (1923), 129 L. T. 808; *Monnickendam v. Leane* (1923), 39 T. L. R. 445.

3838. —[—*Re LEITE, LEITE v. FERREIRA* (1881), 72 L. T. Jo. 97.

3839. —[—(1) Defts., being the owners of a patent, communicated with pltf.s. "without prejudice" by letters, & at a personal interview with them, on the footing that pltf.s. had begun to use, & were preparing extensive plant for further using, a process of manufacture which defts. alleged to be an infringement of their patent. By the letters, as well as at the interview, defts. asserted that unless an amicable arrangement could be attained they should insist upon their legal rights. No arrangement was made, nor did defts. commence any proceedings:—*Held*: defts. had made threats against the plaintiffs within the meaning of the Patents Act, 1883 (c. 57), s. 32.

(2) What I understand by negotiation without prejudice is this: pltf. or deft., a party litigant, may say to his opponent: "Now you & I are likely to be engaged in severe warfare; if that warfare proceeds you understand I shall take every advantage of you that the game of war permits; you must expect no mercy & I shall ask for none; but before bloodshed let us discuss the matter & let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms & that nothing that each of us says shall over be used against the other so as to interfere with our rights at war, if unfortunately war results." That is what I understand to be the meaning not the definition of "without prejudice" (*KERWICK, J.*).—*KURTZ & Co. v. SPENCE & SONS* (1887), 57 L. J. Ch. 238; 58 L. T. 438; 5 R. P. C. 161.

Annotation:—(*Generally*, *Mentd.* *Willoughby v. Taylor* (1893), 11 R. P. C. 45.

3840. —[—(1) Letters written without prejudice are inadmissible to show that there is good cause for depriving a successful litigant of costs under Ord. 65, r. 1.

(2) What is the meaning of the words "without prejudice." I think they mean without prejudice to the position of the writer of the letter. If the terms proposed in the letter are accepted a complete contract is established, & the letter, although written without prejudice, operates to alter the position of affairs & to establish a contract of which specific performance would be given. Supposing a letter is written without prejudice, it is, according both to authority & to good sense,

that the answer also should be without prejudice (*LINDLEY, L.J.*).—*WALKER v. WILSHER* (1889), 23 Q. B. D. 335; 58 L. J. Q. B. 501; 54 J. P. 213; 37 W. R. 723; 5 T. L. R. 649, C. A.

3841. —[—*Resps.* made three contracts with applt. in Jan. 1913, July, 1913, & Apr. 1914, under which they contracted to supply applt.s. with three hundred reels of paper weekly from 1914 to 1917. Each contract contained a clause that the orders were subject to strike or lock-out clauses & *force majeure*, fire, or breakdown. After war was declared disputes arose as to each of the contracts, but ultimately these disputes were settled "without prejudice" by agreements for an increase in price. While the rearrangements for continued supply were in force regulations were issued under a Proclamation made in Feb. 1916, fixing the quantity of paper or paper making material allowed to be imported under licence at two-thirds of the licensee's consumption in 1914. Further disputes then arose as to prices demanded by *resps.* which increased prices applt.s. paid under protest, reserving their right to bring an action to recover the moneys paid in excess of the contract prices & damages for breach of contract:—*Held*: the words "without prejudice" only meant that the rearrangement was not to be treated as prejudicing the position of the parties under the contracts in reference to any period other than the particular one in reference to which they were then arriving at a fresh agreement, & as there was nothing unreasonable in the rearrangement applt.s. could not recover the excess paid up to Mar. 1, 1916.—*HULTON (E.) & Co., LTD. v. CHADWICK, TAYLOR & Co.* (1919), 122 L. T. 66; 35 T. L. R. 620; 63 Sol. Jo. 681; 24 Com. Cas. 297, H. L.; *affg.* (1918), 34 T. L. R. 230, C. A.

Annotations:—*Mentd.* *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Re Badische Co., Bayer Co., etc.*, [1921] 2 Ch. 331.

B. Admissibility.

3842. Letter must be written in reference to dispute or negotiation—Letter of apology.—*HEALEY v. THATCHER*, No. 3804, *ante*.

3843. —[—Where letters are written "without prejudice," with a view to a compromise, they cannot be given in evidence.—*HOGHTON v. HOGHTON* (1852), 15 Beav. 278; 51 E. R. 515.

Annotations:—*Mentd.* *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *Beanland v. Bradley* (1854), 2 Sm. & G. 339; *Cobbett v. Brock* (1855), 20 Beav. 524; *Wright v. Vanderplank* (1855), 2 K. & J. 1; *Dimsdale v. Dimsdale* (1856), 25 L. J. Ch. 806; *Hartopp v. Hartopp* (1856), 21 Beav. 259; *Bury v. Oppenheim* (1859), 26 Beav. 594; *Head v. Godlee, Reynolds v. Godlee* (1859), *John. 536*; *Jenner v. Jenner* (1860), 2 De G. F. & J. 359; *James v. Holmes* (1862), 31 L. J. Ch. 567; *Chambers v. Crabbe* (1865), 34 Beav. 457; *Potts v. Surr* (1865), 34 Beav. 543; *Turner v. Collins* (1871), 7 Ch. App. 329; *Carnegie v. Carnegie* (1874), 30 L. T. 460; *Fane v. Fane* (1875), L. R. 20 Eq. 698; *Lovell v. Wallis* (No. 2) (1884), 50 L. T. 681; *Allcard v. Skinner* (1887), 36 Ch. D. 145; *Hoblyn v. Hoblyn* (1889), 41 Ch. D. 200; *Bischoff's Trustee v. Frank* (1903), 89 L. T. 188.

3844. —[—*Semble*: a letter expressed to be without prejudice could not be used against the writer.—*Re RIVER STEAMER CO., MITCHELL'S CLAIM* (1871), 6 Ch. App. 822; 25 L. T. 319; 19 W. R. 1130, L. J.J.

Annotations:—*Mentd.* *Morgan v. Rowlands* (1872), L. R. 7 Q. B. 493; *Quincey v. Sharpe* (1876), 1 Ex. D. 72; *Skeet v. Lindsay* (1877), 2 Ex. D. 314; *Banner v. Berridge* (1881), 18 Ch. D. 254; *Re Bethell, Bethell v. Bethell*

proposals therein contained were not accepted:—*Held*: not admissible evidence on behalf of pltf.—*RITCHIEY v. HOWARD* (1857), 6 C. P. 437.—*CAN.*

k. —[—*Where compromise previously offered.*—Where a party has, on a previous application in the action, made use of the fact that he had offered

PART IV. SECT. 13, SUB-SECT. 7.—B.

3843 i. Letter must be written in reference to dispute or negotiation.—[The rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another, & terms are offered for the settlement of the

dispute or negotiation.—*BANK OF OTTAWA v. STAMCO, LTD.* (1915), 8 W. W. R. 574.—*CAN.*

h. Extent of protection—Letter & account.—[Where deft. had rendered an account to pltf. with a letter stating that the letter & account were sent "without prejudice," in case certain

(1887), 34 Ch. D. 561; *Firth v. Slingsby* (1888), 58 L. T. 481; *Curwen v. Milburn* (1889), 42 Ch. D. 424; *Nichols v. Regent's Canal Co.* (1894), 63 L. J. Q. B. 641; *Barrett v. Davies* (1904), 91 L. T. 736; *Lusher v. Hassard* (1904), 20 T. L. R. 563; *Maniram v. Rupchand* (1906), 22 T. L. R. 619; *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486; *Fettes v. Robertson* (1921), 37 T. L. R. 581.

3845. —[—]*GRACE v. BAYNTON* (1877), 21 Sol. Jo. 631, L. J. J.

3846. —[—]*LA ROCHE v. ARMSTRONG*, No. 3852, *post*.

3847. Inclusion in affidavits.—Letters written "without prejudice" are not to be introduced into affidavits.—*FRIPP v. BRIDGWATER & TAUNTON CANAL CO.* (1855), 3 W. R. 356.

3848. —Time for objection.—The question of the admissibility in evidence of letters written without prejudice ought to be decided at the trial of an action, when all the facts are before the ct., & not on an application under R. S. C. Ord. 38, r. 11, to strike extracts from such letters out of an affidavit.—*Re JESSOPP (A SOLICITOR)* (1910), 51 Sol. Jo. 543, C. A.

3849. Extent of protection—Letter & answer.—Where a letter written by one of the parties to a dispute to the other, is expressed to be "without prejudice," neither that letter nor the answer to it can be given in evidence on the part of the writer of the first letter, although the answer is not expressed to be "without prejudice."—*PADDOCK v. FORRESTER* (1842), 3 Man. & G. 903; 3 Scott, N. R. 715; 133 E. R. 1404.

Annotations.—*Reid. Walker v. Wilsheer* (1889), 23 Q. B. D. 335. *Mentid. Hilton v. Granville* (1844), 5 Q. B. 701.

3850. —Preceding letter.—A letter from pltf.'s solrs. to defts., which was followed in a day or two by another letter guarding against prejudice to pltf.'s legal & other rights, was not allowed to be used by defts. as evidence for any purpose of his defence.—*PEACOCK v. HARPER* (1877), as reported in 26 W. R. 109.

3851. —Whole negotiation.—Where a negotiation for a compromise is commenced by one letter written "without prejudice," the whole is protected.—*Re HARRIS, Ex p. HARRIS* (1875), as reported in 44 L. J. Bey. 33; 32 L. T. 417, L. J. J.

3852. —Parties & their solicitors.—In a dispute between two parties, letters & negotiations between their respective solrs., which are written or declared to be without prejudice, are inadmissible in evidence not only against the parties themselves but also against the solrs.—*LA ROCHE v. ARMSTRONG*, [1922] 1 K. B. 485; 91 L. J. K. B. 342; 126 L. T. 699; 38 T. L. R. 347; 66 Sol. Jo. 351.

C. For What Purposes Admitted.

3853 Not as admission—Of debt.—A letter sent by a debtor to a creditor, respecting a debt, which contains, in the introductory part, these words, "which is not to be used in prejudice of my rights now, or in any future arrangement that may be made or instituted," cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the statute of limitations.—*CORY v. BRETTON* (1830), 4 C. & P. 462, N. P.

3854. —[—]Letters written "without prejudice" cannot be used in evidence of admissions.

a compromise, evidence of such offer is admissible at the trial, though it purported to be made without prejudice. Such previous use of the offer divests it of the character of a privileged communication.—*JOHNSTON v. JACKSON* (1889), 6 V. L. R. 1.—*AUS.*

1. —Not after settlement effected.—Letters written "without prejudice" with a view to effecting

a settlement of a case are privileged, but lose that privilege as soon as the settlement has been effected.—*KNAPP v. METROPOLITAN PERMANENT BUILDING ASSOC.* (1888), 9 N. S. W. L. R. 468; 5 N. S. W. N. 27.—*AUS.*

PART IV. SECT. 13, SUB-SECT. 7.—C.

3855 i. Question of costs.—Although a letter written "without prejudice"

—*JONES v. FOXALL* (1852), 15 Beav. 388; 21 L. J. Ch. 725; 51 E. R. 588.

Annotations.—*Mentid. Vyso v. Foster* (1874), L. R. 7 H. L. 318; *Re Wilcoxon, Ex p. Andrews* (1884), 25 Ch. D. 505.

3855. Question of costs.—(1) A railway co. having entered into possession of certain lands required for their works after notice by the landowner that they were not to enter until payment of the purchase money, an injunction was granted, against their retaining possession. They afterwards entered into a long correspondence "without prejudice." Ultimately they paid the purchase & compensation money into ct.; & then moved only to dissolve the injunction. Pltf. wished, on that motion, that all proceedings might be stayed & to go into the general question, but defts. refused. Thereupon pltf. moved to that effect:—*Held:* defts. ought to pay all the costs of the suit, including the costs of this motion.

(2) The correspondence was to be "without prejudice"; which means, not that the parties are not to be bound by the statements made in the course of that correspondence, but only that the whole is to be considered as an amicable treaty, not to be strictly construed to the injury of any party (*WOOD, V.-C.*).—*WOODARD v. EASTERN COUNTIES & LONDON & BLACKWALL RY. CO.* (1855), 1 Jur. N. S. 899.

3856. —[—]A husband & wife, under their marriage settlement, were to have the use & enjoyment of all the personal estate of the wife, together with chattels of the husband, during their lives, & of all such personalty as they might become possessed of or entitled to during the coverture. Shortly after the marriage the husband built houses on land, not his own, but adjoining his own, obtained a lease & built other houses, stating that they were built with his wife's money, & then died. The wife remained in possession of the property, & died intestate, & the heiress of the husband brought an action of ejectment against the wife's representative & the tenants, to recover possession. An injunction was obtained to restrain the action, pltf., the wife's representative, claiming the houses & lease, & asking by his bill for a conveyance, account, injunction, & receiver, defts. solicitor offering, "without prejudice," to take the money laid out as a charge on the houses:—*Held:* the offer of defts. solicitor might be used against pltf. on the question of costs, & inasmuch as the decree was in the same terms as the offer, pltf. must pay the costs.—*WILLIAMS v. THOMAS* (1862), 2 Drew. & Sm. 29; 31 L. J. Ch. 674; 7 L. T. 181; 8 Jur. N. S. 250; 10 W. R. 417; 62 E. R. 532.

Annotations.—*Consid. Walker v. Wilsheer* (1889), 23 Q. B. D. 335. *Mentid. Re British Provident, etc. Assoc. Soc., Stanley's Case* (1864), 4 De G. J. & Sm. 407.

3857. —[—]*WALKER v. WILSHER*, No. 3840, *ante*.

3858. To prove waiver of notice of dishonour—On acceptance of conditional offer.—Deft. being sued on a bill of exchange drawn & indorsed by him, wrote to pltf.'s attorneys in a letter headed "Without prejudice," as follows: "I never had any notice of dishonour of this bill, but if the debt will be accepted without costs, I do not want Mr. Holdsworth to be the loser of it, & I would give a cheque." Thereupon pltf. took out a rule to

by a party in the course of a cause cannot be read against him, it may be read by him on the question of costs, in order to show that he had made such an offer as rendered the further prosecution of the suit unnecessary.—*BOYD v. SIMPSON* (1879), 26 Gr. 278.—*CAN.*

m. To prove bona fides.—*CLARK*

Sect. 13.—Private documents: Sub-sect. 7, C.; sub-sects. 8, 9, 10, 11 & 12.]

discontinue the action on payment of costs, which were afterwards taxed & paid by him. Before the costs were paid pltf. commenced another action on the bill against deft., & at the trial offered the above letter as evidence of waiver of notice of dishonour; it was admitted by the learned judge & the jury found for the plaintiff. On a motion for a rule to set the verdict aside upon the ground that the letter, being "without prejudice," was not admissible:—*Held*: the letter was a conditional offer to waive notice of dishonour, which became absolute when pltf. accepted the terms by discontinuing the first action & foregoing costs, & was therefore rightly admitted in evidence.—*HOLDSWORTH v. DIMSDALE* (1871), 24 L. T. 360; 19 W. R. 798.

3859. To prove act of bankruptcy.]—A written notice sent by a debtor to one of his creditors that he has suspended payment or is about to suspend payment though expressed to be of his debts written "without prejudice" is admissible in evidence to prove an act of bkpcy., upon the hearing of a bkpcy. petition.—*Re DAINTRY, Ex p. HOIT*, [1893] 2 Q. B. 116; 62 L. J. Q. B. 511; 69 L. T. 257; 41 W. R. 590; 9 T. L. R. 452; 37 Sol. Jo. 480; 10 Morr. 158; 5 R. 414, D. C.

3860. Not to prove malice.]—Counsel for pltf. in his opening speech read a letter which was written without prejudice & which was undoubtedly well calculated to influence the jury against deft. . . . It is not necessary to discuss how it could have been evidence against deft. under any circumstances. It was a letter written by the husband to one of the solrs. in the case & assumed to be evidence of malice on the part of deft. because it was a copy in her handwriting. I will only say that I do not assent to its being evidence against her, its only relevance being to show malice by her & simply without more proof of authorship than that it was in her handwriting & a copy of her husband's letter (*LOID HALSBURY, C.*).—*WATT v. WATT*, [1905] A. C. 115; 74 L. J. K. B. 438; 92 L. T. 480; 53 W. R. 547; 21 T. L. R. 386, H. L.

Annotations:—Mentd. *Jenkins v. Taff Vale Ry.* (1912), 106 L. T. 715; *Barber v. Deutsche Bank (Berlin) London Agency*, [1919] A. C. 304.

SUB-SECT. 8.—PRIVATE AND CONFIDENTIAL LETTERS.

3861. Admissibility.]—An action having been commenced by a clergyman for the rescission of a contract on the ground of misrepresentation by deft., deft. wrote to pltf. inclosing a copy of the statement of claim in the action, with marginal comments of an abusive character, & stating his intention of publishing & sending to all the clergy in London copies of the pleading so annotated, & of his letter to pltf. He had previously sent to pltf. letters on the subject of the action, marked "private & confidential" in which he made other threats as to publication:—*Held*: deft. could not, by making his letters "private," etc., impose upon pltf., who had refused to hold any personal communication with him, any condition as to the way in which they might be used.—*KITCAT v. SHARP* (1882), as reported in 48 L. T. 64.

Annotation:—Mentd. *Hubbard v. Woodfield* (1913), 57 Sol. Jo. 729.

v. GRAND TRUNK RY. CO. (1869), 29 U. C. R. 136.—**CAN.**

n. To prove binding contract.] —

Where negotiations with a view to settlement of a suit concluded by means of letters marked "without prejudice" the letters may be given in evidence to

prove the binding contract notwithstanding the restrictive words.—*VARDON v. VARDON* (1883), 6 O. R. 719.—**CAN.**

SUB-SECT. 9.—NEGOTIABLE INSTRUMENTS.

3862. Admissibility—Copy.]—Copy of a promissory note taken by one, who had been entrusted with the note & was since dead, contained an acknowledgment that nothing was due. This was allowed to be read as evidence, though not proved to be a true copy, & though deft. had sworn there was no such acknowledgment under the note, it appearing when the note was produced, that the bottom of it was torn off.—*WINNE v. LLOYD* (1707), 2 Vern. 603; 1 Eq. Cas. Abr. 228; 23 E. R. 994, L. C.; *affd.*, *sub nom. LLOYD v. WYNNE* (1709), 2 Bro. Parl. Cas. 374, H. L.

— Unstamped instrument.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 493, 509–512, Nos. 3122, 3253–3278.

How proved—Date of instrument.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 50–52.

— Acceptance & signature.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 65–68.

— Forged signatures.]—*See* *BILLS OF EXCHANGE*, Vol. VI., p. 108, Nos. 740–745.

— Consideration.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 172–174.

— Payment of instrument.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 359–362.

— Alteration of instrument.]—*See* *BILLS OF EXCHANGE*, Vol. VI., pp. 385, 386.

3863. For what purposes admitted—All purposes.]—In an action for rent by the landlord's exor. a cheque was put in, which bore at the back an indorsement by deft. confirming his statement that it was given as payment in advance of the rent.

The cheque is in evidence, & in evidence for all purposes. How can I prevent the jury from seeing anything on it? What the indorsement amounts to is another question. It is a general rule as to all such instruments, that if put in they are evidence altogether, & taken as read. What the cheque proves is payment, but it is impossible for me to exclude what is upon it. A parol contract may be varied by parol, & the rent made payable in advance (*BYLES, J.*).—*NASH v. GRAY* (1861), 2 F. & F. 391, N. P.

3864. — To prove debt.]—It is not evidence of itself to establish a loan of money by pltf. to deft. to prove that deft. received cash for a draft or cheque drawn by pltf. on his bankers, & payable to him by name out of money of pltf.'s, then in the bank.—*CARY v. GERRISH* (1801), 4 Esp. 9, N. P.

3865. — —.]—Proof of the delivery & payment of a cheque to pltf. is not sufficient evidence of a debt in order to support a set-off, unless it be shown upon what consideration, & under what circumstances, the cheque was given.—*AUBERT v. WALSH* (1812), 4 Taunt. 293; 128 E. R. 342.

— To prove payment.]—*See* *CONTRACT*, Vol. XII., pp. 462–471, 473, Nos. 3755–3846, 4061–4063.

3866. — I.O.U.—Evidence of advances.]—Deft. had taken, & still held, an acceptance & two I. O. U.'s of pltf. as acknowledgments of sums due to him, which were afterwards included in the mtge. debt:—*Held*: in the absence of anything to throw discredit on the holder, these acknowledgments must be taken as *prima facie* evidence of the advances.—*JUDD v. OLLARD* (1859), 33 L. T. O. S. 268; 5 Jur. N. S. 755.

— — —.]—*See, generally*, **BILLS OF EXCHANGE**, Vol. VI., pp. 459, 460.

— **Unstamped instrument.**—*See* **BILLS OF EXCHANGE**, Vol. VI., pp. 509–512.

— — —.]—*See, also*, **BILLS OF EXCHANGE**, Vol. VI., pp. 486–489.

SUB-SECT. 10.—RECEIPTS.

For what purposes admitted—To prove payment.—*See* **CONTRACT**, Vol. XII., pp. 494–496, Nos. 4028–4059.

3867. — **To prove agreement as to mode of payment.**—**BERTIE v. BEAUMONT**, No. 3587, *ante*.

3868. — — —.]—Old receipts for tithes & moduses, expressed merely to have been given to A. for sums received of him by B. on account of C., sufficiently appear to relate to the parish, it having been proved that persons of those names were respectively, at the dates of the receipts, owner of lands in the parish, & curate & rector thereof; & such receipts having been found by A. amongst his late father's papers, under whom he claimed, are admissible in evidence to prove the moduses.—**TOMLINSON v. LYMER** (1831), 4 Sim. 467; 58 E. R. 175.

3869. — **As evidence of existence at time of date.**—Certain documents purporting to be a receipt of & a delivery order for the goods, in the handwriting of the bkpt. & dated as of the day of the sale, were delivered to a witness by the bkpt. after his bkpcy., & about a month after the alleged sale. There was no evidence, independent of the documents themselves, that they existed before the bkpcy.:—**Held**: the documents were admissible as evidence of their existence at the time they bore date.—**MORGAN v. WHITMOIRE** (1851), 6 Exch. 716; 20 L. J. Ex. 289; 155 E. R. 733.

On policies.—*See* **Marine Insurance Act**, 1906 (c. 41), s. 54; **INSURANCE**.

Receipt clause in deed.—*See* **ESTOPPEL**, Vol. XXI., pp. 265, 266.

SUB-SECT. 11.—TELEGRAMS.

3870. Admissibility.—*Semble*: telegraphic messages are admissible evidence.—**MEESON v. OLIVER** (1851), 23 L. T. O. S. 271, N. P.

3871. — **Unsigned telegram.**—(1) Telegraph cos. cannot refuse to answer questions as to messages transmitted by them, & they must, if called upon, produce such messages.

(2) A telegram will be admitted as evidence, although not signed.—**COVENTRY CASE**, **INCE'S CASE** (1869), 20 L. T. 405, 421; 1 O'M. & H. 97, 104.

Annotations:—**Generally**, **Mentd.** **Bristol Case**, **Britt v. Robinson** (1870), L. R. 5 C. P. 503; **Horsham Case** (1876), 3 O'M. & H. 52; **Carrickfergus Case** (1880), 3 O'M. & H. 90; **Louth County Case** (1880), 3 O'M. & H. 161; **Rigden v. Passmore Edwards & Grenfell** (1880), 44 L. T. 193; **Salisbury Case** (1880), 3 O'M. & H. 130; **Salisbury Case**

PART IV. SECT. 13, SUB-SECT. 11.

3872 I. Production—Jurisdiction of court to order.—The ct. ordered the agent of a telegraph co. to produce all telegrams sent by resp. & his alleged agent during the election, reserving to resp. the right to move the ct. of appeal on the point; & the responsibility as to consequences, if it were wrong so to order, to rest on petitioner.—**SOUTH OXFORD ELECTION CASE**, **HOPKINS v. OLIVER** (1875), H. E. C. 243.—**CAN.**

o. Whether secondary evidence admissible—Proof of receipt by addressee.—In an action claiming damages for wrongfully procuring plff.'s son to leave his service & refusing to allow him to return, secondary evidence was offered & rejected of a telegram sent by plff. to deft. demanding the son's return:—**Held**: the evidence should have been received. The same principle that admits proof that letters were deposited in the post office duly addressed, as

(1883), 4 O'M. & H. 21; **Belfast Western Division Case** (1886), 4 O'M. & H. 105; **Packard v. Collings & West** (1886), 54 L. T. 619.

3872. Production—Jurisdiction of court to order.—**MARE v. LAWRIE** (1853), 10 L. T. 275.

3873. — — —.]—**STROUD CASE** (1874), 2 O'M. & H. 107.

Annotations:—**Overd.** **Bolton Case** (1874), 2 O'M. & H. 138. **Consd.** **Harwich Case** (1880), 3 O'M. & H. 61. **Mentd.** **Monmouth Boroughs Case** (1901), 5 O'M. & H. 166.

3874. — — —.]—**TAUNTON CASE** (1874), 30 L. T. 125, 130; 2 O'M. & H. 66, 72.

Annotations:—**Consd.** **Stroud Case** (1874), 2 O'M. & H. 107. **Mentd.** **Galway Borough Case** (1874), 2 O'M. & H. 196; **Wigan Case** (1881), 4 O'M. & H. 1.

3875. — — —.]—**BOLTON CASE** (1874), 2 O'M. & H. 138.

Annotations:—**Consd.** **Harwich Case** (1880), 3 O'M. & H. 61. **Mentd.** **Stroud Case** (1874), 2 O'M. & H. 181; **Stroud Case** (1874), 3 O'M. & H. 7; **Woodward v. Sarsons** (1875), L. R. 10 C. P. 733; **Horsham Case** (1876), 3 O'M. & H. 52; **Packard v. Collings & West** (1886), 54 L. T. 619.

3876. — — —.]—The Post Office authorities may be ordered to produce specified telegrams.—**HARWICH CASE**, **TOMLINE v. TYLER** (1880), 44 L. T. 187; 3 O'M. & H. 61.

Annotations:—**Mentd.** **Westbury Case** (1880), 3 O'M. & H. 78; **McLaren v. Home** (1881), 7 Q. B. D. 477.

3877. — **Duty of officials to obey order for production.**—**COVENTRY CASE**, **INCE'S CASE**, No. 3871, *ante*.

3878. — — —.]—**BOLTON CASE** (1874), 2 O'M. & H. 138.

Annotations:—**Refd.** **Harwich Case** (1880), 3 O'M. & H. 61. **Mentd.** **Stroud Case** (1874), 2 O'M. & H. 181; **Stroud Case** (1874), 3 O'M. & H. 7; **Woodward v. Sarsons** (1875), L. R. 10 C. P. 733; **Horsham Case** (1876), 3 O'M. & H. 52; **Packard v. Collings & West** (1886), 54 L. T. 619.

3879. — **Necessity for—Criminal proceedings—To prove telegram sent by prisoner.**—Where in a criminal case it is sought to give in evidence the contents of a telegram sent by prisoner to a witness, it is absolutely necessary that the original message handed to the post office should be produced or proof given that it is destroyed, & the copy received by a witness cannot be given in evidence until it is proved that the original cannot be produced.—**R. v. REGAN** (1887), 16 Cox, C. C. 205.

Contracts made by telegram.—*See* **CONTRACT**, Vol. XII., pp. 64, 75, 77, 79, 92, Nos. 373, 436, 444, 449, 450, 470, 561.

Ambiguity in telegram—Sent to agent.—*See* **AGENCY**, Vol. I., p. 429, Nos. 1208, 1212, 1213.

SUB-SECT. 12.—WILLS.

3880. Admissibility—Unexecuted will.—In questions of pedigree, the circumstance that a document containing a relevant declaration by a deceased declarant is not complete for its primary purpose does not affect the admissibility of the declaration. Thus, where the question was one as to the marriage of A. & B., both deceased, a declaration by A. that B. passed as his wife contained in a draft will in A.'s handwriting:—**Held**: admissible, although such draft will was never executed by A.

tending to show that they were received by the persons to whom they are addressed, applies to telegrams.—**WHITE v. FLEMMING** (1888), 20 N. S. R. (8 L. & G.) 335.—**CAN.**

PART IV. SECT. 13, SUB-SECT. 12.

p. Admissibility—Copy.—A copy of a will certified by the deputy registrar of probate after the death of the registrar, & during a vacancy in the office, was properly received in

Sect. 13.—Private documents: Sub-sect. 12. Sects. 14 & 15.]

—*Re* LAMBERT (1886), 56 L. J. Ch. 122; 56 L. T. 15; 3 T. L. R. 216.

3881. ———.]—A testator left in a box belonging to him a letter written by him to his exor., which had not been communicated to the exor., in which was said "the £100 I lent you does not form part of the money left you; it is cancelled":—*Held*: the letter was a testamentary document not duly executed, & was inadmissible in evidence of the cancellation of the debt.—*Re* HYSLOP, *HYSLOP v. CHAMBERLAIN*, [1894] 3 Ch. 522; 64 L. J. Ch. 168; 71 L. T. 373; 43 W. R. 6; 38 Sol. Jo. 663; 8 R. 680.

Annotation:—*Mentd.* *Re* Stewart, *Stewart v. McLaughlin*, [1908] 2 Ch. 251.

.]—*See, generally*, EXECUTORS; WILLS.

How proved — Necessity for calling attesting witness.—*See* EXECUTORS.

Ancient will.—*See* Sub-sect. 1, *ante*.

.]—*See, generally*, EXECUTORS; WILLS.

3882. **For what purposes admitted—To prove age of person—Statement of date of person's birth.**—

The statement in a will of the date of a person's birth:—*Held*: *prima facie* evidence of that person's age.—*VULLIAMY v. HUSKISSON* (1838), 3 Y. & C. Ex. 80; 2 Jur. 656; 100 E. R. 623.

3883. ———.]—**To prove death of testator without children—Will leaving all testator's property to collateral relations or friends.**—In pedigree cases an old will, by which testator purports to leave all his property to collateral relations or friends, is regarded as very strong evidence of his having died without children.—*HUNGATE v. GASCOIGNE* (1816), 2 Ph. 25; 2 Coop. temp. Cott. 405; 15 L. J. Ch. 382; 8 L. T. O. S. 17; 10 Jur. 625; 41 E. R. 850, L. C.

Annotation:—*Mentd.* *Wason v. Westminster Improvement Comrs.* (1861), 4 L. T. 80.

3884. ———.]—**To prove cancellation of debt—Unexecuted will.**—*Re* HYSLOP, *HYSLOP v. CHAMBERLAIN*, No. 3881, *ante*.

SECT. 14.—INSCRIPTIONS.

3885. **Admissibility—Monumental inscription.**—*NEAL d. ATHOL (DUKE) v. WILDING* (1741), 2 Stra. 1151; 93 E. R. 1094.

3886. ———.]—**Tombstone.**—Inscriptions upon tombstones & engravings on rings are evidence of pedigree.

Upon questions of pedigree inscriptions upon tombstones are admitted; as it must be supposed, the relations of the family would not permit an inscription without foundation to remain. So engravings upon rings are admitted; upon the presumption, that a person would not wear a ring with an error upon it (*LORD ERSKINE, C.*).—*VOWLES v. YOUNG* (1806), 13 Ves. 140; 33 E. R. 247. *Annotations*:—*Mentd.* *Johnson v. Lawson* (1824), 2 Bing. 86; *Doe d. Futter v. Randall* (1828), 2 Moo. & P. 20; *Haines v. Guthrie* (1884), 13 Q. B. D. 818.

3887. ———.]—**In an action for use & occupation by the reversioner, against a person who had been tenant for years, determinable on three lives:** (1) a register of burials of a Wesleyan chapel, is not admissible to prove the death of one of the *cestuis que vie*; (2) nor is the evidence of a witness who heard in the family that another of the *cestuis que vie* was dead. (3) *Semble*: a copy

of an inscription on a tombstone in the burial ground of a Wesleyan chapel is also not evidence for this purpose.—*WHITTUCK v. WATERS* (1830), 4 C. & P. 375, N. P.

Annotations:—*As to* (1) *Refd.* *Re* Woodward, *Kenway v. Kidd* (1913), 82 L. J. Ch. 230. *As to* (2) *Consd.* *Haines v. Guthrie* (1884), 13 Q. B. D. 818.

3888. ———.]—The publicity of an inscription on a tombstone gives a sort of authenticity to it, & if it remains uncontradicted for a great many years, it will, in the absence of evidence to the contrary, be taken to be true. But the rule as to the authority of inscriptions on tombstones cannot be put higher than that.—*ILASLAM v. CRON, OLIVANT'S CLAIM* (1871), 19 W. R. 968.

3889. ———.]—(1) Qualification as to evidence of tradition, even upon pedigree. It must be from persons having such a connection with the party that it is natural & likely, from their domestic habits, that they are speaking the truth & could not be mistaken. (2) Upon that principle descriptions in wills, monuments, bibles, etc., are admitted.—*WHITELOCKE v. BAKER* (1807), 13 Ves. 511; 33 E. R. 385.

Annotations:—*As to* (1) *Consd.* *Berkeley Peerage Case* (1811), 4 Camp. 401; *Johnson v. Lawson* (1824), 2 Bing. 86; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *Shields v. Boucher* (1847), 1 De G. & Sm. 40; *Haines v. Guthrie* (1884), 13 Q. B. D. 818. *As to* (2) *Refd.* *Slaney v. Wade* (1836), 7 Sim. 595.

3890. ———.]—*Semble*: in a pedigree case, statements contained in monumental inscriptions, & hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.—*KIDNEY v. COCKBURN* (1831), 2 Russ. & M. 167; 39 E. R. 358, L. C.

Annotations:—*Refd.* *Figg v. Wedderburne* (1841), 11 L. J. Q. B. 45; *Haines v. Guthrie* (1884), 13 Q. B. D. 818. *Mentd.* *Shields v. Boucher* (1846), 1 De G. & Sm. 40.

3891. ———.]—**Mural inscription.**—(1) An ancient mural inscription giving an historical account of a family, & placed in a chancel which had formerly been used as a burying-place of the family, & which formed part of the church of the parish where members of the family had long been resident proprietors, was held to be admissible evidence in a question of pedigree for the purpose of proving the facts stated in the inscription.

(2) The inscription having been effaced twenty-five years ago its contents were allowed to be proved by the secondary evidence furnished by copies made while the inscription was entire.

Such copies are not inadmissible in evidence, merely because, at the time when they were made, the possibility of a claim or controversy at some future period was contemplated.

(3) *Semble*: a recital that A. is a child of the marriage of the persons therein named, occurring in a deed by which the personal representative of the last surviving trustee of the premises comprised in the deed assigns the premises to A., who is not related to the assignor, & whose sole title to the assignment is in the character of a child of such marriage, is not admissible as a declaration to prove the legitimacy of A. in a question of pedigree between third parties.—*SLANEY v. WADE* (1836), 1 My. & Cr. 338; *Donnelly*, 14; 40 E. R. 404.

Annotations:—*As to* (1) *Refd.* *Shields v. Boucher* (1846), 1 De G. & Sm. 40. *As to* (2) *Consd.* *Davies v. Lowndes* (1813), 6 Man. & G. 471. *Refd.* *Hood v. Beauchamp* (1836), 8 Sim. 26. *Generally, Mentd.* *Doe d. Bacon v. Brydges* (1843), 6 Man. & G. 282.

evidence.—*INGRAM v. BROWN* (1907), 38 N. B. R. 256.—*CAN.*

q. ———.]—A copy of a will executed before two notaries in the

province of Quebec under the provisions of art. 843 C. C. certified by one of the notaries to be a true copy of the original in his possession, is

admissible in evidence on the trial of an action of ejectment in Nova Scotia.—*MUSGRAVE v. ANGLE* (1910), 30 C. L. T. 691; 43 S. C. R. 484.—*CAN.*

3892. — **Inscription on ring.**—*VOWLES v. YOUNG*, No. 3886, *ante*.

3893. — **Inscription on old portrait.**—Old pedigrees, produced from the custody of a person whose ancestor was connected by marriage with the family described in the pedigree, are admissible as evidence to show the state of one of that family; & an inscription on an old portrait of one of that family, produced from the same custody, is admissible for the same purpose.—*CAMOYS PEERAGE* (1839), 5 Bing. N. C. 751; 3 State Tr. N. S. App. 1290; 6 Cl. & Fin. 789; West, 34; 132 E. R. 1291.

Annotations:—*Mentd.* *Braye Peerage* (1839), 6 Cl. & Fin. 757; *St. John Peerage Claim*, [1915] A. C. 282; *Beauchamp Barony* (1924), 40 T. L. R. 862.

3894. **How proved—Inscription effaced—Copies made while inscription entire.**—*SLANEY v. WADE*, No. 3891, *ante*.

3895. — **Old collection of monumental inscriptions.**—*SHREWSBURY PEERAGE*, No. 2908, *ante*.

3896. **For what purposes admitted—To prove death of cestui que vie—In action for use & occupation by reversioner.**—*WHITTUCK v. WATERS*, No. 3887, *ante*.

— **Pedigree cases.**—*See* Nos. 3885, 3886, 3889–3893, *ante*.

SECT. 15.—MAPS AND PLANS.

3897. **Admissibility—Ancient map.**—In a suit for tithes between a vicar & the occupier of a mill, an old map of the parish, belonging to the lord of the manor, was not admitted as evidence for deft.—*NEWCOME v. MATHEW* (1832), 5 Sim. 243; 58 E. R. 328.

3898. — **—**—*MILDRED v. WEAVER* (1862), 3 F. & F. 30; 6 L. T. 225, N. P.

3899. — **Ordnance map.**—*MERCER v. DENNE*, No. 3907, *post*.

3900. — **—**—*On* an indictment for the non-repair of a bridge the ct. admitted in evidence an ancient map purporting to have been made by C., a person of repute in connexion with maps & surveys, proof being given of the custody from which it came. *Semble*: the map would have been admissible even without proof of the custody from which it came. The ct. also admitted two maps purporting to have been made by the King's Geographer, without proof of the custody from which they came.—*R. v. NORFOLK COUNTY COUNCIL*, (1910), 26 T. L. R. 269; *subsequent proceedings*, 74 J. P. Jo. 113.

3901. — **County map.**—A disputed right of way started from a public road, & passing a devious course for about a mile across an estate,

came out into another public road. It was in the nature of a rough field or occupation road & was unfenced, & had existed more or less in the same course since 1826, & had gates across it at certain places. It had never been repaired by any public authority. The public used it both before & after 1818. Pltf. was the owner of part of the estate & the occupier of the whole of it. In 1818 a predecessor in title of pltf. purchased part of the estate, & the plan annexed to the particulars of sale showed the way where it passed through part of the property, & stated that it was a public road, & a copy of this plan was attached to a statutory declaration, identifying certain plots of land, made at the same time by the then agent of the estate. Pltf., in 1882, placed a bank across the way at a certain place & diverted it, & afterwards committed other acts of interruption.—*Held*: old county maps, showing the way, published, one in 1797 by the King's Geographer, & the other in 1826 by A., a well known country surveyor, & produced from the British Museum by the proper official, were admissible as some evidence of reputation.—*TRAFFORD v. ST. FAITH'S RURAL DISTRICT COUNCIL* (1910), 74 J. P. 297.

Annotation:—*Dbtd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

3902. — **—**—*Ancient maps produced from the custody of the British Museum & Guildhall Library*:—*Held*: not admissible as evidence of reputation of public highways in the absence of evidence that the map makers were competent or had a special duty to perform in making the maps, or that the maps had been received & acted on by the public.—*A.-G. v. HORNER* (No. 2), [1913] 2 Ch. 140; 82 L. J. Ch. 339; 108 L. T. 609; 77 J. P. 257; 29 T. L. R. 451; 57 Sol. Jo. 498; 11 L. G. R. 781, C. A.

Annotations:—*Consd.* *Clode v. L. C. C.*, [1914] 3 K. B. 852. *Apld.* *Fowke v. Berington*, [1914] 2 Ch. 308. *Mentd.* *Dysart v. Hamerton*, [1914] 1 Ch. 822; *London Corp'n. v. Horner* (1914), 111 L. T. 512; *Maskell v. Horner*, [1915] 3 K. B. 106.

3903. — **—**—*The Euston road was laid out in 1756 under 29 Geo. 2, c. 88, which enacted that no buildings should be erected on new foundations in the road within fifty feet of the highway, & that, if so erected, they should be deemed to be common nuisances. The Metropolis Management Act, 1862 (c. 102), s. 75, enacted that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings if the distance of that line from the highway did not exceed fifty feet. Before 1862 a row of buildings had been erected about fifty feet back from the highway, & a second row of buildings had been erected on the forecourts of those buildings; the fronts of this second*

r. — Map of original owner.—A map produced from the custody of the son of the original owner of the lot, & sworn to be the map upon which the township was originally sold:—*Held*: to be properly admitted in evidence.—*VAN EVERY v. DRAKE* (1860), 9 C. P. 478.—*CAN.*

s. ——*On* the trial of an action of trespass, with which was included a claim for the rectification of pltf.'s deed, a plan was received in evidence, from the Crown Land Office, which appeared to have been made for the original owner & showed the division of the land into lots, including the lot which was the subject of action:—*Held*: the evidence was properly received.—*McFATRIDGE v. GRIFFIN* (1895), 27 N. S. R. 421.—*CAN.*

t. — Plans — Not registered.—*Deft.* was convicted for unlawfully & wilfully destroying or damaging a

PART IV. SECT. 15.

3897 i. **Admissibility—Ancient map.**—*Defts.* tendered two plans in evidence which came from the Crown Land Office, which the witness who produced them stated had been there for at least thirty years, but neither their origin nor history was given; nor was it shown that they had been regarded in that office as authentic.—*Held*: the judge did right in rejecting them.—*WALKER v. BAYERS* (1873), 9 N. S. R. 270.—*CAN.*

3897 ii. — **—**—*Pursuer* tendered in evidence an old plan of his estate, which had been preserved in his charter-chest for many years, but the origin of which was unknown, showing the disputed ground as part of pursuer's property. Defender objected to the plan being put in evidence:—*Held*: objection sustained.—*PLACE v. BRKADALBANE (EARL)* (1874), 1 R.

(Ct. of Sess.) 1202; 11 Sc. L. R. 704.—*SCOT.*

3897 iii. — **—**—*In* a dispute in 1889 as to marches between two landowners whose lands had one time formed parts of the same barony, pursuer tendered as evidence a plan bearing the date 1842. It had been found in the possession of a third person, owner of another part of the original barony, who had at one time had a claim over the disputed ground identical with the claims of the pursuer, who had bought up his rights. It was not known on whose instructions or for what purpose the plan had been made. It had at one time passed with the titles of defender's predecessors & a copy of it had been used by them in connection with a projected sale of their lands:—*Held*: It was competent evidence.—*REID v. HALDANES' TRUSTEES* (1891), 18 Il. (Ct. of Sess.) 744.—*SCOT.*

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row adjoined the inner edge of the pavement, being about eleven feet from the kerb of the roadway. With the view of showing that they were erected on new foundations & were consequently illegal buildings & common nuisances, maps of the years 1793 & 1819 were put in evidence & received by the tribunal of appeal as evidence of such fact; the maps were not made on the authority of any public body or for any public purpose:—*Held*: the maps were not admissible evidence for the purpose for which resps. sought to make use of them.—*CLODE v. LONDON COUNTY COUNCIL*, [1914] 3 K. B. 852; 83 L. J. K. B. 1587; 111 L. T. 361; 78 J. P. 353; 30 T. L. R. 489; 58 Sol. Jo. 633; 12 L. G. R. 673, C. A.; *reversd.* on other grounds, [1915] A. C. 947, H. L.

3904. — Map referred to in Turnpike Act.]—

On a question whether a road was or was not a public highway before the Highway Act, 1835 (c. 50), maps made before that date & so recognised & used since as to amount to declarations by deceased persons who had competent knowledge of the facts as to the existence of the highway & some interest in the matter are admissible in evidence.

On the hearing of a special case stated by quarter sessions on an appeal from a decision by justices on an objection under the Private Street Works Act, 1892, raising the question whether the alleged street was a highway repairable by the inhabitants at large, it appeared that fresh evidence bearing on the question, consisting in deposited plans & a book of reference referred to in a Turnpike Act, had been discovered since the hearing at quarter sessions; & the ct. remitted the case to quarter sessions in order that the fresh evidence might be considered.—*VYNER v. WIRRAL RURAL DISTRICT COUNCIL* (1909), 73 J. P. 212; 7 L. G. R. 628, D. C.

Annotations:—*Refd.* A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. *Mentd.* Cubabé v. Walton-upon-Thames U. D. C. (1912), 107 L. T. 159.

3905. — Map made by King's Geographer.]—

R. v. NORFOLK COUNTY COUNCIL, No. 3900, *ante*.

3906. — Map prepared for purpose of trial—Containing inadmissible matters.]—A map or plan prepared for the purpose of a trial ought not to contain any reference to transactions & occurrences which are subject-matter of the investigation before the ct., & not existing when the survey was made; & if it does, & the objection is taken, the ct. will not allow the jury to look at it.—*R. v. MITCHELL* (1852), 6 Cox, C. C. 82.

3907. — Ordnance map—Ancient map.]—In an action to establish the existence & validity of a custom, affecting land of a private owner at Walmer, called the "beach ground," deft. sought to prove that within legal memory the land had been covered by the sea, & in proof of this he tendered in evidence *inter alia* a survey of Walmer Castle taken in the year 1816 by the direction of

the then Lord Warden of the Cinque Ports, & an estimate made by the King's engineer for the reparation of Walmer & other castles. These documents were produced from the Record Office, & they stated that serious damage had been done by the sea to a wall of Walmer Castle:—*Held*: (1) these documents were not admissible in evidence as public documents on the ground that they were not, & were not intended to be, records affecting the King's property or revenues, but were to serve temporary purposes only, & in no way affected Crown property, Crown revenues, or Crown grants when the respective purposes were served; (2) the documents were not admissible within the doctrine of *Price v. Earl of Torrington*, No. 816, *ante*, as records made by a deceased official in the discharge of his official duty, there being nothing to show that they were made contemporaneously with the doing of something which it was the duty of the deceased official to record, & no evidence what his instructions were or of the relation of those instructions to the documents, or of the source of the knowledge or information on which the contents of the documents were based; (3) maps & plans prepared by the directions of the Board of Ordnance in 1641, 1644, & 1647, & produced from the War Office, were not admissible as public documents or as evidence of reputation; (4) a map or chart published in 1837, & in the possession of the Admiralty, was inadmissible, it not being an Admiralty chart, & not having received in any way the sanction of the Admiralty.—*MERCER v. DENNE*, [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293, C. A.; *affg.*, [1904] 2 Ch. 534.

Annotations:—*As to* (1) *Appld.* *Collis v. Amphlett*, [1918] 1 Ch. 232. *Refd.* *Assheton-Smith v. Owen* (1905), 94 L. T. 42; *Heyne v. Fischel* (1913), 110 L. T. 264. *As to* (2) *Distd.* *North Staffordshire Ry. v. Hanley Corp.* (1909), 73 J. P. 477. *Generally*, *Mentd.* *Ramsgate Corp. v. Dobling* (1906), 70 J. P. 132; *Fitzhardinge v. Purcell* (1908), 77 L. J. Ch. 529; *Johnson v. Clark*, [1908] 1 Ch. 303; *Re Fountaine*, *Fountaine v. Amherst* (1909), 78 L. J. Ch. 648; *Re A Petn. of Right*, [1915] 3 K. B. 349.

3908. ——*]*—In an action claiming a strip of waste land as part of a highway, a tithe map & an ordnance map were admitted in evidence.—*A.-G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS* (1907), 72 J. P. 123; 6 L. G. R. 470.

3909. — Dated 1837.]—A print of an ordnance map dated 1837, obtained from the Board of Agriculture & bearing its stamp, was admissible to show the condition of the district.—*NORTH STAFFORDSHIRE RY. CO. v. HANLEY CORPN.* (1909), 73 J. P. 477; 8 L. G. R. 375, C. A.

3910. — Dated 1841.]—A map issued by the Ordnance Survey in 1841 was admitted as evidence of what physical features were or were not seen by those who made the survey.—*A.-G. v. MEYRICK & JONES* (1915), 79 J. P. 515.

3911. — Tithe map.]—A tithe commutation

certain fence upon the land of complainant:—*Held*: the convicting magistrate erred in disregarding plans of the *locus* because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a land among the different sub-owners, whether registered or not.—*R. v. JOHNSON* (1904), 24 C. L. T. 267; 7 O. L. R. 525; 3 O. W. R. 221, 222.—*CAN.*

a. — Official maps.]—Maps & surveys, made in India for revenue

purposes are official documents prepared by competent persons & with such publicity & notice to persons interested as to be admissible & valuable evidence of the state of things at the time they are made. They are not conclusive, & may be shown to be wrong; but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made.—*JAGADINDRANATH ROY v. SECRETARY OF STATE FOR INDIA* (1902), 1 L. R. 30 Calc. 291; 7 C. W. N. 193; L. R. 30 Ind. App. 41.—*IND.*

b. For what purposes admitted—

*Whether to explain another ambiguous map.]—*Where a parish map, referred to in a certificate of title, contained certain figures & letters:—*Held*: another map was not admissible in evidence for the purpose of explaining what those letters & figures meant.—*CLARKE v. COWPER* (1889), 10 N. S. W. L. R. 106; 5 N. S. W. W. N. 125.—*AUS.*

*To prove title.]—*Survey officers having no jurisdiction to inquire into questions of title, a survey map is not direct evidence of title in the same way that a decree in a disputed cause is evidence of title, but it

map & the deposited plans of a proposed railway are admissible as evidence of public repute.—*A.-G. v. ANTROBUS*, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 69 J. P. 141; 21 T. L. R. 471; 49 Sol. Jo. 459; 3 L. G. R. 1071.

Annotations :—*Apld.* *A.-G. & Croydon R. D. C. v. Moorsom-Roberts* (1907), 72 J. P. 123; North Staffordshire Ry. v. Hanley Corpn. (1909), 8 L. G. R. 375. *Consd.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Fold.* *Fuller v. Chippenham R. D. C.* (1914), 79 J. P. 4. *Apld.* *Collis v. Amphlett*, [1918] 1 Ch. 232. *Refd.* *Trafford v. St. Faith's R. D. C.* (1910), 74 J. P. 297. *Mentd.* *Whitehouse v. Hugh*, [1906] 1 Ch. 253; *Robinson v. Smith* (1908), 24 T. L. R. 573; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

3912. ———.]—*A.-G. & CROYDON RURAL DISTRICT COUNCIL v. MOORSOM-ROBERTS*, No. 3908, *ante*.

3913. ———.]—A tithe map is not admissible as evidence of the extent of a public right of way, though it may be evidence that part of the land was not used at the time when the map was made for such purposes as to make it tithable.—*COPESTAKE v. WEST SUSSEX COUNTY COUNCIL*, [1911] 2 Ch. 331; 80 L. J. Ch. 673; 105 L. T. 298; 75 J. P. 465; 9 L. G. R. 905.

3914. ———.]—In an action to restrain debts from trespassing on land which debts claimed was part of a public highway, a tithe map was admitted in evidence.—*FULLER v. CHIPPENHAM RURAL DISTRICT COUNCIL* (1914), 79 J. P. 4.

3915. ———.]—*Survey taken by direction of Lord Warden of Cinque Ports.*—*MERCER v. DENNIE*, No. 3907, *ante*.

—Plan annexed to deed.]—*See DEEDS*, Vol. XVII., p. 375.

3916. For what purposes admitted.—To prove reputation of highway.]—A copper-plate map taken by the direction of the overseers of a parish is no evidence on an issue whether a particular spot of ground is a highway or not.—*POLLARD v. SCOTT* (1790), Peake, 26, N. P.

3917. ———.]—*TRAFFORD v. ST. FAITH'S RURAL DISTRICT COUNCIL*, No. 3901, *ante*.

3918. ———.]—*A.-G. v. HORNER* (No. 2), No. 3902, *ante*.

3919. ———.]—In a defence of a modus for the produce of an ancient farm, it is indispensably necessary to show by evidence that the farm is ancient. Producing a map of the lands of which the farm was stated to consist, & proving the accuracy of the description of the lands in the map, as compared with them in 1803, with reference to the time of commencing the suit, is no proof of such farm being ancient, nor sufficient even to raise such a presumption that it may be capable of further proof, as to furnish ground for giving an opportunity of establishing it by an issue.—*STUART v. GREENAIL* (1821), 9 Price, 106; 147 E. R. 36.

Annotation :—*Refd.* *Brazier v. Mytton* (1825), M'Cle. & Yo. 613.

3920. ———.]—To prove public right of way.]—In order to prove that there was a public right of way over & along certain closes which were part of a manor, deft. put in evidence a map which had been used by a deceased steward of the manor at the manor cts. for the purpose of defining

the copyholds. In it there appeared a space marked out by two lines crossing the closes in question and called Mellow Lane. There were occupation-ways as well as public highways marked upon the map, but there was nothing to distinguish one from the other, nor was there anything to show that the space marked out as above mentioned was a public highway at all :—*Held* : the map was inadmissible.—*PIPE v. FULCHER* (1858), 1 E. & E. 111; 28 L. J. Q. B. 12; 32 L. T. O. S. 105; 5 Jur. N. S. 140; 7 W. R. 19; 120 E. R. 850.

Annotations :—*Distd.* *Vyner v. Wirral R. D. C.* (1909), 73 J. P. 242. *Apld.* *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. *Refd.* *Fowke v. Berington*, [1914] 2 Ch. 308.

3921. ———.]—*COPESTAKE v. WEST SUSSEX COUNTY COUNCIL*, No. 3913, *ante*.

3922. ———.]—*MILDRED v. WEAVER* (1862), 3 F. & F. 30; 6 L. T. 225, N. P.

3923. ———.]—To show places where party stated he had lived.]—*R. v. ORTON* (1873), Stephen's Digest of the Law of Evidence, 10th ed., p. 48.

Annotations :—*Mentd.* *R. v. Cox & Railton* (1884), 14 Q. B. D. 153; *Williams v. Quebrada Ry. Land & Copper Co.*, [1895] 2 Ch. 751; *Evans v. Evans*, [1904] P. 378; *R. v. Watt* (1905), 70 J. P. 29.

3924. ———.]—To show situation of places referred to in trial.]—*R. v. JAMESON* (1806), Stephen's Digest of the Law of Evidence, 10th ed., p. 48; Phipson's Law of Evidence, 6th ed., p. 378.

Annotations :—*Mentd.* *R. v. Audley*, [1907] 1 K. B. 383; *R. v. Stride & Millard*, [1908] 1 K. B. 617; *R. v. Porter* (1909), 3 Cr. App. Rep. 237; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90.

3925. ———.]—To show on what foundations buildings erected.]—*CLODE v. LONDON COUNTY COUNCIL*, No. 3903, *ante*.

—To prove reputation of boundaries.]—*See BOUNDARIES*, Vol. VII., pp. 315-321.

SECT. 16.—NEWSPAPER REPORTS.

3926. Admissibility.—Unstamped copy.]—(1) A copy of a newspaper may be read in evidence, though not stamped according to Act of Parliament.

(2) To prove the publication of a newspaper it is not necessary to produce a copy which has been actually published.—*R. v. PEARCE* (1791), 1 Peake, 106, N. P.

3927. How proved.]—*R. v. PEARCE*, No. 3926, *ante*.

3928. For what purposes admitted.]—*R. v. CARLILE* (1831), 4 C. & P. 415; 2 State Tr. N. S. 459.

3929. ———.]—To prove by whose authority advertisement inserted.]—An admission under judge's order of a newspaper containing an advertisement is no admission of that advertisement being inserted by the direction of the co. to which it refers.—*SYKES v. COOPER* (1846), 7 L. T. O. S. 452, N. P.

3930. ———.]—Not as evidence of facts recorded.]—A report in a newspaper of the proceedings at a

is direct evidence of possession at the time of the survey being made.—*NOMO COOMAR DOSH v. GOBIND CHUNDER ROY* (1881), 9 C. L. R. 305.—**IND.**

Fishery.—In a case of right of fishery in a tidal navigable river :—*Held* : a thakbust map was important evidence of possession at the time, & as such evidence of possession, was also evidence of title.—*SATCOWRI GHOSH MONDAL v. SECRETARY OF STATE FOR INDIA*

(1894), 1 L. R. 22 Cal. 252.—**IND.**

e. ———.]—To determine meaning of ambiguous devise.]—*J.*, by his will made in 1868, devised certain lands to his granddaughter, E. The will contained no plan of the lands included in the devise. A question having arisen as to the boundaries of such lands, a former will of *J.*, made in 1865, was produced in evidence, by which he had devised lands to his son, A., by exactly the same description of parcels as that

contained in the latter devise to E., but referring also to a plan drawn on the former will. E. was the daughter of A. who died between 1865 & 1868 :—*Held* : the description & plan in the old will were admissible as evidence of what testator meant by the description in the latter will, & were, in the particular case, convincing proof that he meant by that description the lands shown upon the plan of the old will.—*ISAAC v. SCHULZE* (1892), 10 N. Z. L. R. 707.—**N.Z.**

Sect. 16.—Newspaper reports. Sects. 17 & 18:
Sub-sects. 1 & 2.]

meeting of shareholders was stated by a witness in a cause to be correct, & it was proposed to read the same as evidence; the ct. refused to allow it to be read.—*ROSSMORE (LORD) v. MOWATT* (1850), 15 L. T. O. S. 84; 15 Jur. 238.

3931. ———.]—*HEDLEY v. BARLOW* (1865), 4 F. & F. 224, N. P.

——— **To enable witness to refresh memory.]**—*See* Part V., Sect. 6, sub-sect. 7, D., *post*.

SECT. 17.—PHOTOGRAPHS.

3932. Admissibility—Necessity for verification on oath.]—Photographs, unless verified upon oath, are not of themselves evidence (A. L. SMITH, L.J.).—*HINDSON v. ASHBY*, [1890] 2 Ch. 1; 65 L. J. Ch. 515; 74 L. T. 327; 45 W. R. 252, O. A.

Annotations:—Mentd. Pearce v. Bunting, R. v. Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; Eeroyd v. Coulthard, [1897] 2 Ch. 554; Thames Conservators v. Smeed, Dean, [1897] 2 Q. B. 334; Hanbury v. Jenkins, [1901] 2 Ch. 401; Barwick v. S. E. & C. Ry., [1921] 1 K. B. 187.

3933. For what purposes admitted—To show nature of locality.]—Photographs allowed to be used on the trial of an indictment for an obstruction to a highway, to show the nature of the *locus in quo*.—*R. v. UNITED KINGDOM ELECTRIC TELEGRAPH CO., LTD.* (1862), 3 F. & F. 73, N. P.; *subsequent proceedings*, 31 L. J. M. C. 166.

Annotations:—Mentd. R. v. Train (1862), 2 B. & S. 640; R. v. Maybury (1864), 4 F. & F. 90; R. v. Harris (1865), 13 W. R. 652; Veysey v. Hoskins, Harris v. Hoskins (1865), 34 L. J. M. C. 145; A.-G. v. Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282; Turner v. Ringwood Highway Board (1870), L. R. 9 Eq. 418; Cubitt v. Maxse (1873), L. R. 8 C. P. 704; Tutill v. West Ham Board of Health (1873), L. R. 8 C. P. 447; R. v. Burney (1875), 31 L. T. 828; Nicol v. Beaumont (1883), 53 L. J. Ch. 853; Locke-King v. Woking U. D. C. (1897), 77 L. T. 790; Neeld v. Hendon U. D. C. (1899), 81 L. T. 405; A.-G. v. Barker (1900), 83 L. T. 245; Harvey v. Truro R. C., [1903] 2 Ch. 638; Sheringham U. D. C. v. Halsey (1904), 68 J. P. 395; Chorley Corp. v. Nighthingale, 1906] 2 K. B. 612; Offin v. Rochford H. C., [1906] 1 Ch. 342; Wednesbury Corp. v. Lodge Ho. Colliery Co., [1907] 1 K. B. 78; R. v. Bartholomew, [1908] 1 K. B. 554; A.-G. v. Smith (1910), 8 L. G. R. 679; Pettey v. Parsons, [1914] 2 Ch. 653.

3934. ———.]—*HINDSON v. ASHBY*, [1890] 2 Ch. 1; 65 L. J. Ch. 515; 74 L. T. 327; 45 W. R. 252, C. A.

Annotations:—Mentd. Pearce v. Bunting, R. v. Wedd, *Ex p.* Pearce, [1896] 2 Q. B. 360; Eeroyd v. Coulthard, [1897] 2 Ch. 554; Thames Conservators v. Smeed, Dean, [1897] 2 Q. B. 334; Hanbury v. Jenkins, [1901] 2 Ch. 401; Barwick v. S. E. & C. Ry., [1921] 1 K. B. 187.

——— **To prove identity.—In criminal proceedings.]**—*See* CRIMINAL LAW, Vol. XIV., p. 361, Nos. 3813-3817.

3935. ——— **In matrimonial causes.]**—It may be laid down as a fixed rule of practice that the ct., in a matrimonial suit, will not accept a photograph as evidence of identification, except where no better evidence can be obtained, & even then the ct. will be guided as to whether it will act on the evidence of a photograph or not, by the

special circumstances of each case.—*FRITH v. FRITH & PAICE*, [1896] P. 74; 65 L. J. P. 53.

3936. ———.]—*HILLS v. HILLS & EASTON* (1915), 31 T. L. R. 541.

See, generally, HUSBAND & WIFE.

SECT. 18.—WORKS OF HISTORY AND SCIENCE.

SUB-SECT. 1.—HISTORICAL WORKS.

Admissibility.—What are historical works—Camden's Britannia.]—*See* No. 3943, *post*.

3937. ——— **Coke's Institutes.]**—Though Coke's Institutes are good authorities as to matters of law, yet they are no legal evidence of the historical facts mentioned in them; & the same has been held as to Camden's Britannia & such like books (*LORD HARDWICKE, C.J.*).—*R. v. REFFIT* (1734), as reported in Cunn. 36; 94 E. R. 1047.

——— **Habrington's Survey of Worcester-shire.]**—*See* No. 3954, *post*.

Speed's Chronicles.]—*See* Nos. 3939-3941, *post*.

3938. ——— **Archbishop Wells's Book of Endowments.]**—The book known by the name of Archbishop Wells's Book of Endowments rejected as evidence at *Nisi Prius*.—*HARWARD v. SIMS* (1810), 4 Price, 427; 146 E. R. 513.

3939. For what purposes admitted—To prove facts of public nature.]—*ST. KATHERINE'S HOSPITAL CASE* (1671), 1 Vent. 149; 86 E. R. 102; *subsequent proceedings, sub nom.* Brounker (*LORD*) *v. ATKYNS* (1681), Skin. 14.

Annotations:—Refd. Stainer v. Droitwich Burgesses (1694), 1 Salk. 281; Read v. Lincoln (Bp.), [1892] A. C. 644. **Mentd.** Owen v. Saunders (1696), 1 Ld. Raym. 158.

3940. ——— **Date of death of English Queen.]**—*BRIDGWATER'S (LORD) CASE* (prior to 1681), cited in Skin. p. 15; 90 E. R. 8, II. 1.

3941. ———.]—*BROUNKER (LORD) v. ATKYNS* (1681), Skin. 14; 90 E. R. 8.

Annotation:—Refd. Read v. Lincoln (Bp.), [1892] A. C. 644.

3942. ——— **Date of assumption of titles by Sovereign.]**—*NEAL v. FRY* (1684), cited in 1 Salk. 281; 91 E. R. 247; *sub nom.* NEAL v. JAY, 12 Mod. Rep. 86; *sub nom.* IVY (LADY) v. NEAL, Skin. 623; *sub nom.* IVY'S (LADY) TRIAL, MOSSAM v. IVY, 10 State Tr. 555, 625.

Annotations:—Refd. Stainer v. Droitwich Burgesses (1694), 1 Salk. 281; Darby v. Ouseley (1856), 2 Jur. N. S. 497.

3943. ———.]—A general history is evidence to prove a matter relating to the kingdom in general; otherwise of a particular right.

Camden's Britannia refused in evidence to prove a particular custom.—*STAINER v. DROITWICH (BURGESSES)* (1695), 1 Salk. 281; 91 E. R. 247; *sub nom.* STEYNER v. DROITWICH (BURGESSES), Holt, K. B. 290; Skin. 623; *sub nom.* STAYNER v. DIOTWISCH (BURGESSES), 12 Mod. Rep. 85.

Annotations:—Refd. Fowke v. Berington, [1914] 2 Ch. 308. **Mentd.** *Ex p.* Blunt (1737), West temp. Hard. 25.

3944. ——— **Universal custom of Mohammedan religion.]**—*WARREN HASTINGS' IMPEACHMENT*

PART IV. SECT. 17.

3935 i. For what purposes admitted—To prove identity.—In matrimonial causes.]—Evidence of identity of defender in an action for divorce, with a person deposed to by certain witnesses by means of a photographic portrait was not admitted, without, in the first place, ordaining defender to appear personally, for exhibition to the witnesses. Defender having been ordained to appear, & having failed to do so, such evidence was admitted.—

FORBES v. FORBES (1861), 24 Dunl. (Ct. of Sess.) 145.—**SCOT.**

3935 ii. ———.]—**Held:** where a defender in an action of divorce has been cited to appear for identification at the proof, & has not appeared, it is competent for pursuer to show a photograph of defender to witnesses for the purpose of identification.—*L. R. (1890)*, 17 R. (Ct. of Sess.) 754.—**SCOT.**

i. Photographs of public documents—Admissible if authenticated.]—A

photograph of original papers which are deposited as a public record if accompanied by a letter from the person in charge of them may be accepted as evidence.—*KENNEDY v. HUSBAND, KENNEDY v. ELLISON*, [1923] 1 D. L. R. 1069.—**CAN.**

PART IV. SECT. 18, SUB-SECT. 1.

g. Admissibility.]—In deciding suit the district judge referred to Portuguese work dated 1606, "*India Orientalis Christiana*," published in

(1788), 2 Philipps & Arnold on Law of Evidence, 10th ed., p. 156, H. L.

Annotations.—**Refd.** R. v. Picton (1812), 30 State Tr. 225, 492; Shore v. Wilson (1842), 9 Cl. & Fin. 355; Read v. Lincoln (Bp.), [1892] A. C. 644. **Mentd.** Melluish v. Collier (1850), 14 Jur. 621.

3945. ——— **That almshouses in mortmain.]**—The fact that almshouses were in mortmain before Charitable Uses Act, 1736 (c. 36), proved by an old inscription, & an extract from a local history.—**SHAW v. PICKTHALL** (1818), Dan. 92; 159 E. R. 860.

3946. ——— **Church doctrine & usage.]**—**RIDSDALE v. CLIFTON** (1877), 2 P. D. 276; 46 L. J. P. C. 27; 36 L. T. 865; 42 J. P. 148, P. C.; *varying* S. C. *sub nom.* **CLIFTON v. RIDSDALE** (1876), 1 P. D. 316.

Annotations.—**Consd.** Read v. Lincoln (Bp.), [1892] A. C. 644. **Refd.** Fowke v. Berington, [1914] 2 Ch. 308. **Mentd.** Combe v. Edwards (1877), 2 P. D. 354; Howard v. Bodington (1877), 2 P. D. 203; Hudson v. Tooth (1877), 2 P. D. 125; Hughes v. Edwards (1877), 2 P. D. 361; Serjeant v. Dale (1879), 43 J. P. 220; *Re* St. Lawrence, Pittington (1880), 5 P. D. 131; Combe v. De La Bere (1881), 6 P. D. 157; Heywood v. Manchester (Bp.) (1884), 12 Q. B. D. 404; The Vera Cruz (No. 2) (1884), 9 P. D. 96; R. v. London (Bp.) (1889), 23 Q. B. D. 414; R. v. London (Bp.), Leighton's Case, (1891) 2 Q. B. 48; Tooth v. Power, (1891) A. C. 284; St. John, Pendlebury v. St. John, Pendlebury, [1895] P. 178; St. John the Baptist, Timberhill v. St. John the Baptist, Timberhill, [1895] P. 71; Barsham, Suffolk v. Barsham, Suffolk, [1896] P. 256; Great Bardfield v. All Having Interest, [1897] P. 185; Richmond & St. Matthias, Richmond v. All Persons Having Interest, [1897] P. 70; *Re* Robinson, Wright v. Tugwell, [1897] 1 Ch. 85; *Re* St. Mark's, Marylebone Road, St. Mark's v. St. Mark's, [1898] P. 114; Davey v. Hinde, [1901] P. 95; *Re* St. Austein, Pinner, [1901] P. 202; Davey v. Hinde, [1903] P. 221; Paignton v. All Having Interest, [1905] P. 111; *Re* Christ Church, Ealing, [1906] P. 289; Markham v. Shirebrook Overseers, [1906] P. 239; St. John the Evangelist, Clevedon v. All Having Interest, [1909] P. 6; St. Paul, Bow Common v. St. Paul, Bow Common, [1909] P. 245; *Re* St. Paul, Bow Common (1912), 28 T. L. R. 584; *Re* St. Paul's, Carlisle, [1919] P. 134; *Re* Tenbury, Parish Church (1919), 36 T. L. R. 188; Gore-Booth v. Manchester (Bp.), [1920] 2 K. B. 412; *Re* St. Luke's, Southport (1920), 36 T. L. R. 733; St. Magnus the Martyr, London Bridge (1924), 41 T. L. R. 3.

3947. ——— **—Where ancient facts of a public nature, such as modes of ritual, are in dispute, disquisitional & historical works & pictures are admissible in evidence.]**—**READ v. LINCOLN** (Bp.), [1892] A. C. 644; 62 L. J. P. C. 1; 67 L. T. 128; 56 J. P. 725; 8 T. L. R. 763, P. C.

Annotations.—**Consd.** Fowke v. Berington, [1914] 2 Ch. 308. **Refd.** Asheton-Smith v. Owen (1905), 94 L. T. 42; Commonwealth Shipping Representative v. P. & O. Branch Service, [1923] A. C. 191. **Mentd.** *Re* St. Paul, Camden Square (1897), 14 T. L. R. 156; Wimbledon v. Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167; Hendon Parish Church (1912), 28 T. L. R. 438; Gore-Booth v. Manchester (Bp.), [1920] 2 K. B. 412.

3948. ——— **Not to prove facts of private or local nature—Particular custom.]**—**STAINER v. DROITWICH** (BURGESSES), No. 3943, *ante*.

3949. ——— **Foundation of college.]**—**COCKMAN v. MATHER** (1727), 1 Barn. K. B. 14; 94 E. R. 10.

3950. ——— **Boundaries—Of manors.]**—The manors of R. & of S., the parishes of C. & of Y., & the counties of B. & G., were coterminous:—**Held**: in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of B., which stated the boundaries of the counties at

this spot, was not receivable in evidence.—**EVANS v. GETTING** (1831), 6 C. & P. 586, N. P.

Annotation.—**Consd.** Fowke v. Berington, [1914] 2 Ch. 308.

3951. ——— **Of parishes.]**—**Qu.**: whether Morant's History of Essex is admissible evidence to prove that Great & Little Coggeshall are one parish.—**WHITE & JACKSON v. BEARD** (1840), 2 Curt. 480; 163 E. R. 481.

Annotations.—**Mentd.** Ramsbottom v. Duckworth (1847), 1 Exch. 506; R. v. Byrom (1848), 12 Q. B. 321; R. v. Wilkinson (1848), 12 J. P. 360; R. v. Crook, Lancashire JJ. (1857), 21 J. P. 627; Asterley v. Adams (1871), L. R. 3 A. & E. 361.

3952. ——— **Creation of peerage.]**—**VAUX PEERAGE**, No. 3099, *ante*.

3953. ——— **—Counsel at a trial may refer to matters of general history, provided the licence be exercised with prudence, but cannot refer to particular books of history or read particular passages from them to prove any fact relevant to the cause.]**—**DARRY v. OUSELEY** (1856), 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497; 156 E. R. 1093; *sub nom.* **DERBY v. OUSELEY**, 27 L. T. O. S. 70; 4 W. R. 463.

Annotation.—**Mentd.** Henman v. Lester (1862), 12 C. B. N. S. 176.

3954. ——— **Condition of church.]**—**HABINGTON'S** Survey of Worcestershire, a work written in the seventeenth century but only recently published, & regarded as an historical authority, was tendered as evidence of a particular fact, viz. the physical condition of the church when the author saw it, but rejected.—**FOWKE v. BERINGTON**, [1914] 2 Ch. 308; 83 L. J. Ch. 820; 111 L. T. 440; 58 Sol. Jo. 379.

SUB-SECT. 2.—SCIENTIFIC WORKS AND RECORDS.

Almanac.]—*See* Part III., Sect. 5, sub-sect. 4, *ante*.

3955. Carlisle Tables—To prove average duration of life at particular age.]—At the trial of an action under Fatal Accidents Act, 1816 (c. 93), brought for the benefit of the mother, widow, & children of R., claiming damages from defts. for having by their negligence caused the death of R., it was proved that the deceased was under a covenant to pay his mother an annuity of £200 during their joint lives. A witness was then called for plff. who stated that he was an accountant, & that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance officers called the Carlisle Tables, as to the average duration of life of two persons of the ages of the mother & son respectively, & as to the price for which an annuity for the mother's life could be bought. This evidence was objected to by defts., but was ruled to be admissible.—**ROWLEY v. LONDON & NORTH WESTERN RY. CO.** (1873), L. R. 8 Exch. 221; 42 L. J. Ex. 153; 29 L. T. 180; 21 W. R. 869, Ex. Ch.

Annotations.—**Mentd.** Phillips v. L. & S. W. Ry. (1879), 5 C. P. D. 280; Phillips v. L. & S. W. Ry. (1879), 5 Q. B. D. 78; Johnston v. G. W. Ry., [1904] 2 K. B. 250.

3956. Dictionary—General dictionary of English language.]—A general dictionary of the English language is not authority to show, on a trial, the

1839:—**Held**: the district judge was justified in referring to the books.—**AUGUSTINE v. MEDLYCOTT** (1892), 1 L. R. 15 Mad. 241.—**IND.**

h. For what purposes admitted—Evidence of usage.]—**VALLABHA v. MADHUBANAN** (1889), 1 L. R. 12 Mad. 495.—**IND.**

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k. —As evidence of creation & existence of peerage.]—**CRAWFORD & LINDSAY PEERAGE CLAIM** (1848), 6 State Tr. N. S. App. A. 1126.—**SCOT.**

PART IV. SECT. 18, SUB-SECT. 2.

1. Text-books—Medical text-books.]

—**Held**: incompetent to refer to medical books, in opposition to, or in explanation of the testimony of medical witnesses, whose opinions must be taken as facts in the case.—**McKAY v. DAVIDSON** (1831), 5 Wils. & S. 210; *affg.*, 6 Sh. (Ct. of Sess.) 368; 3 Fac. Coll. 402.—**SCOT.**

Sect. 18.—Works of history and science: Sub-sect. 2. Sects. 19 & 20.]

meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage.—**HOUGHTON v. GILBART** (1836), 7 C. & P. 701, N. P. Annotation:—**Reid**. **Kreuger v. Blanck** (1870), L. R. 5 Exch. 179.

3957. — Law dictionary.]—BLANDFORD (MARCHIONESS) v. MARLBOROUGH (DOWAGER DUCHESS) (1743), 2 Atk. 542; 26 E. R. 725, L. C. Annotations:—**Mentd.** **Tyrconnell v. Ancaster** (1754), Amb. 237; **Londonderry v. Wayne** (1763), 2 Eden, 170; **Floyer v. Bankes** (1863), 3 De G. J. & Sm. 306; **Phillips v. James** (1866), 3 De G. J. & Sm. 72.

3958. Engineer's reports—As to facts not within living memory.]—Where an engineer's reports are within the common knowledge of engineers & accepted by them as accurate, they constitute evidence which the ct. will accept as to facts not within living memory.—**EAST LONDON RY. CO. v. THAMES CONSERVATORS** (1904), 90 L. T. 347; 68 J. P. 302; 20 T. L. R. 378.

Annotations:—**Consd.** **Fowke v. Berington**, [1914] 2 Ch. 308. **Mentd.** **Jones v. Llanrwst U. C.**, [1911] 1 Ch. 393.

3959. Text-books—Medical text-books.]—On the hearing of a claim for compensation under Workmen's Comp. Act, 1906 (c. 58), judgment was reserved, & a few days afterwards the county ct. judge invited the parties to refer him to standard medical text-books on the disease known as *mitral stenosis*. Resp.'s solrs. alone complied with the invitation, & sent the information to appts. also:—**Held**: the evidence so furnished was admissible.—**MCCARTHY v. THE MELITA (OWNERS)** (1923), 16 B. W. C. C. 222, C. A.

—**Right of expert witness to refresh memory by reference to.]—**See Part VI., Sect. 4, *post*.

3960. Specification of patent.]—I am not prepared to say that in some way & for some purpose, these specifications [from the records of the Patent Office] might not have been put into the hands of those acquainted with the trade, & questions have been asked upon them; nor am I prepared to say that they might not for some purpose have been admissible in evidence, & if admissible in evidence for some purpose, of course they would become evidence, whatever the weight & effect of that evidence might be in the cause (**LORD CAIRNS, C.**).—**CLARK v. ADIE** (No. 2) (1877), 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 45, 47, H. L.

Annotations:—**Apld.** **Jandus Arc Lamp & Electric Co. v. Johnson** (1900), 17 R. P. C. 361. **Refd.** **Ashworth v. Law** (1890), 7 R. P. C. 231. **Mentd.** **Gosnell v. Bishop** (1888), 4 T. L. R. 397; **Crosthwaite v. Steel** (1889), 6 R. P. C. 190; **Eliot v. Bristol Corpn.** (1894), 71 L. T. 659; **Van Berkel v. Booth** (1906), 23 R. P. C. 573; **Gold Ore Treatment Co. of Western Australia (In Liquidation) v. Golden Horseshoe Estates Co.** (1919), 36 R. P. C. 95.

3961. —.]—In 1893 a patent was granted to H. for improvements in electric arc lamps. The Jandus Co. in 1898 granted to J. a licence under controlling patents of which they claimed to be possessed. At the time of the licence the Jandus Co. had only an equitable title to H.'s patent, but they alleged this was included in the licence. J. began making arc lamps, which the Jandus Co. alleged to be made under H.'s specification,

without paying any royalties reserved by the licence. The Jandus Co. commenced an action to recover royalties & for an account. J. denied that his lamps were made under licenced patents, & counterclaimed for rescission of the licence on the ground of misrepresentation. He sought to put in evidence the specifications of certain prior patents for the purpose of showing the state of public general knowledge:—**Held**: the prior specifications sought to be put in by deft. were inadmissible, in evidence; & plffs., in proving their title to H.'s patent, might put in without strict proof assignments of the patent which had been registered at the Patent Office in accordance with Patents, etc. Act, 1883 (c. 57), sect. 23.—**JANDUS ARC LAMP & ELECTRIC CO., LTD. v. JOHNSON** (1900), 17 R. P. C. 361.

SECT. 19.—DOCUMENTS TENDING TO INCRIMINATE PARTY OR TO EXPOSE TO PENALTY OR FORFEITURE.

See CRIMINAL LAW, Vol. XIV., p. 440, Nos. 4054–4663; DISCOVERY, Vol. XVIII, pp. 161–166, Nos. 1132–1201.

SECT. 20.—MISCELLANEOUS DOCUMENTS.

3962. Accounts—Printed copies of trust accounts—Not signed by chairman of trustees—Admissibility.]—**PARDOE v. PRICE**, No. 2030, ante.

3963. — Not disputed—For what purposes admitted—To show striking of balance.]—**DIXON v. WING** (1844), 3 L. T. O. S. 150.

3964. — Recorded in Court of Chancery in Jamaica—Admissibility—Where account directed to be taken.]—Accounts, recorded in the Ct. of Ch. in Jamaica in a suit instituted against exors. who had proved testator's will in that island, ordered in a suit against them in England, to be taken under 15 & 16 Vict. c. 86, s. 51, as *prima facie* evidence of the truth of the matters therein contained; with liberty to plff. to surcharge & falsify.—**SLEIGHT v. LAWSON** (1857), 3 K. & J. 292; 26 L. J. Ch. 553; 29 L. T. O. S. 379; 5 W. R. 589; 69 E. R. 1119.

Annotation:—**Mentd.** **Massey v. Massey** (1862), 2 John. & H. 728.

3965. — For what purposes admitted—To show balance of account.]—In Apr. 1844, one of the partners of a partnership died, having by will devised his real & personal estate, nearly all of which was assets of the partnership, to three trustees & exors., defts. A., B. & C., two of whom, A. & B., were his co-partners, upon trust to raise the sum of £12,000, & invest the same in Govt. or real security, or in some railway co., & apply the proceeds towards the maintenance & education of plff., his then infant daughter, & accumulate the surplus at compound interest, & upon his daughter attaining twenty-one, to pay the same to her separate use, & to stand possessed of the capital, in trust to pay her the proceeds during

PART IV. SECT. 20.

m. Systematic records kept by purchaser.]—Where a purchaser has devised & conducted such a system of inspection & tests & of compiling records thereof as to involve a high probability of the correctness of the results, & these inspections, tests & records are made & compiled by numerous officials under the careful personal supervision of one super-

intendent as if made & compiled by him personally, & he is afterwards called as a witness in an action for damages, for breach of contract against the sellers, he may properly be allowed to verify the official records, & the records may properly be received in evidence. The records are, under a proper exception to the hearsay rule, admissible in evidence as proof of the facts stated therein. From the enormous amount of testing it is absurd

to speak about the witness's memory being refreshed. The necessity principle arises not merely from death or from absence but from sheer impossibility of memory in such a case.—**OMAND v. ALBERTA MILLING CO.**, [1922] 3 W. W. L. 412; 69 D. L. R. 6.—**CAN.**

n. Record of market-rate.]—Where the ct. has had the advantage of having in evidence before it a record of the market-rate of any particular day

her life to her sole & separate use. On Dec. 31, 1844, a valuation was made, by which testator's share was ascertained to be £20,000 & upwards. After more than ten years had expired from the date of the articles, in June, 1853, certain hereditaments, consisting of freeholds, leaseholds & machinery, being part of the partnership assets, were, in alleged consideration of £12,000 conveyed by deft. B. to defts. A. & C. by way of mtgc., subject to a proviso for redemption. Pltf. came of age in 1857, & in 1858 defts. A. & B. rendered to her an account of the trust funds, in which they debited her with various items of expenditure for maintenance & education, with 5 per cent. interest thereon, & credited her with the sum of £12,000 & interest at 5 per cent., with yearly rents up to May 1, 1853, & thenceforth with interest at 4 per cent., with yearly rests. Pltf. prayed for an inquiry & an account of the profits made in the partnership business on the sum of £12,000 from testator's death, & for payment of what should be found due to her, alleging that the mtgc. was an improper security:—*Held*: the entry of the sum of £12,000 in the account furnished by defts. must be taken as conclusive against them that they had such a sum in their hands.—*TOWNEND v. TOWNEND* (1859), 1 Giff. 201; 33 L. T. O. S. 143; 5 Jur. N. S. 506; 7 W. R. 529; 65 E. R. 885.

Annotations:—*Mentd.* Vyse v. Foster (1872), 8 Ch. App. 315, n.; *Re* Chennell, Jones v. Chennell (1878), 8 Ch. D. 492.

Account books, *see* Sect. 13, sub-sect. 2, *ante*.

3966. Acknowledgment—In handwriting of debtor—Undated—Admissibility.—In an action of debt, containing counts for goods sold & delivered, interest, & on an account stated, pltf. proved that he was a shopkeeper, & that deft., on being served with the writ, indorsed with the amount sought to be recovered, said that he would call & pay the bill. The following paper, without date, & in the handwriting of deft., was also given in evidence: "I send you £4 & will pay the balance in the book in a week." The jury having found for pltf.:—*Held*: the paper was rightly received in evidence.—*MOSELEY v. READE* (1846), 10 Jur. 18.

3967. Apprenticeship deed—Reciting order for binding apprentice—Primary evidence of recited order—Admissibility.—A parish apprentice was bound by indenture executed by B., churchwarden of L., & by D., one of the overseers of the same township. The indenture, which was duly allowed by two justices under Parish Apprentices Act, 1816 (c. 139), s. 1, recited that it was made by virtue of an order under the hands & seals of A. & C., justices of the peace in & for the county, etc., made in pursuance of the statute in such case made & provided, & bearing date, etc.:—*Held*: it was good primary evidence of the order for binding, which was not produced.—*R. v. STAINFORTH (INHABITANTS)* (1847), 11 Q. B. 66; 3 New Sess. Cas. 53; 17 L. J. M. C. 25; 10 L. T. O. S. 412; 12 J. P. 105; 12 Jur. 95; 116 E. R. 399.

Annotations:—*Refd.* R. v. Broadhempston (1858), 5 Jur. N. S. 267. *Mentd.* R. v. Preston (1848), 12 Q. B. 816; R. v. Totness (1849), 11 Q. B. 80; Staverton Overseers v. Ashburton Overseers (1855), 4 E. & B. 526.

Bill of lading.—*See* SHIPPING.

Bill of sale—Admissibility.—*See* BILLS OF SALE,

Vol. VII., pp. 104, 105, Nos. 624–626.

made up by a broker of intelligence & experience, such a record should be received as evidence of the particular state of the market on that day.—*NARAIN CHUNDER DHUR v. COHEN* (1884), 1 L. R. 10 Calc. 565.—*IND.*

o. Horoscope.—In a suit to set aside a decree on the ground of

minority, pltf. relied upon a horoscope to prove his age:—*Held*: the horoscope was not admissible.—*SATIS CHUNDER MUKHOPADHYA v. MOHENDRO LAL PATHUK* (1890), 1 L. R. 17 Calc. 849.—*IND.*

p. Certificate of guardianship—Evidence of minority.—A certificate of

guardianship is no evidence of minority being neither a book nor a register nor a record kept by any officer in accordance with any law.—*SATIS CHUNDER MUKHOPADHYA v. MOHENDRO LAL PATHUK* (1890), 1 L. R. 17 Calc. 849.—*IND.*

A certificate of
c c 2

— **How proved—Proof of registration.**—*See* BILLS OF SALE, Vol. VII., pp. 83–86, Nos. 479–483, 488, 489.

Books—Account books.—*See* Sect. 13, sub-sect. 2, *ante*.

Ancient books.—*See* Sect. 13, sub-sect. 1, *ante*.

Bankers' books—Bank books generally.—*See* BANKERS, Vol. III., pp. 305–309.

Bank of England books.—*See* BANKERS, Vol. III., p. 138, Nos. 81–88.

3968. —Of club—Open to inspection by members.—*WILTZIE v. ADAMSON* (1789), 1 Phillpotts & Arnold on Law of Evidence, 10th ed., p. 339, N. P.

Company & corporation books.—*See* Sect. 13, sub-sect. 4, *ante*.

3969. —Of partnership—For what purposes admitted.—In an action against one of several members of a society established under a deed of copartnership for goods supplied to the society, deft. may be proved to be a partner by parol evidence without producing the deed, & the entries in a book containing a record of the proceedings of the society produced at the meetings, & open to the inspection of all the members, are admissible in evidence against deft. after he has been proved to be a member of the society.—*ALDERSON v. CLAY* (1816), 1 Stark. 405, N. P.

Annotation:—*Mentd.* Dickinson v. Valpy (1829), 5 Man. & Ry. K.

3970. —Warehouse book—Selected entries from lost book.—E. & Co. were the registered proprietors of a Trade Mark registered in 1886. In an action for infringement & passing off brought by E. & Co. against G. & Co. defts. contended that they had used their device since a date anterior to the user or registration by pltf. of their device. Evidence had been given at the trial by M. that he had entered the employment of pltf. in the year 1885, & that pltf. had at that date been using labels bearing their device. On appeal it was admitted by pltf. that M. had been mistaken as to his dates & that he had not entered pltf.'s employment until the autumn of 1886. A copy of certain entries selected from an old warehouse book of pltf., the book having been lost, had been given in evidence, & had been relied on by the judge as corroborating the recollection of the witness M.:—*Held*: the copy of the entries in the lost book was not admissible in evidence.—*YOUNG & CO., LTD. v. GRIERSON, OLDHAM & CO., LTD.* (1924), 41 R. P. C. 548, C. A.

3971. Brief of counsel—Admissibility.—An attorney was employed to conduct the defence to an action, & the briefs for counsel were prepared in his office. Some passages purported to be statements made by the attorney:—*Held*: such passages were admissible, if the writing of the attorney was upon the margin of the brief opposite to such passages.

Semble: inadmissible without such writing.—*KEANE v. STEWART* (1851), 18 L. T. O. S. 143, N. P.

3972. Delivery note—For what purposes admitted—As evidence of existence at time of date.—*MORGAN v. WHITMORE*, No. 3869, *ante*.

—*See, generally*, SALE OF GOODS.

EVIDENCE.

Sect. 20. — Miscellaneous documents. Part V.
Sect. 1: Sub-sect. 1, A. (a), (b), (c), (d) & (e).]
Share certificates.]—See COMPANIES, Vol. IX,
pp. 286 et seq.; Vol. X., pp. 1129, 1130.

3973. Transfer of ship—For what purposes admitted—To prove ownership of ship.]—MORISS v. OLIVER (1852), 19 L. T. O. S. 62.
—.]—See, generally, SHIPPING.

Part V.—Witnesses.

SECT. 1.—COMPETENCY.

SUB-SECT. 1.—WHO ARE INCOMPETENT WITNESSES.

A. Persons under General Incapacity. (a) Children.

Sec. generally, INFANTS.

3974. General rule.]—What age the law will allow an infant to be a witness at. No distinction in this respect between capital & lesser offences.—*R. v. TRAVERS (1726)*, 2 Stra. 700; 93 E. R. 793.
Annotation:—Refd. R. v. Perkins (1840), 2 Mood. C. C. 135.

3975. —.]—Though a witness be an infant his tender years will not invalidate his evidence.—*SMITH v. FRENCH (1741)*, 2 Atk. 243; 26 E. R. 550.

Annotation:—Mentd. Davies v. Hodgson (1858), 25 Beav. 177.

3976. Ability to understand nature of oath—No limitation as to age.]—An infant of any age may be sworn as a witness, if he is conscious of the danger of perjury.—*YOUNG v. SLAUGHTERFORD (1709)*, 11 Mod. Rep. 228; 88 E. R. 1007.
Annotation:—Mentd. Pyle v. Grant (1729), 1 Barn. K. B. 260.

3977. —.]—An infant witness under seven years of age, if apprized of the nature of an oath, must be sworn; for no testimony is legal except it be given upon oath.—*R. v. BRASIER (1779)*, 1 Leach, 199; 1 East, P. C. 443, C. C. R.
Annotations:—Refd. R. v. Paul (1890), 25 Q. B. D. 202.
Mentd. R. v. Guttridge (1840), 9 C. & P. 471; *R. v. Lillyman (1896)* 2 Q. B. 167.

3978. —.]—There is no rule to the age of children to be examined as witnesses. A child, who has sufficient knowledge, may be examined (*PARKE, B.*).—*R. v. PERKINS (1840)*, as reported in 9 C. & P. 395, C. C. R.

3979. — Question for judge.]—Before a child is examined as a witness, the judge must be satisfied that the child feels the binding obligation of an oath from a general course of religious education; & the effect of the oath on the conscience of the child should arise from religious feelings of a permanent nature, & not from instruction recently communicated for the purposes of a trial.

Where it appeared, that, up to a very recent

guardianship is not evidence of minority when the question of minority is in issue.—(*GUNJRA KUAR v. ABIAKH PANDE (1896)*), 1 L. R. 18 All. 478.—**IND.**

PART V. SECT. 1, SUB-SECT. 1.— A. (a).

3974 i. General rule.]—A ct. shall only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen & afterwards to inform the ct. thereof.—*R. v. DHANI RANI (1916)* 1 L. R. 38 All. 49.—**IND.**

3974 ii. —.]—In an action of divorce:—*Held:* the evidence of a boy nearly seven years of age could not be received on account of his tender years & the nature of the case.—*ROBERTSON v. ROBERTSON (1888)*, 15 It. (Ct. of Sess.) 1001; 25 Sc. L. R. 708.—**SCOT.**

3976 i. Ability to understand nature of oath—No limitation as to age.]—A child witness, though under seven years of age, must be examined on oath or affirmation, & the ct. has no power to refrain from dispensing with same.—*NAPAR (SHEIKH) v. R. (1913)*, 1 L. R. 41 Calc. 406.—**IND.**

3979 i. — Question for judge.]—It is the duty of the judge to determine whether a child is competent to give evidence & counsel has no right to cross-examine the witness before being sworn in order to test competency to give evidence.—*R. v. LYONS (1889)*, 15 V. L. R. 15.—**AUS.**

3979 ii. —.]—The question was whether complainant, a girl under fourteen, appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony. The magistrate stated that on examination of the girl he found that she did understand, &

period, a girl aged eight years was totally ignorant of religion, but had had some religious instruction given to her with a view to her being examined, but at the trial showed that she had no real understanding on the subject of religion or a future state, the judge would not allow her to be examined.—*R. v. WILLIAMS (1835)*, 7 C. & P. 320.

3980. —.]—*R. v. HOLMES (1861)*, 2 F. & F. 788.

Postponement of criminal trial—For instruction of witness as to nature of oath.]—*See CRIMINAL LAW, Vol. XIV., p. 258, Nos. 2588–2593.*

Evidence not on oath—Criminal proceedings.]—*See CRIMINAL LAW, Vol. XIV., pp. 453 et seq.*

Evidence of recollections of childhood.]—*See No. 1600, ante.*

(b) Deaf and Dumb Persons.

3981. Ability to understand & answer questions—Necessity for.]—The evidence of a deaf witness, unable to express himself intelligently, which cannot be faithfully interpreted must be excluded altogether.—*R. v. IMRIE (1917)*, 12 Cr. App. Rep. 282, C. C. A.

3982. — Mode of communication—Writing or signs.]—*DICKENSON v. BLISSET (1754)*, 1 Dick. 268; 21 E. R. 271.

3983. —.]—*JERSEY (EARL) v. O'BRYEN (LADY) (1753)*, Barnes, 168; 94 E. R. 860.

3984. —.]—*R. v. JONES (1773)*, 1 Leach, 102, 452, n.

Annotation:—Consd. R. v. Halton (1824), Ry. & M. 78.

3985. —.]—A witness though deaf & dumb may be sworn & give evidence on an indictment for felony if intelligence can be conveyed to & received from him by means of signs & tokens.—*R. v. RUSTON (1786)*, 1 Leach, 408.
Annotation:—Mentd. A-G. v. Bradlaugh (1884), 34 L. J. Q. B. 203.

3986. —.]—Though the mode of examining a deaf & dumb witness by means of signs made with the fingers, is a mode receivable even in capital cases, yet, where the witness can write, *semble*: it would be better to make him write his answers to the questions put to him.—*MORRISON v. LENNARD (1827)*, 3 C. & P. 127, N. P.

there was nothing in her answers as reported to indicate otherwise.—*Held:* the magistrate was right in receiving the girl's evidence under oath, & the fact that she had been instructed on the subject of the nature & meaning of an oath a few days before the trial, afforded no sufficient ground for holding otherwise.—*R. v. ARMSTRONG (1907)*, 10 O. W. R. 508; 15 O. L. R. 47.—**CAN.**

3979 iii. —.]—Whether an oath should be administered to a young witness is a question within the discretion of the presiding judge.—*ANDERSON v. MCFARLANE (1899)*, 1 F. (Ct. of Sess.) 36; 36 Sc. L. R. 315; 6 S. L. T. 291, J.—**SCOT.**

PART V. SECT. 1, SUB-SECT. 1.— A. b).

r. Ability to understand & answer questions—Mode of communication.]—The ct. permitted a witness to read

3987. ———. ———.]—**BARTHOLOMEW v. GEORGE** (1851), *Best's Law of Evidence*, 12th ed., p. 134.

3988. Ability to understand nature of oath—Necessity for.]—Before the evidence of a dumb witness can be received the ct. must be satisfied that he comprehends the obligation of an oath.—*R. v. JACKSON* (1844), 3 L. T. O. S. 343.

3989. Competency question for judge—Effect of incompetency discovered during evidence.]—On a prosecution for rape it appeared that prosecutrix was deaf & dumb, & her father, who was sworn to interpret her evidence, said that he believed her to be ignorant of the nature of an oath. An expert however came, & from his report to the ct. prosecutrix was sworn & her evidence taken down as interpreted by the expert. In the course of her examination it became apparent that she did not understand the questions, & that her answers could not be relied upon. The judge directed her to stand down, & struck out her evidence from the case:—*Held*: although prosecutrix had been sworn, the judge acted rightly in striking out & withdrawing her evidence from the jury.—*R. v. WHITEHEAD* (1866), L. R. 1 C. C. R. 33; 35 L. J. M. C. 186; 14 L. T. 489; 30 J. P. 391; 14 W. R. 677; 10 Cox, C. C. 234, C. C. R.

(c) *Lunatics.*

Sec. generally, LUNATICS.

3990. General rule—Incompetent.]—Where A., being in the act of committing suicide, is interrupted by B. who meets with his death in a struggle thus originating. *Semble*: the statement of A. made immediately after & at a time when he was still labouring under an aberration of intellect, is not evidence against him on the charge of murdering B. by drowning him.

Qu.: whether he ought not to be acquitted altogether, & unconditionally, if that be the sole evidence of the manner by which B. came to his death, inasmuch as it proceeds from the mouth of a witness, incompetent on the score of insanity.—*R. v. JONES* (1839), 3 J. P. 357.

3991. Competency & ability to understand nature of oath—Question for judge.]—(1) If a lunatic be tendered as a witness it is for the judge to examine whether the lunatic be of competent understanding to give rational evidence, & is aware of the nature & obligation of an oath. If the judge is satisfied on these points he should admit the lunatic as a witness.

(2) The lunatic may be examined & cross-

the interrogatories to which he was to be examined; it being sworn that he was deaf & could not otherwise be examined.—*NANGLE v. NANGLE* (1849), 1 Lr. Jur. 78.—*IR.*

3988 i. Ability to understand nature of oath—Necessity for.]—The testimony of a deaf & dumb person, who although intelligent & capable of communicating & receiving information by signs, yet could not be made to understand clearly the nature & obligation of an oath.—*Held*: inadmissible.—*R. v. O'BRIEN* (1845), 5 L. T. O. S. 23.—*IR.*

PART V. SECT. 1, SUB-SECT. 1.—A. (c).

3990 i. General rule—Incompetent.]—The fact of a person being confined as a lunatic patient in an asylum, is not in itself sufficient to render him inadmissible as a witness.—*H.M. ADVOCATE v. SHERIFF & MITCHELL* (1866), 5 Lrv. 226; 38 Sc. Jur. 376.—*SCOT.*

a. Competency & ability to understand nature of oath.]—In an action of seduction:—*Held*: the girl's evidence was improperly received as it clearly

appeared that she was not capable of understanding or appreciating the nature of an oath, or the obligation she assumed in swearing to tell the truth.—*UDY v. STEWART* (1885), 10 O. R. 591.—*CAN.*

PART V. SECT. 1, SUB-SECT. 1.—A. (e).

3996 i. Person under sentence of death.]—A person under sentence of death is not a competent witness.—*GRAEME v. GLOBE PRINTING CO.*, 10 C. L. T. Occ. N. 367.—*CAN.*

t. Person pardoned.]—If a person be convicted of a crime under a statute which would exclude his testimony as a witness, a charter of pardon will not restore his competency; *aliter* if convicted by the common law.—*NEWELL v. MASSY*, 2 How. E. E. 866.—*IR.*

a. Want of religious belief.]—It is not the duty of the trial judge to examine a witness on the *voir dire* as to his religious belief, for the purpose of testing his competency as a witness,

examined, & witnesses called on either side in order to determine the question of competency; but when admitted, it is for the jury to determine whether his testimony is affected by his insanity, & what degree of weight is to be attached to it.—*R. v. HILL* (1851), 2 Den. 254; T. & M. 582; 4 New Sess. Cas. 613; 20 L. J. M. C. 222; 15 J. P. 387; 15 Jur. 470; 5 Cox, C. C. 259, C. C. R. *Annotation*:—As to (1) *Apld. Spittle v. Walton* (1871), L. R. 11 Eq. 420.

3992. Whether evidence tainted by insanity—Question for jury.]—*R. v. HILL*, No. 3991, *ante*.

3993. How competency determined—Ability to give rational evidence—Nature & obligation of oath understood.]—*R. v. HILL*, No. 3991, *ante*.

3994. — Examination & cross-examination of lunatics—Witnesses on either side.]—*R. v. HILL*, No. 3991, *ante*.

3995. Evidence by affidavit—Necessity for preliminary inquiry into mental condition.]—Before the affidavit of a person suffering from mental delusions, & in confinement in a lunatic asylum, can be received, his mental condition must first be ascertained by preliminary inquiry before the ct. or some person specially delegated for that purpose. An affidavit was sworn by a person in a lunatic asylum, without any notice in the *jurat* of the circumstances under which, or the place where it was sworn:—*Held*: it should be ordered to be taken off the file.—*SPITTLE v. WALTON* (1871), L. R. 11 Eq. 420; 40 L. J. Ch. 368; 24 L. T. 18; *sub nom. SPITTLE v. WALTON, Re BEDDOE*, 19 W. R. 405.

(d) *Spouses.*

In civil proceedings—Generally.]—*See* No. 4749, *post*; Evidence Amendment Act, 1853 (c. 83); Evidence Further Amendment Act, 1869 (c. 68).

— **Admissions.]**—*See* Part II., Sect. 4, sub-sect. 2; Part III., Sect. 2, *ante*.

— **To bastardise issue—Rebuttal of presumption of legitimacy.]**—*See* *BASTARDY*, Vol. III., pp. 364 *et seq.*; *HUSBAND & WIFE*.

— **In matrimonial causes.]**—*See* *HUSBAND & WIFE*.

In criminal proceedings.]—*See* *CRIMINAL LAW*, Vol. XIV., pp. 450–453.

Whether bound to disclose communications made during marriage.]—*See* Sect. 2, sub-sect. 10, *post*.

(e) *Other Persons.*

3996. Person under sentence of death.]—A person under sentence of death is incapable of

even if requested to do so by counsel for opposite party, & a party who has not been examined on the *voir dire* at the trial, will not be heard upon affidavit on appeal against the competency of the evidence.—*GRAY v. MCCALLUM* (1892), 2 B. C. R. 104.—*CAN.*

b. —.]—A person offered as a witness, upon being examined on the *voir dire* stated that he believed in God but did not believe in a future state of rewards & punishments dependent upon his conduct while on earth, whereupon he was rejected as incompetent:—*Held*: he was properly so rejected.—*BELL v. BELL* (1899), 34 N. B. R. 615.—*CAN.*

— **Total defect in religious belief makes a witness incompetent, & the question of belief may be examined into after he has sworn or affirmed, but it is not the duty of the trial judge to so examine before receiving his evidence.**—*GRAY v. MCCALLUM* (1892), 2 B. C. R. 104.—*CAN.*

d. Person instructed—Papers sent

Sec. 1.—Competency: Sub-sect. 1, A. (e) being a witness.—*R. v. WEBB* (1867), 32 J. P. 168; 11 Cox, C. C. 133.

Person pardoned.—*See* Evidence Act, 1843 (c. 85).

Whether witness privileged from answering questions incriminating witness.—*See* Sect. 2, sub-sect. 4, F., *post*.

B. Persons Incapacitated by Connection with Proceedings.

3997. Judges—Competent—Ceasing to take further part in trial.—*REGICIDES' CASE* (1660), 5 State Tr. 917; Kel. 7; 84 E. R. 1056.

3998. — Peer on trial of peer—May continue as judge after giving evidence.—*R. v. FIVE POPISH LORDS* (1680), 7 State Tr. 1217.

3999. — Should be sworn.—*R. v. MACCLESFIELD (EARL)* (1725), 16 State Tr. 767.

— *See, generally, PARLIAMENT; PEERAGES & DIGNITIES.*

4000. Arbitrators—Commercial arbitration.—A dispute arose between the buyer & sellers of a quantity of meat as to its quality. The buyer

carelessly.—A person to whom depositions of other witnesses were sent, rejected as a witness, as the carelessness of the party in sending him the papers amounted to instructing him.—*WRIGHT v. LIDDEL* (1829), 5 Murr. 35.—*SCOT.*

PART V. SECT. 1, SUB-SECT. 1.—B.

39971. Judges—Competent—Causing to take further part in trial.—In a prosecution under the game laws a magistrate who had given information which led to the prosecution, & who was a witness against prisoner, upon being challenged stated that he would not adjudicate, but only moved his chair a short distance from the other magistrates.—*Held:* where a magistrate is also a witness, he should occupy the same position as the other witnesses.—*IT. v. GALWAY J.J.* (1897), 31 L. L. T. 160.—*IR.*

— *See, generally, COMPETENT WITNESS & C.*—A judge is a competent witness & can give evidence in a case being tried before himself, even though he laid the complaint acting as a public officer, provided that he has no personal or pecuniary interest in the subject of the charge, & he is not precluded thereby from dealing judicially with the evidence of which his own forms a part.—*IT. v. MUKTA SINGH* (1870), 4 B. L. R. A. C. 15; 13 W. R. 60.—*IND.*

f. ——A judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts.—*HURPURSHAD v. SHEO DYAL* (1876), L. R. 3 Ind. App. 259; 26 W. R. 55.—*IND.*

g. Advocates—Proctor.—It is not a valid objection to a witness in the Probate Ct. that he appeared as proctor for another person interested in the estate.—*Re STOCKTON, Ex p. ROACH* (1872), 1 Pug. 142.—*CAN.*

h. Parties.—Although the law now allows interested parties to give evidence, & makes such evidence admissible, great weight should not be attached to such evidence.—*HASHER v. SUMMERS* (1884), 10 V. L. R. 204.—*AUS.*

k. ——A person charged, under Act No. 1165, s. 183, is a competent witness to give evidence on his own behalf.—*Re BELL, Ex p. MARINE BOARD OF VICTORIA* (1892), 18 V. L. R. 55, 432.—*AUS.*

l. ——One maker of a joint promissory note is not a competent witness for another, who alone is sued, without a release, as he is not indifferently liable to the payee &

his co-maker, being liable in an action by the latter for contribution to both damages & costs.—*DUDLEY v. MOORE* (1833), 3 O. S. 71.—*CAN.*

m. ——In an action against one of two joint makers of a promissory note, the maker not joined is a competent witness for his co-maker, to prove illegality of consideration for the note, upon receiving a release.—*PHINNEY v. SMITH* (1843), 6 O. S. 498.—*CAN.*

n. ——Under 8 & 9 Vict. c. 93, s. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty. He therefore cannot be rejected as an incompetent witness upon a case of information for a penalty, for harbouring smuggled goods.—*A.-G. v. WARNER* (1848), 5 U. C. R. 485.—*CAN.*

o. ——Where in an action for goods sold & delivered, *pltf.* made out a *prima facie* case through his clerk, who proved a delivery of the goods; & the promise to pay on request implied therefrom was repelled by *def.*, who stated a special contract varying from that implied.—*Held:* *pltf.* was admissible as a witness to reply to the new case set up by *def.*, & *semble*, he could not be excluded as a witness by reason of his presence in *ct.* during the examination of his clerk.—*McFARLANE v. MARTIN* (1853), 3 C. P. 64.—*CAN.*

p. ——A party directly interested in a defence, who has indemnified *def.* on the record & who states that the suit is defended on his individual behalf, is incompetent as a witness under R. S. C., c. 135.—*JOHNSTONE v. BRENNAN* (1853), James, 14.—*CAN.*

q. ——One *deft.* in ejectment is not entitled to have his name struck out at the trial, on disclaiming all right to possession, in order to be called as a witness for his co-*defts.*—*GROGAN v. ADAIR* (1857), 14 U. C. R. 479.—*CAN.*

r. ——One of two *defts.* sued as joint maker of a note, who allows judgment to go by default cannot be called as a witness for the other.—*JORDAN v. SMITH & PATTERSON* (1858), 17 U. C. R. 590.—*CAN.*

s. ——In an action against three members of a municipal corp., one being the *reeve*, for combining to delay & obstruct the proceedings of comrs. appointed to inquire into the affairs of the township, under 12 Vict. c. 81, s. 181:—*Held:* one *deft.*, who had

sent K. to inspect & report upon the meat. The dispute having been referred to *arbn.*, the buyer appointed K. as his arbitrator. The arbitrators having failed to agree upon their award the matter was referred to an umpire, & the buyer then proposed to call K. as a witness before the umpire to prove the state of the meat. The sellers objected to the competency of K. as a witness on the general principle that an arbitrator was disqualified from giving evidence in the *arbn.* proceedings:—*Held:* as it was a commercial *arbn.* K. was not disqualified from giving evidence before the umpire, notwithstanding that he had acted as an arbitrator.—*BOURGEOIS v. WEDDELL & Co.*, [1924] 1 K. B. 539; 93 L. J. K. B. 232; 130 L. T. 635; 40 T. L. R. 261; 68 Sol. Jo. 421; 29 Com. Cas. 152; 88 J. P. Jo. 25, D. C.

— *See, generally, ARBITRATION*, Vol. II., pp. 454, 455.

Jurors.—*See JURIES.*

Advocates—Barrister.—*See BARRISTERS*, Vol. III., pp. 336, 337, Nos. 260, 261.

4001. — Solicitor.—Where a party makes a speech & conducts a case as an advocate, he cannot afterwards give evidence as a witness in

suffered judgment by default could not be called as a witness on behalf of the others.—*EAST MISSOURI MUNICIPALITY v. HORSEMAN* (1858), 16 U. C. R. 556; 18 U. C. R. 31.—*CAN.*

t. ——The *reeve* of a township received moneys for license fees which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash, & a note for the balance. The treasurer denied having received the note or balance, & at his instance the municipality by resolution allowed an action to be brought for it in their name against the *reeve*.—*Held:* the treasurer was not admissible as a witness.—*KING MUNICIPALITY v. HUGHES* (1859), 17 U. C. R. 253.—*CAN.*

defts. H., M., & S., as joint makers of a note. H. & M. did not appear, & judgment was signed by mistake against all, but set aside as against S., who pleaded:—*Held:* an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused.—*KERR v. HEKEFORD* (1859), 17 U. C. R. 158.—*CAN.*

a. ——An equitable plea must be proved by such witnesses as a *ct.* of law can receive. In an action upon a promissory note against three *defts.* as joint makers two allowed judgment to go by default. The other pleaded an equitable defence, & desired to call one of his co-*defts.* as a witness:—*Held:* he was clearly inadmissible.—*PERLEY v. LONEY* (1859), 18 U. C. R. 429.—*CAN.*

b. ——*Held:* where a party to the suit is called by the opposite party, he is not thereby made a witness for all purposes, but can be cross-examined by his own counsel, or the counsel of his co-*pltf.* or *def.*, only as to those matters upon which he has been examined by the party calling him.—*LAMB v. WARD* (1859), 18 U. C. R. 304.—*CAN.*

c. ——A proceeding to obtain an order of affiliation under the 1 R. S. c. 57, is not a criminal proceeding on which the party charged is punishable on summary conviction, & therefore he is a competent witness by 19 Vict. c. 41.—*Ex p. COOK* (1860), 4 All. 506.—*CAN.*

d. ——Where *defts.* being sued as maker & endorser of a promissory note, pleaded a defence showing want of consideration which if proved must equally discharge both:—*Held:* neither could be called as a

the same cause.—*STONES v. BYRON* (1846), 4 Dow. & L. 393; 1 New Pract. Cas. 570; 1 Saund. & C. 248; 16 L. J. Q. B. 32; *sub nom.* *STONES v. BACON*, 8 L. T. O. S. 197; 11 Jur. 44.

Annotations :—*Fold*. Deane v. Packwood (1847), 4 Dow. & L. 395, n. *Expld.* Cobbett v. Hudson (1852), 1 E. & B. 11. *Distd.* R. v. Morgan (1852), 6 Cox, C. C. 107. *Refd.* R. v. Tooke (1884), 48 J. P. 661.

4002. ———.]—If an attorney acts on the trial of a cause as advocate for his client, he cannot be examined as a witness.—*DEANE v. PACKWOOD* (1847), 4 Dow. & L. 395, n.; *sub nom.* *DUNN v. PACKWOOD*, 2 New Pract. Cas. 65; 1 Saund. & C. 312; 8 L. T. O. S. 371; 11 Jur. 242.

Annotations :—*Refd.* Cobbett v. Hudson (1852), 1 E. & B. 11; R. v. Tooke (1884), 48 J. P. 661.

—.]—*See, generally*, SOLICITORS.

4003. ——— *Party appearing in person.*—(1) A party to a suit, conducting his own cause at the trial, has a right to address the jury, as an advocate, without waiving his right to give evidence as a witness in his own behalf.

(2) *Semble* : though a judge has power to order witnesses out of ct., & may fine a witness for disobeying this order, he cannot lawfully refuse to permit the examination of the witness.—*COBBETT*

witness for the other.—*MOFFAT v. ROBERTSON* (1860), 19 U. C. R. 401.—*CAN.*

f. ———.]—At the hearing of the cause evidence is not admissible by one deft. against another.—*A. (f.) v. TORONTO STREET RY. CO.* (1868), 15 Gr. 187.—*CAN.*

g. ———.]—A purchaser entered into the contract in his own name, & was a deft. :—*Held* : a good witness on behalf of pltf. against his co-purchaser, the other deft.—*SANDERSON v. BURDETT* (1871), 18 Gr. 417.—*CAN.*

h. ———.]—The term "witness," in U. C. C. s. 79, s. 4, includes parties to the cause as well as witnesses in the ordinary sense of the word.—*MOFFATT v. PRENTICE* (1873), 6 P. R. 33.—*CAN.*

k. ———.]—*Held* : the agent of a life insurance co. was not competent to give evidence on behalf of such co., of any statements or acknowledgments of deceased insured, in an action by his exor. or administrator against such co.—*O'DONNELL v. CONFEDERATION LIFE INSURANCE CO.* (1877), 2 R. & C. 570; 16 S. C. R. 717.—*CAN.*

l. ———.]—In an action on a bond against two sureties, deft. R. set up the defence & gave evidence that his signature to the bond had been obtained by fraud. The evidence of his co-deft. C. was tendered for the purpose of showing that C.'s signature to the bond had also been so obtained, which was rejected as inadmissible :—*Held* : the evidence of C. was admissible as showing a fraud practised on him, with respect to the same instrument by the same person, & at or about the same time as the alleged fraud on R., & because it was confirmatory of R.'s evidence.—*WATERLOO MUTUAL INSURANCE CO. v. ROBINSON* (1883), 4 O. R. 295.—*CAN.*

m. ———.]—The provision of Witnesses & Evidence Act, R. S., c. 107, s. 16, excluding parties from giving evidence of dealings, transactions, or agreements with deceased on the trial of any issue joined, or on any inquiry arising in any suit, action, or other proceeding in any ct. of justice, etc., has no application to an investigation as to questions of testamentary capacity.—*Re FARQUHARSON'S ESTATE* (1900), 33 N. S. R. 261.—*CAN.*

n. ———.]—A letter from a trustee who is a party in the cause, & had been agent in another cause for the person interested in the trust, is not evidence.—*SCOTT v. WILSON* (1825), 3 Murr. 518.—*SCOT.*

v. HUDSON (1852), 1 E. & B. 11; 22 L. J. Q. B. 11; 20 L. T. O. S. 109; 17 J. P. 39; 17 Jur. 488; 1 W. R. 54; 118 E. R. 341.

Annotations :—*As to* (1) *Refd.* Curtis v. Curtis (1858), 27 L. J. P. & M. 73; R. v. Tooke (1884), 48 J. P. 661. *As to* (2) *Refd.* Fortescue v. Clayton (1860), 24 J. P. 712.

4004. Parties—Former law.—A declaration on a policy of assurance on goods, averred that it was effected in the names of pltf.s, as agents, & that A., B., C., & D. were interested in the goods to the full amount insured, & that the policy was effected on their account & for their sole use & benefit. A. being called as a witness for pltf.s, was objected to, & thereupon they gave in evidence a deed poll executed by A., before the commencement of the action, whereby he released to pltf.s. all actions which he might have by reason of the policy, or for any moneys to be recovered by them from the underwriters. They also gave in evidence an indenture, executed by A. after the commencement of the action, whereby (after reciting that pltf.s. had effected the policy; that A., B., C., & D. were the persons interested; that actions had been commenced in the names of pltf.s.; & that they being desirous of an indemnity against the costs, the Ct.

Interest in the witness, in order that in the event of the cause going to appeal, his evidence should not appear there as the evidence of an unbiassed witness.—*WATERHOUSE v. LEE* (1863), 10 Gr. 176.—*CAN.*

b. ———.]—One of the conditions of a fire policy required, that persons sustaining loss should procure a certificate of a magistrate "most contiguous to the place of the fire, & not concerned in the loss as a creditor or otherwise," that he was acquainted with the insured, & believed that he had sustained the loss without fraud, etc. :—*Held* : where the nearest magistrate was also sufferer by the same fire which destroyed pltf.'s property, he was disqualified from certifying.—*GANONG v. AETNA INSURANCE CO.* (1864), 6 All. 75.—*CAN.*

c. ———.]—In an action by the endorsee of a note, the payee, being called as a witness & examined on his *voir dire*, said he owed pltf. \$100, & that as there was no one to prove the case against defts. but himself, he advised pltf. to take this note from him, on which about \$270 was due, so that he could give evidence; that for the balance over \$100 pltf. gave him his note, which the witness said at the trial he did not intend to sue upon it in the event of pltf. failing in this action, although he could not say there was any bargain to that effect :—*Held* : the payee was a competent witness.—*SHANNON v. DALY* (1868), 27 U. C. R. 458.—*CAN.*

— The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband :—*Held* : notwithstanding such interest on her part, she was a competent witness to prove notice as against the purchasers from the grantor in the impeached deed.—*SCOTT v. HUNTER* (1868), 14 Gr. 376.—*CAN.*

e. ———.]—Reduction of a disposition & deed of settlement on the ground of imbecility & fraud. It was objected to the first witness for pursuer that she was interested, being a legatee in all the deeds :—*Held* : the general line of distinction in every question of this sort is, whether the objection renders the witness incompetent or whether it goes merely to affect the credit to be given to the evidence, whether it goes to establish an interest in the witness, or only goes to influence the mind. If it establishes an interest the witness must be rejected, but if it only goes to influence the mind the

o. ———.]—Evidence having been led by both parties as to the character & proceedings of a certain person, on the footing of his being a party in the cause, & no notice having been given in the opening for defender that he was to be adduced as a witness :—*Held* : defender was, notwithstanding entitled to call him.—*HERCULES INSURANCE CO. v. HUNTER* (1836), 14 Sh. (Ct. of Sess.) 1137; 15 Sh. (Ct. of Sess.) 1318; 32 Fac. Coll. (App.) 62.—*SCOT.*

p. ———.]—Defender in an action of damages for breach of contract having been sequestrated during the process, his trustee was sisted in his room, & her name was subsequently dropped out of the proceedings; he was subsequently discharged. *Qu.* : whether he would be a competent witness.—*CHANTER v. BORTHWICK* (1848), 10 Dunl. (Ct. of Sess.) 1544; 20 Sc. Jur. 659.—*SCOT.*

q. Interested parties.—If a witness be objected to as interested, & on *voir dire* denies any interest, other witnesses may be called to prove that he is incompetent.—*THRASHER v. TULLOCH* (1837), 5 O. S. 326.—*CAN.*

r. ———.]—If a witness be called for pltf. who is incompetent from interest, & be afterwards called for deft., the incompetency is cured.—*HALL v. SHANNON* (1839), 2 Ont. Dig. 2325.—*CAN.*

s. ———.]—When arbitrators without consent examined an interested witness, & afterwards awarded in favour of the party calling him, the award was set aside.—*DAVIS v. BIRD-SALL* (1846), 2 U. C. R. 199.—*CAN.*

t. ———.]—Under R. S., c. 135, s. 11, a party directly interested in a defence, who had indemnified deft. on the record, & who stated that the suit was defended on his individual behalf :—*Held* : incompetent as a witness.—*RUSSELL v. MARSHALL* (1854), James, 330.—*CAN.*

u. ———.]—After judgment had been given in a cause, an application was made to open publication, on the ground that since the decree had been pronounced it was discovered that a material witness in the cause was beneficially interested in setting aside a will which it was the object of the suit to have declared void, & had entered into an agreement to indemnify the pltf.s. from the costs; but as the result would have been the same had that witness's testimony been out of the case, the Ct. refused the motion; but offered deft., who applied, liberty to give evidence to establish the fact of

Sect. 1.—Competency: Sub-sect. 1, B.; sub-sect. 2. Sect. 2: Sub-sects. 1 & 2, A.]

of Common Pleas had ordered A., B., C., & D. to indemnify, & that L. & R. had agreed to do it) A., B., C., & D., in consideration thereof & of 10s., assigned to L. & R. all their interest in the policy, & all benefit to be derived therefrom, & all moneys to be recovered in the said actions, to & for their own exclusive use & benefit:—*Held*: A. was, at all events, still liable to the attorney employed to bring the action, & therefore incompetent.—*BELL v. SMITH* (1826), 5 B. & C. 188; 7 Dow. & Ry. K. B. 846; 4 L. J. O. S. K. B. 140; 108 E. R. 70.

Annotations:—Consd. Handley & Jones v. Edwards (1838), 1 Curt. 722. *Distd.* Hearne v. Turner (1846), 2 C. B. 535. —.]—*See, now*, Evidence Act, 1851 (c. 99), s. 2; Evidence Amendment Act, 1853 (c. 83).

In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 443 et seq.

SUB-SECT. 2.—OBJECTION TO COMPETENCY.

4005. Time for—Incompetency known—On voir dire.]—Where it was alleged, on the part of deft., that the witness who proved pltf.'s case was pltf. on the record:—*Held*: deft. could not give evidence of that fact, but the objection should have been taken on the *voir dire*.—*DEWDNEY v. PALMER* (1839), 4 M. & W. 664; 7 Dowl. 177; 1 Horn & H. 402; 8 L. J. Ex. 148; 3 Jur. 74; 150 E. R. 1587.

4006. ——— Before examination-in-chief—Not after witness has left box.]—Where a witness had been examined & had left the witness box, but was recalled & examined not as to the general purposes of the cause, but merely as to his interest in the event of the suit & it appeared that he was interested:—*Held*: an objection then taken to his competency was too late.—*FELLINGHAM v. SPARROW* (1840), Woll. 11; 4 Jur. 1036.

4007. ——— Although recalled.]—It is too late to object to the competency of a witness, when such witness, after having been examined upon matters on which the objection to the competency might have been taken, has left the box, & is recalled for another purpose in respect of which the objection also arises.—*WOLLASTON v. HAKEWILL* (1841), 3 Man. & G. 297;

evidence must be received, but it must be weighed carefully.—*CLARK v. SPENCE* (1825) 3 Murr. 450.—*SCOT.*

*f. Deputy sheriff.]—*The deputy sheriff is, under 4 Anne, c. 16, s. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits.—*WHITTIER v. HANDS* (1860), 19 U. C. R. 172.—*CAN.*

*g. Mortgagor—Prior mortgage.]—*A party foreclosing subject to a prior mtge. cannot call the common mtgor., if he has the equity of redemption, to give evidence as to the amount due upon the prior mtge.—*WARREN v. TAYLOR* (1862), 9 Gr. 59.—*CAN.*

*h. Plaintiff's witness called by defendant.]—*Evidence of an alleged license was given on the cross-examination of one of pltf.'s witnesses, who was afterwards called as a witness by deft., & his evidence rejected on the ground that he had been already examined:—*Held*: the evidence was improperly rejected.—*BETTS v. VENNING* (1873), N. B. Dig. 560.—*CAN.*

PART V. SECT. 1, SUB-SECT. 2.

4008. Time for—Incompetency known—Before examination-in-chief—Not after

3 Scott, N. R. 593; 10 L. J. C. P. 303; 133 E. R. 1157.

Annotations:—Mentd. Beardman v. Wilson (1868), L. R. 4 C. P. 57; Rendall v. Andros (1892), 61 L. J. Q. B. 630.

4008. ——— Incompetency appearing on examination.]—*FELLINGHAM v. SPARROW*, No. 4006, *ante*.

4009. ———.]—Where a witness for deft., to whom several questions had been put in his examination-in-chief, stated, in answer to a question put to him by pltf.'s counsel, who had interposed, that he was answerable to deft.'s attorney for the costs, & was thereupon objected to as incompetent:—*Held*: the objection did not come too late.—*JACOBS v. LAYBORN* (1843), 11 M. & W. 685; 1 Dow. & L. 352; 12 L. J. Ex. 427; 1 L. T. O. S. 289; 7 Jur. 562; 152 E. R. 980.

4010. ———.]—*R. v. WHITEHEAD*, No. 3989, *ante*.

SECT. 2.—PRIVILEGE.

SUB-SECT. 1.—IN GENERAL.

4011. Mode of claiming privilege—Injunction to restrain witness from giving evidence.]—(1) Motion to restrain a solr. from giving evidence of confidential matters refused, the propriety of his being examined being left to the consideration of the ct. before which he might appear as a witness.

(2) *Semble*: a solr. who has been discharged may, upon proof of misconduct, be restrained from communicating information that came to him confidentially from his client.—*BEER v. WARD* (1821), Jac. 77; 37 E. R. 779.

Annotations:—As to (1) *Refd.* Rakusen v. Ellis, Munday & Clarke, [1912] 1 Ch. 831. *As to* (2) *Refd.* *Re* Holmes, *Re* Electric Power Co. (1877), 25 W. R. 603. *Generally*, *Mentd.* Ramsbotham v. Senior (1869), L. R. 8 Eq. 575.

Must be by witness.]—*See* Nos. 4105, 4106, *post*.

4012. Time for claiming privilege.]—*WISDEN v. WISDEN* (1849), 6 Hare, 549; 13 L. T. O. S. 546; 67 E. R. 1281.

—.]—*See, also*, No. 4104, *post*.

SUB-SECT. 2.—AFFAIRS OF STATE.

A. In General.

4013. Official statement that production of document injurious to public interest—Court

*witness has left box.]—*It is too late to object to the competency of a witness as being interested after his examination, upon grounds known before he entered the box.—*PRESCOTT v. JARVIS* (1848), 5 U. C. R. 489.—*CAN.*

*k. ——— After verdict.]—**R. v. SMITH* (1906), 6 S. R. N. S. W. 85; 23 N. S. W. W. N. 11.—*AUS.*

*l. ——— At trial.]—*It is no ground that an incompetent witness has been examined, unless he was objected to at the trial.—*DOE d. SULLIVAN v. READ* (1847), 3 U. C. R. 293.—*CAN.*

*m. Evidence received subject to objection.]—*Where at the hearing the competency of a witness was objected to, & the ct., received the evidence subject to the objection, but afterwards held the witness incompetent, a reference was directed as to the material points to which his evidence applied, & further directions were reserved.—*LINDHAY v. BANK OF MONTREAL* (1867), 13 Gr. 63.—*CAN.*

n. Objection to recall of witness overruled—Subsequent general objection.]—

On the trial of a cause pltf. recalled a witness who previously gave evidence for him & left the stand. Defts.' counsel objected to pltf. being allowed to recall, & upon the objection being overruled, objected generally to any of witness's testimony being received:—*Held*: this general objection did not enable the defts., on a motion for a new trial, to claim that part of the evidence was improperly received, but the particular evidence complained of should have been objected to.—*ALLEN v. McDONALD* (1881), 20 N. B. R. 533.—*CAN.*

PART V. SECT. 2, SUB-SECT. 1.
4012 i. Time for claiming privilege.]—An affidavit of documents which described certain bank books as bill registers, current accounts & ledgers for stated periods, was held sufficient. Privilege was claimed for the first time in respect of such books in a supplementary affidavit filed subsequently to the issue of a summons for a further & better affidavit:—*Held*: this affidavit defeated the summons & the claim of privilege must be allowed.—*BANK OF BRITISH COLUMBIA v. OPPENHEIMER* (1900), 7 B. C. R. 104.—*CAN.*

PART V. SECT. 2, SUB-SECT. 2.—A.

4013 i. Official statement that pro-

duction of document injurious to public

bound thereby—Necessity for attendance in court of head of department.]—(1) A judge at *Nisi Prius* has no power to compel a witness to produce documents connected with affairs of state, if their production would be injurious to the public service; & that question must be determined, not by the judge, but by the head of the department having the custody of the documents.

(2) The case, however, is different where the head of the department does not personally attend at the trial, but sends a subordinate with the documents, to be produced or not as the judge may think proper.—*BEATSON v. SKENE* (1860), 5 H. & N. 838; 29 L. J. Ex. 430; 2 L. T. 378; 6 Jur. N. S. 780; 8 W. R. 544.

Annotations.—As to (1) *Consd.* H.M.S. Bellerophon (1874), 44 L. J. Adm. 5; *Hennessy v. Wright* (1888), 21 Q. B. D. 509. *Fold.* *Hughes v. Vargas* (1893), 9 T. L. R. 551. *Reid.* *Kain v. Fairer* (1877), 37 L. T. 469; *Marks v. Beyniss* (1890), 54 J. P. 775; *Re Hargreaves* (1899), 16 T. L. R. 93; *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*, [1916] 1 K. B. 822. *Generally, Mentd.* *Campbell v. Spottiswoode* (1863), 3 B. & S. 769; *Henwood v. Harrison* (1872), L. R. 7 C. P. 606; *Dickeson v. Hilliard* (1874), L. R. 9 Exch. 79; *Robinson v. Hilliard & Hare, Dickeson v. Hilliard & Hare* (1874), 22 W. R. 372.

4014. ———.]—Under Cos. Act, 1862 (c. 89), s. 115, the judge has a discretion as to making an order for the production of documents, & the Ct. of Appeal will not readily interfere with the exercise of his discretion, though it has jurisdiction to do so in a proper case.

The liquidator of a co., in order to obtain evidence in support of a misfeasance summons which he had issued against the directors of the co. & the auditors, applied under the above sect. for an order that the surveyor of taxes should attend for examination & produce some balance-sheets of the co. which had been delivered to him for the purpose of assessment of income tax. The surveyor objected to produce these documents, & the Board of Inland Revenue supported his objection by a resolution that their production would be "prejudicial & injurious to the public interests & service":—*Held*: (1) (*WRIGHT, J.*) an order for production ought not to be made under the sect.; (2) (*CT. OF APPEAL*) the exercise by the judge of his discretion ought not to be interfered with.

(3) It is not in every case essential that the principal officer of a Govt. department should himself attend in ct. to take such an objection to the production of documents in the possession of the department. In many cases the ct. will be satisfied of the validity of the objection by other evidence, e.g. by the affidavit of a responsible officer.—*Re HARGREAVES (JOSEPH), LTD.*, [1900] 1 Ch. 347; 69 L. J. Ch. 183; 82 L. T. 132; 48 W. R. 241; 16 T. L. R. 155; 44 Sol. Jo. 210; 7 Mans. 354, C. A.

interest—Court bound thereby—Whether necessary for attendance in court of head of department.]—Where a person who as minister has charge of a document, & who is qualified by his position to have an opinion whether the production of the document would be objectionable on the ground of public policy, objects on this ground to produce it, the ct. will determine the question of admissibility by reference to the opinion of the minister. The proper mode in which objection to produce such document should be made is for the minister to attend in ct. & state his objection. If a minister instead of attending himself sends a subordinate to ct. to object to produce the document this mode of taking the objection, although irregular, may be accepted by the ct.—*FORAN v. DERRICK* (1892), 18 V. L. R. 408.—**AUS.**

4015 i. ———.]—In an action for

4015. ———.]—It is not for the judge to decide whether it is injurious to the public service to produce a document; but if the head of the public department takes the objection that it is contrary to the public interest to produce the document in ct., the judge will not order its production.—*HUGHES v. VARGAS* (1893), 9 T. L. R. 551; 37 Sol. Jo. 615; 9 R. 661, C. A.

4016. ———.]—*LATTER v. GOOLDEN* (1894), cited 24 T. L. R. at p. 297; 72 J. P. Jo. at p. 66, C. A.

4017. ———.]—**Although protesting against decision.]**—A Local Govt. Board inspector who was subpoenaed stated that the President of the Local Govt. Board had ordered him not to produce a report that he had made of the hospital, on the ground that it might be prejudicial to the public service. The inspector was not examined, but the ct. respectfully protested against the action of the Local Govt. Board.—*A.-G. v. NOTTINGHAM CORPN.* (1904), as reported in 90 L. T. 308; 68 J. P. 125; 2 L. G. R. 698.

Annotations.—*Mentd.* *East London Ry. v. Thames Conservators* (1904), 68 J. P. 302; *R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

4018. ———.]—Where the head of a department of Govt. states at the trial of an action that the production of a particular document by the department would be injurious to the public interest, the judge ought not to order its production.—*WILLIAMS v. STAR NEWSPAPER CO., LTD.* (1908), 24 T. L. R. 297; 72 J. P. Jo. 65.

4019. ———.]—**Party interested bound thereby—Not entitled to waive privilege.]**—Where in the opinion of the Secretary of State for War it is not in the public interest that a man's army medical history sheets should be produced, they are privileged from production, & as the privilege is one of the Crown, it cannot be waived by the person to whom the documents relate.—*ANTHONY v. ANTHONY* (1919), 35 T. L. R. 559.

4020. **Omission to claim privilege—Right of party interested to claim privilege.]**—*ANDERSON v. HAMILTON* (1816), 2 Brod. & Bing. 156, n.; 8 Price, 241, n.; 129 E. R. 917.

Annotations.—*Reid.* *Stace v. Griffith* (1869), L. R. 2 P. C. 420; *Hennessy v. Wright* (1888), 21 Q. B. D. 509; *Chatterton v. Secretary of State for India in Council*, [1895] 2 Q. B. 189.

4021. **Waiver of privilege—Communication made public by objector's own act.]**—*HYETT v. CHELTENHAM GUARDIANS*, No. 4033, *post*.

—**Power of party interested to waive privilege—After official statement that production injurious to public interest.]**—*See* No. 4019, *ante*.

Resisting production of documents on ground of public policy.]—*See* *DISCOVERY*, Vol. XVIII., pp. 166–169.

libel & slander pltf.'s counsel insisted on the production of a certain anonymous letter written by deft. to the Ontario Govt. relating to the license of pltf.'s hotel. The head of the department attended & declined to produce the letter on the ground that its production would be injurious to the public service, & it was therefore privileged. The judge ordered the letter to be produced & read:—*Held*: the question whether the production of such a document was injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, & the production of the document ought not to have been compelled.—*BRADLEY v. MCINTOSH* (1884), 5 O. R. 227.—**CAN.**

o. Cannot be disclosed—If contrary to public policy.]—Production of documents was called for at a trial,

& subsequently, during the trial, pltf.'s counsel applied for an order for the inspection of them. The judge ordered the documents to be produced to him, & after he had examined & found as a fact that they were not in the nature of State secrets, or documents whose admission would be prejudicial or detrimental to the public interest & service, ordered inspection of them, & they were subsequently admitted in evidence at the trial.—*QUEENSLAND PINE CO., LTD. v. AUSTRALIAN COMMONWEALTH*, [1920] St. R. Qd. 121.—**AUS.**

p. ———.]—**Income Tax Assessment Act, 1915–1918, s. 9,** does not weaken the rule of common law that evidence of affairs of State is excluded when its admissions would be against public policy.—*O'FLAHERTY v. MCBRIDE* (1920), 28 C. L. R. 283.—**AUS.**

*Sect. 2.—Privilege: Sub-sect. 2, B., C. & D. (a).]**B. Advice to Sovereign.*

4022. Cannot be disclosed.—An action having been brought against the Secretary of State for the Home Department, for not submitting to Her Majesty a petition of right left with him by ptff., it appeared at the trial that he had, in fact, submitted the petition, but, at the same time, had advised Her Majesty not to grant her *fial* as prayed:—*Held*: this was a complete answer to the action, & no question, if objected to, would be allowed to be put to the Secretary of State touching any advice given by him to Her Majesty.—*IRWIN v. GREY* (1863), 1 New Rep. 237; *on appeal* (1865), L. R. 1 C. P. 171; 19 C. B. N. S. 585, Ex. Ch.; (1867), L. R. 2 H. L. 20, H. L.

Annotations:—*Refd.* Dawkins v. Paulet (1870), 21 L. T. 584. *Mentd.* Tobin v. R. (1864), 16 C. B. N. S. 310; Met. Ry. v. Wilson (1871), L. R. 6 C. P. 376; Dawkins v. Prince Edward of Saxe Weimar, Dawkins v. Wynyard, Dawkins v. Stephenson (1876), 24 W. R. 670; Ruffy-Arnell, etc. Co. v. R., [1922] 1 K. B. 599.

4023. — Without leave of Sovereign.—*DICKSON v. COMBERMERE (VISCOUNT)* (1863), 3 F. & F. 527.

Annotations:—*Mentd.* Dawkins v. Paulet (1869), L. R. 5 Q. B. 94; Grant v. Secretary of State for India (1877), 2 C. P. D. 445.

C. Communications between State Officials.

4024. Cannot be disclosed.—Communication between Governor & Attorney-General of province.—Communications which take place between the Governor of a distant province & his A.-G. are confidential; & if a witness is interrogated as to their substance in a ct. of justice, he is not bound to answer any questions respecting them.—*WYATT v. GORE* (1816), Holt, N. P. 299, N. P.

Annotations:—*Apld.* Home v. Bentinck (1820), 2 Brod. & Bing. 130. *Refd.* Blake v. Pilfold (1832), 1 Mood. & R. 198.

4025. — Correspondence between Secretary of State & Colonial Governor.—Communications in official correspondence relating to matters of state cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer, not only because such communications are confidential but because their disclosure might betray secrets of state policy, which might be injurious to the interests of the country. Nor can an extract be admitted relating to the particular matter, because the whole must be read or none.—*ANDERSON v.*

HAMILTON (1816), 2 Brod. & Bing. 156, n.; 8 Price, 241, n.; 129 E. R. 917.

Annotations:—*Consd.* Stace v. Griffith (1869), L. R. 2 P. C. 420; Chatterton v. Secretary of State for India in Council, [1895] 2 Q. B. 189. *Refd.* Hennessy v. Wright (1888), 21 Q. B. D. 509.

4026. — Orders given by Colonial Governor to officer.—*COOKE v. MAXWELL* (1817), 2 Stark. 183, N. P.

4027. — Report of military court of inquiry.—The commander-in-chief of the army, having directed an assemblage of commissioned military officers to hold an inquiry into the conduct of H., a commissioned officer in the army; & H. having sued the president of the inquiry for a libel stated to be contained in the report thereupon made:—*Held*: this report was a privileged communication; it was properly rejected as evidence at the trial; & an office copy of the same was also properly rejected.—*HOME v. BENTINCK* (1820), 2 Brod. & Bing. 130; 8 Price, 225; 1 State Tr. N. S. App. 1348; 4 Moore, C. P. 563; 129 E. R. 907, Ex. Ch. *Annotations*:—*Apld.* Dawkins v. Rokeby (1873), L. R. 8 Q. B. 255. *Consd.* Hennessy v. Wright (1888), 21 Q. B. D. 509; Chatterton v. Secretary of State for India in Council, [1895] 2 Q. B. 189. *Refd.* Blake v. Pilfold (1832), 1 Mood. & R. 198; Dawkins v. Paulet (1869), 9 B. & S. 768.

4028. — — — — —.—Statements made by an officer summoned to attend to give evidence before a ct. of inquiry, instituted by the commander-in-chief of the army under the Articles of War to inquire into a complaint made by an officer in the army, are part of the minutes of the proceedings of the ct., which, when reported & delivered to the commander-in-chief, are received & held by him on behalf of the sovereign & on grounds of public policy cannot be produced in evidence.—*DAWKINS v. ROKERY (LORD)* (1873), L. R. 8 Q. B. 255; 42 L. J. Q. B. 63; 28 L. T. 134; 21 W. R. 544, Ex. Ch.; *affd.* (1875), L. R. 7 H. L. 744, H. L.

Annotations:—*Consd.* Chatterton v. Secretary of State for India in Council, [1895] 2 Q. B. 189. *Refd.* Hennessy v. Wright (1888), 21 Q. B. D. 509; Copartnership Farms v. Harvey-Smith, [1918] 2 K. B. 405. *Mentd.* Dickson v. Hilliard (1874), L. R. 9 Exch. 79; Dawkins v. Prince Edward of Saxe Weimar (1876), 1 Q. B. D. 499; Seaman v. Nethercliff (1876), 2 C. P. D. 53; Re Tufnell's Petn. (1876), 45 L. J. Ch. 731; Grant v. Secretary of State for India (1877), 46 L. J. Q. B. 681; R. v. Harington (1879), 48 L. J. Q. B. 300; Goffin v. Donnelly (1881), 6 Q. B. D. 307; Munster v. Lamb (1883), 11 Q. B. D. 588; Royal Aquarium & Summer & Winter Garden Soc. v. Parkinson, [1892] 1 Q. B. 431; Barratt v. Kearns, [1905] 1 K. B. 504; Attwood v. Chapman, [1914] 3 K. B. 275; Fraser v. Hamilton (1917), 33 T. L. R. 431; R. v. Army Council, *Ex p.* Ravenscroft (1917), 33 T. L. R. 387; Fraser v. Balfour (1918), 87 L. J. K. B. 1116; Slack v. Barr (1918), 82 J. P. 91; Heddon v. Evans (1919), 35 T. L. R. 642; Everett v. Griffiths, [1920] 3 K. B. 163.

PART V. SECT. 2, SUB-SECT. 2.—C.

Cannot be disclosed.—Communications between Governor & Ministers.—In an action brought by the Crown for ejectment:—*Held*: the determination of the members of the Cabinet upon that matter in dispute in the action could not be given in evidence on behalf of deft., as the Cabinet is a body not recognised by the constitutional law of the colony.—*R. v. DAVENPORT* (1874), 4 Q. S. C. R. 99.—*AUS.*

r. — — — — —.]—A Minister of the Crown may not, without the permission of the Governor disclose something that has taken place in Council between the Governor & his Ministers.—*L. v. TOOTH* (1874), 4 Q. S. C. R. 96.—*AUS.*

a. — — — — —.]—*Official communications between Government & Foreign Governments.*—An application was made under R. S. O., 1884, Ord. 31, r. 14, for the production of official communications which had passed from a friendly foreign power to its accredited agent in his colony, & which were intended for

transmission to the Govt. here, & for the production of other papers passing here between that agent & this Govt., all the papers being sent with the purpose of assisting the criminal administration of the foreign power, & having also the effect indirectly of bringing into force the provisions of Post Office Act, 1883. The communications were received & sent by deft. both with regard to the foreign Govt. & the Govt. here, in the discharge of his official public duty as Belgian Consul & not in order to serve any private purpose:—*Held*: the application should be refused on the ground that it would be against public policy, & would be injurious to the due administration of justice to produce them.—*SPITZEL v. BECKX* (1890), 16 V. L. R. 661.—*AUS.*

t. — — — — —.]—*Report of mining expert.*—Although a Minister of the Crown may refuse to produce a report made to him by one of his officers, on the ground that to do so would be prejudicial to public interest, he has no power to forbid the examination of the officer

in a ct. of law as to what he did & observed in the process of obtaining information for his report. To examine the officer on these matters is not giving secondary evidence of the contents of the report.—*LAKE GEORGE MINES, LTD. v. GIBBS, BRIGHT & CO.* (1903), 3 S. R. N. S. W. 440; 20 N. S. W. W. N. 163.—*AUS.*

a. — — — — —.]—A public officer is not bound to produce copies of official communication made by him to his superiors, in order to afford evidence in a cause depending between private parties.—*YOUNG v. EXCISE COMRS.* (1816), 19 Fac. Coll. 102.—*SCOT.*

b. — — — — —.]—*Report of Inspector of Schools.*—Motion for diligence to obtain an excerpt from the report of the Govt. Inspector of Schools refused on the ground that it was a State paper, over which the ct. had no power.—*STURROCK v. GREIG* (1849), 12 Dunl. (Ct. of Sess.) 166.—*SCOT.*

c. — — — — —.]—*Report of Inspector of Prisons.*—Reports made in the discharge of the duties of their respective offices by Govt. Officials to the Crown

4029. — **Communication from Secretary of State to under-secretary.]**—A written communication from a Secretary of State to his under-secretary, made by him in the course of carrying out his official duties as Secretary of State, cannot be used as evidence in a civil action, nor can secondary evidence of its contents be given.—*CHATTERTON v. SECRETARY OF STATE FOR INDIA IN COUNCIL*, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; 59 J. P. 596; 11 T. L. R. 462; 14 R. 504, C. A.

D. Communications between State Officials and Members of Public.

(a) *In General.*

4030. Communications to State officials—Whether privileged—Information acquired by tax collector.]—Notwithstanding the oath administered to a collector of the property tax by the comrs., that he will not disclose anything he learns in that capacity, except with their consent, or by virtue of an Act of Parliament, he is bound, when subpoenaed as a witness, to give evidence of all facts within his knowledge touching the matter in question.—*LEE v. BIRRELL* (1813), 3 Camp. 337.

4031. — **Memorial to Home Secretary.]**—*HATCH v. LEWIS* (1861), 2 F. & F. 467.

or its representatives are State documents & their production in ct. cannot be enforced. A report made by an Inspector General of Prisons Ireland under 7 G. 4, c. 74, s. 59, to the Lord Lieutenant is a State document & privileged as its production would be injurious to the public interest.—*M'ELVENEY v. CONNELLAN* (1864), 17 I. C. L. R. 55.—*IR.*

PART V. SECT. 2, SUB-SECT. 2.—D. (a).

4030 i. Communications to State officials—Whether privileged—Information acquired by tax collector.]—Where an income-tax comr. had been subpoenaed to produce the income-tax returns of one of the parties to the suit, & had stated on oath that in his opinion the production of the returns would be prejudicial to the public service, the ct. refused to direct the production of the return.—*WILKINSON v. WILKINSON* (1901), 1 S. R. N. S. W. 285.—*AUS.*

4030 ii. — **—.]**—In a suit brought to establish that plts. were partners in a certain firm the comrs. for taxation were subpoenaed to produce the income-tax returns made on behalf of the firm. All persons claiming to be beneficially interested in the firm consented to the production, but the chief comr. objected to produce the same, stating on oath that in his opinion their production would be prejudicial to the public interest.—*Held*: the returns were not privileged from production.—*MCLEOD v. PHILLIPS* (1905), 5 S. R. N. S. W. 503.—*AUS.*

4030 iii. — **—.]**—Statements made & documents produced by assessors before income-tax officers for the purpose of showing the income of such assessors, do not refer to matters of State & are not privileged under Indian Evidence Act, s. 123. The collector, when summoned to produce such documents by the ct., is bound to produce them & the ct. is empowered under Evidence Act, s. 162, to inspect them to decide on the validity of any objection to their admissibility in evidence. Income-Tax Act, s. 38, & rule 15 of the rules framed thereunder only forbid public servants to make public or disclose any information contained in such documents. The prohibition, however, does not extend to evidence given in cts. of justice. Under Income-Tax Act the collector can compel the production of docu-

ments & attendance of witnesses. Documents produced & statements made under process of law cannot be said to be made in "official confidence" within Evidence Act, s. 124, & they are not privileged under that sect.—*VENKETACHIELLA CHETTIAR v. SAMPATHU CHETTIAR* (1908), 1 L. R. 32 Mad. 62.—*IND.*

4030 iv. — **—.]**—Pursuer endeavoured to obtain production of defender's income-tax returns, with a view of proving that he was in a position to repay a loan. The ct. would not order production of the returns, on the ground of confidentiality & public interest.—*SHAW v. KAY* (1904), 5 Tax Cas. 74.—*SCOT.*

4030 v. — **—.]**—In an action for damages pursuer, who had been in partnership with defenders, averred that they had accused him of fraudulently understating the profits of the portion of the business of which he was manager. Defenders pleaded *veritas*, & craved a diligence for the recovery of documents, including income-tax returns of the profits of the business which had been handed in by the pursuer. The Inland Revenue objected to produce these returns, on the ground that they were confidential, & that it was prejudicial to the public interest that they should be recovered.—*Held*: the ct. had power in the exercise of its discretion to order production of documents in the custody of a public department, even though that department pleaded public interest as an objection to their production.—*HENDERSON v. M'GOWN*, [1916] S. C. 821.—*SCOT.*

d. Communications to Postmaster-General.]—For the enforcement of Act No. 781, protection may be claimed for all official communications made in the course of duty to the Postmaster-General, no matter by whom they are made or from what country they may come, & the protection will be extended where the aid of the Postmaster-General is invoked on behalf of the criminal law of a foreign land.—*SPITZEL v. BECKX* (1890), 16 V. L. R. 661.—*AUS.*

e. Information acquired by Customs official.]—Actions against the Comptroller & Collector of Customs of the Commonwealth, under Customs Act, are not actions against the Crown. In such actions, therefore, the common order for discovery should be made as between subject & subject. In

4032. — **— Statements made to Lord Chamberlain.]**—The Lord Chamberlain cannot be compelled to disclose in evidence communications made to him in his official capacity.—*WEST v. WEST* (1911), 27 T. L. R. 476, C. A.

4033. Communications from State officials—Whether privileged—Correspondence between Poor-Law Board & guardians.]—The correspondence between a board of guardians & the Poor-Law Board at Somerset House are *prima facie* privileged communications between public bodies, & on grounds of public policy ought not to be disclosed. But where the board of guardians who had sought the advice of the Poor-Law Board on the subject of a demand against them, caused the answer of the Poor-Law Board to be read at a meeting of the guardians which was open to all ratepayers of the union:—*Held*: (1) the board having by their own act made the answer public, could not object to its being given in evidence in support of the claim to which it related; (2) the letter of the guardians, to which the one read was an answer, was not, by the course adopted with respect to that answer, removed from the above general rule.—*HYETT v. CHELTENHAM GUARDIANS* (1850), 15 L. T. O. S. 507.

affidavits, in compliance with such orders, it is competent for deft. to claim privilege on grounds usual between subjects, & also on the ground that the discovery is not expedient in the opinion of Ministers on grounds of public policy.—*CLUTTERBUCK BROTHERS v. WOLLASTON*, [1908] S. A. L. R. 159.—*AUS.*

f. Communications to Lords Commissioners of the Great Seal.]—In an action for libel plff. interrogated deft. as to the contents of a written communication made by deft. a justice of the peace, to the Lords Commissioners of the Great Seal, concerning plff., who was also a justice of the peace. Deft. by his answer admitted that he had made a privileged communication concerning plff. to the Lords Commissioners, but declined to answer as to its contents. The ct., in the exercise of its judicial discretion, refused to compel deft. to answer the interrogatory.—*FITZGIBBON v. GREER* (1875), 1 L. R. C. L. 294.—*IR.*

g. Opinion of counsel.]—An opinion of counsel given to a public officer, ought not to be produced in evidence.—*EDWARDS v. MACINTOSH* (1823), 3 Murr. 369.—*SCOT.*

h. — **—.]**—A public department cannot be compelled by a ct. of law to produce confidential documents in its possession coming from third parties, if so to compel it would be to discourage similar communications being made in future.—*BROWN'S TRUSTEES v. HAY* (1897), 3 Tax Cas. 598.—*SCOT.*

k. Communications from State officials—Whether privileged—Statements made to newspaper reporters.]—The intentional introduction of newspaper reporters to a discussion with a Cabinet Minister of matters of public interest cannot deprive the occasion of its privileged character, or afford evidence of express malice.—*SMITH v. MUSGROVE* (1885), 11 V. L. R. 440.—*AUS.*

l. — **— Communications relative to character of applicant for public office.]**—Public officers are not entitled or compellable to produce written communications made by them officially, relative to the character & conduct of a party applying for a public office, the productions being demanded with a view to an action of damages, against the writer.—*EARL v. VASS* (1822), 1 Sh. Sc. App. 229.—*SCOT.*

Sec. 2.—Privilege: Sub-sect. 2, D. (b) & E.; sect. 3, A. & B.]

(b) Crown Witnesses in Criminal Proceedings.

4034. Whether witness bound to give evidence—Name of person employing informer.]—R. v. HARDY (1794), 24 State Tr. 199, 753.

Annotations:—Folld. R. v. Watson (1817), 2 Stark. 116; A.-G. v. Briant (1846), 15 M. & W. 169; Marks v. Beyfus (1890), 25 Q. B. D. 494. Refld. R. v. Garbett (1847), 2 Cox, C. C. 448. Mentd. R. v. Stone (1790), 25 State Tr. 115; R. v. Edwards (1812), 4 Taunt. 309; Redford v. Birley (1822), 3 Stark. 110, n.; R. v. Barber, Fletcher & Dorey (1844), 8 J. P. 644; R. v. Blake (1844), 6 Q. B. 126; R. v. O'Connell (1844), 5 State Tr. N. S. 1; R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; R. v. Smith O'Brien (1848), 7 State Tr. N. S. 1; R. v. Duffy (1849), 7 State Tr. N. S. 795; Mulcahy v. R. (1867), 15 W. R. 446; R. v. McCafferty (1867), 15 W. R. 1022; R. v. Meany (1867), 15 W. R. 1082.

4035. — Through what channel information disclosed to Government.]—(1) In order to identify a person in ct. with one whom the witness has described, the attention of the witness may be directed to the person in ct., & he may be asked whether that is the person of whom he has spoken.

(2) A witness for the Crown cannot, on cross-examination, be compelled to state through what channel he made a disclosure to Govt., either immediately or mediately.

(3) Evidence of a particular collateral fact cannot be adduced in any case, whether civil or criminal, in order to discredit a witness.

(4) If a witness be asked as to a collateral fact his answer is conclusive.

For the purpose of ascertaining the credit due to witnesses the ct. indulge free cross-examination; but when a crime is imputed to a witness, of which he may be convicted by due course of law, the ct. know but one medium of proof, the record of conviction. You may ask the witness whether he has been guilty of such a crime, this, indeed, would be improperly asked, because he is not bound to criminate himself, but if he does answer promptly, you must be bound by the answer which he gives, for the ct. does not sit for the purpose of examining into collateral crimes (LORD ELLENBOROUGH, C.J.).—*R. v. WATSON (1817), 2 Stark. 116; 32 State Tr. 1.*

Annotations:—As to (2) Apld. A.-G. v. Briant (1846), 15 M. & W. 169. Refld. Marks v. Beyfus (1890), 63 L. T. 733. Generally, Mentd. Redford v. Birley (1822), 1 State Tr. N. S. 1071; Tooth v. Bagwell (1825), 2 C. & P. 187; R. v. Blake (1844), 6 Q. B. 126; R. v. Duffy (1849), 7 State Tr. N. S. 795; Mulcahy v. R. (1867), 15 W. R. 446; R. v. McCafferty (1867), 15 W. R. 1022.

4036. — Whether witness gave information.]—In an information by the A.-G. for a breach of the revenue laws, a witness for the Crown cannot be asked, in cross-examination, "Did you give the information?" The rule of public policy, which protects a witness from being asked such questions

as would disclose the informer, if he be a third person, equally applies to questions which would disclose whether the witness is himself the informer.—*A.-G. v. BRIANT (1846), 15 M. & W. 169; 15 L. J. Ex. 265; 6 L. T. O. S. 394; 10 J. P. 518.*

Annotations:—Folld. Marks v. Beyfus (1890), 25 Q. B. D. 494. Mentd. R. v. Edwards (1853), 9 Exch. 32.

4037. — Police witness—Source of information.]—On an indictment for administering poison with intent to murder the police having in consequence of certain information found the bottle containing the poison in a place used by prisoner:—Held: they were bound to disclose from whom they had the information.—R. v. RICHARDSON (1863), 3 F. & F. 693.

Annotation:—Consd. Marks v. Beyfus (1890), 59 L. J. Q. B. 479.

4038. — Place where secreted when watching premises.]—A constable, having given evidence against a licensed person upon an information under Licensing Act, 1872 (c. 94), s. 14, was asked on cross-examination to say in whose house he had been secreted when watching the licensed premises. He refused to answer the question. The justices held that on the ground of public policy he was privileged from answering it:—Held: the justices had wrongly held that the constable was privileged not to answer the question.—WEBB v. CATCHLOVE (1886), 3 T. L. R. 159; 50 J. P. Jo. 795.

Annotation:—Consd. DUNCAN v. TOMS (1887), 56 L. J. M. C. 81.

4039. — Director of Public Prosecutions—Source & nature of information—Prisoner's innocence.]—A prosecution instituted or carried on by the Director of Public Prosecutions is a public prosecution, & the Director of Public Prosecutions, if called as a witness at the trial or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information & the nature of the information received, unless upon the trial of a prisoner, the judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to show prisoner's innocence.—MARKS v. BEYFUS (1890), 25 Q. B. D. 494; 59 L. J. Q. B. 479; 63 L. T. 733; 55 J. P. 182; 38 W. R. 705; 6 T. L. R. 406; 17 Cox, C. C. 196, C. A.

E. Proceedings in Parliament.

4040. Speaker of House of Commons—May prove fact that member spoke—Not substance of speech.]—The Speaker, or a member of Parliament, may be called upon to give evidence of the fact of a member of Parliament having taken part,

PART V. SECT. 2, SUB-SECT. 2.—D. (b).

4035 i. Whether witness bound to give evidence—Through what channel information disclosed to Government.]—On a prosecution under Canada Temperance Act:—Held: the justices properly refused to allow the disclosure of the source of information on which the complaint was founded.—R. v. SPROULE (1887), 14 O. R. 375.—CAN.

4038 i. — Police witness—Place where secreted when watching commission of offence.]—At a trial in a police ct. on a summary complaint charging betting in a street a police-constable deposed in cross-examination for accused that he had from the windows of a house seen accused commit the offence charged. The constable having been further asked to identify the house, the prosecutor-fiscal objected to the question on the ground that the answer

would lead to the public disclosure of the person who had given facilities to the police, but stated that he had no objection to the answer being communicated in writing to the magistrate & to the agent for accused, but no use of it must be made in further cross-examination. The agent for accused refused to accept the answer on this condition, whereupon the magistrate disallowed the question. Accused having been convicted appealed. The ct. sustained the appeal, holding that the question was a competent & proper question, & the condition one which the magistrate was not entitled to impose.—THOMSON v. NEILSON (1900), 3 F. (Ct. of Sess.), 3; 37 Sc. L. R. 930; 8 S. L. T. 147, J.—SCOT.

m. — Attorney-General—Original depositions.]—In an action for damages for malicious prosecutions, ptf. called the A.-G. of Natal to give

evidence & produce the original depositions made to the Criminal Investigation Department in consequence of which ptf. had been arrested on a charge of theft. On the A.-G. refusing to produce the depositions as not being admissible under the rules of evidence on the grounds of public policy:—Held: the A.-G. was not bound to put in the depositions.—VILJOEN v. DE JAGER (1912), 33 N. L. R. 581.—S. AF.

n. — Secretary to the Treasury.]—Any communication made to the Treasury of a nature to disclose or discover the commission of an offence under Trading with the Enemy Act, 1916, can in no circumstances be given in evidence by the official to whom the communication was made.—ROBINSON v. BENSON & SIMPSON, [1918] W. L. D. 1.—S. AF.

or spoken on a particular debate; but he cannot be asked as to what he then delivered in the course of the debate.—*PLUNKETT v. COBBETT* (1804), 5 Esp. 136, N. P.

Annotations:—*Mentd.* *Pearce v. Ornsby* (1835), 1 Mood. & R. 455; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700.

4041. Member of Parliament—May prove fact that member spoke—Not substance of speech.]—*PLUNKETT v. COBBETT*, No. 4040, *ante*.

4042. — May state who was Speaker—Not how member voted—Without leave of House of Commons.]—On a trial, a member of Parliament may be asked whether L. was Speaker of the House of Commons on a particular day, but if he asked how a member voted, he will not be compelled to answer if he decline doing so, & have not the leave of the House to give evidence.—*CHUBB v. SALOMONS* (1852), 3 Car. & Kir. 75, N. P.

SUB-SECT. 3.—TITLE DEEDS.

A. In General.

4043. Whether privileged from production—Production essential to case.]—In a criminal suit instituted for simony the patron was called as a witness & required to produce the deed of conveyance to him of the advowson of the vicarage in respect of the presentation to which the alleged simony had been committed. It was admitted that the deed was in ct., but the witness declined to produce it on the ground that it was a title deed. The ct. notwithstanding ordered its production.—*LEE v. MEREST* (1869), 39 L. J. Eccl. 53; 22 L. T. 420; 34 J. P. 422.

4044. —.]—It was not intended by Perpetuation of Testimony Act, 1842 (c. 69), to give to the person who wished to perpetuate testimony as against the person with whom he contemplated future litigation, rights of any stronger character than those which would be possessed by him in a suit actually commenced; & it is of course that when parties are in immediate litigation, they cannot investigate the title deeds of the opponent.—*CAMPBELL v. DALHOUSIE* (EARL) (1869), L. R. 1 Sc. & Div. 462; 22 L. T. 879, H. L.
Annotation:—*Reid.* *West v. Sackville*, [1903] 2 Ch. 378.

4045. — Third party's deeds—Held as trustee.]—A deft. who has worked coal mines without interruption, in pursuance of an agreement with the owner, cannot, upon the trial of an action against him for a breach of the agreement, compel a third person to produce his title deeds, by virtue of which he is entitled to the legal estate in which the premises are situated, as a trustee.—*ROBERTS v. SIMPSON* (1817), 2 Stark. 203, N. P.

4046. — —.]—*DOE d. BAKER v. RAWLINS* (1844), 3 L. T. O. S. 50.

4047. — — Held as mortgagee.]—*R. v. UPPER BODDINGTON (INHABITANTS)*, No. 4166 *ist*.

4048. — — Held as pledgee.]—A foreign govt. employed K. & F., as agents in London, to bring out a loan on the English market, & to issue scrip certificates to the subscribers, & to exchange

scrip for bonds upon the amount subscribed being fully paid. The govt. employed E. & Co. as their agents & bankers, with power to receive from K. & F. the sums subscribed. Subsequently bonds in the hands of K. & F. were pledged by the president of the govt. to E. & Co., but the validity of this security was disputed by the govt. The govt. filed a bill against K. & F., E. & Co., & others, for accounts of the dealings connected with the issue of the loan. Upon motion that a member of the firm of K. & F., upon cross-examination in the cause, should produce certain documents to the production of which E. & Co. objected:—*Held*: the scrip certificates & the scrip book in which the certificates were entered must be produced, but not the bonds themselves, since the foreign govt. might, by knowing the numbers of the bonds, use their information to the prejudice of E. & Co., their mtgees., & the knowledge of the numbers of the bonds was not shown to be relevant to the suit.—*COSTA RICA REPUBLIC v. ERLANGER* (1874), L. R. 19 Eq. 33; 44 L. J. Ch. 281; 31 L. T. 635; 23 W. R. 108.

4049. Privilege confined to title deeds.]—In ejectment by tenant for life under a will containing leasing powers against a lessee holding under a demise from a prior tenant for life, to recover possession, on the ground that the lease was not granted according to the power, the lessor of pltf. of the former tenant for life, to prove seisin, required his exors., under a *subpoena duces tecum*, to produce books containing entries, by which the steward of that tenant for life charged himself with receipt of rents for the property in question:—*Held*: the exors. being no parties to the actions, their attorney, who appeared with the books, was bound to produce them as there were not any part of the title deeds of the prior tenant for life; nor was it any reason for their non-production, that if the lessor of pltf. recovered in the action, the estate of the prior tenant for life might be bound to indemnify the lessee under a warranty contained in the demise.—*DOE d. EGREMONT (EARL) v. DATE* (1842), 3 Q. B. 609; 11 L. J. Q. B. 220; 114 E. R. 611; *sub nom.* *DOE d. WYNDHAM v. DATE*, 6 Jur. 990.

Annotations:—*Consd.* *Phelps v. Prew* (1854), 3 E. & B. 430. *Reid.* *R. v. Kinglake* (1870), 22 L. T. 335; *Crowther v. Appleby* (1873), L. R. 9 C. P. 23. *Mentd.* *Doe d. Egremont v. Grazebrook* (1843), 4 Q. B. 406.

Admissibility of secondary evidence to prove contents.]—*See* Part IV., Sect. 5, *ante*.

Resisting production of documents relating to land.]—*See* DISCOVERY, Vol. XVIII., pp. 152 *et seq.*

B. Waiver of Privilege.

4050. Who may waive.]—*DOE d. MARRIOTT v. HERTFORD (MARQUESS)*, No. 4224, *post*.

4051. Effect of.]—The ct. does not usually compel a party to produce his title deeds as evidence, but where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them.—*WILLIS v. FARRER* (1828), 2 Y. & J. 241.

Annotations:—*Mentd.* *Gibson v. Peacock*, Gilcock, Marsding, etc. (1831), You. 184; *Harcourt v. Pierson* (1832), 5 Sim. 368; *Salkeld v. Johnstone* (1842), 1 Hare, 196.

of them by resp., though they are the title deeds of resp. also; otherwise, if parties not before the ct. are interested in them.—*CHAYTOR v. PEYTON* (1857), 9 Ir. Jur. 486.—*IR.*

o. — Third party's deeds — Lien of personal representatives.]—The ct. has not jurisdiction to order the personal representatives of a deceased solr. to deliver up title deeds on which they claim a lien.—*ALLAN v. JERVOISE* (1847), 11 L. Eq. R. 583.—*IR.*

PART V. SECT. 2, SUB-SECT. 3.—A.

4044 i. Whether privileged from production.]—Pltf. refused to produce a patent, or admit the issuing or date of it, so that deft. was unable to go into his defence under Stat. Limitations:—*Held*: pltf. was entitled to take this course.—*DOE d. SHEPHERD v. BAYLEY* (1858), 15 U. C. R. 460.—*CAN.*

4044 ii. —.]—Deft. tenant in dower, is not compellable to give evidence of the contents of the title deeds, etc.,

under which he claims.—*LYNCH v. O'HARA* (1859), 6 C. P. 259.—*CAN.*

4044 iii. —.]—The owner in possession of property cannot be compelled to produce his title deeds, or give evidence which may put his rights in danger.—*MUSKERRY v. CHINNERY* (1833), 2 Hog. 272; 1 Ir. L. Rec. N. S. 107.—*IR.*

4044 iv. —.]—When deeds appear to evidence petitioner's title affirmatively, he is entitled to a production

Sect. 2.—*Privilege: Sub-sect. 4. A. & B. (a).]*

SUB-SECT. 4.—MATTER INCRIMINATING WITNESS.

A. *In General.*

4052. Whether for judge or witness to decide whether matter incriminating.]—(1) A witness is not bound to answer a question, where his answer may have a tendency to render him amenable to a criminal charge: & it is no ground of complaint that the judge cautions the witness, without waiting for him to claim his privilege.

(2) *Seem*: it is for the witness, & not for the judge, to determine whether or not the answer to the question may tend to criminate him.—*FISHER v. RONALDS* (1852), 12 C. B. 762; 22 L. J. C. P. 62; 20 L. T. O. S. 100; 17 Jur. 393; 1 W. R. 54; 138 E. R. 1104.

Annotations:—As to (2) *Consd.* *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *Slidebottom v. Adkins* (1857), 5 W. R. 743. *Apprvd.* *Adams v. Lloyd* (1858), 3 H. & N. 351. *Consd.* *Re Mexican & South American Co., Ex p. Aston* (1859), 28 L. J. Ch. 631; *Scott v. Miller* (No. 2) (1859), John. 328; *It. v. Boyes* (1861), 1 B. & S. 311. *Refd.* *Chester v. Wortley* (1856), 17 C. B. 410; *The Mary or Alexandra* (1868), L. R. 2 A. & E. 319.

4053. —.]—When a witness who refuses to answer a question put to him swears on his oath that he believes that, if he answers it, it will put him in peril of criminal proceedings, it is for the judge to determine whether the occasion is such that the witness should not be compelled to answer.—*Ex p. FERNANDEZ* (1861), 10 C. B. N. S. 3; 30 L. J. C. P. 321; 4 L. T. 324; 7 Jur. N. S. 571; 9 W. R. 832; 142 E. R. 340; *previous proceedings, sub nom. Re FERNANDES*, 6 H. & N. 717.

Annotations:—*Mentd.* *Dale's Case*, *Enraght's Case* (1881), 6 Q. B. D. 376; *It. v. Maldenhead Corp.* (1882), 8 Q. B. D. 339; *It. v. Central Criminal Courts JJ.* (1883), 11 Q. B. D. 479; *Re Davies* (1888), 21 Q. B. D. 236; *R. v. Parke* (1903), 89 L. T. 439; *Gordon v. Gordon*, [1904] P. 163; *Scott v. Scott*, [1912] P. 241.

4054. —.]—*Re REYNOLDS, Ex p. REYNOLDS*, No. 4057, *post*.

4055. —.]—*Re GENESE, Ex p. GILBERT*, No. 4058, *post*.

4056. Necessity for reasonable ground to apprehend danger to witness—To entitle witness to privilege.]—In order to entitle a witness to the privilege of not answering a question, as tending to criminate him, the ct. must see, from the circumstances of the case & the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.

PART V. SECT. 2, SUB-SECT. 4.—A.

4056 i. Necessity for reasonable ground to apprehend danger to witness—To entitle witness to privilege.]—A witness may refuse to consider even a relevant question put to him by a comr. appointed by letters patent under the Great Seal, subject to his being able to satisfy the tribunal charged with reviewing his conduct that he had a reasonable excuse. If any injury was likely to ensue, or if there was any ground, not merely fanciful, for fearing that it might ensue, it would be open to such tribunal to find that the witness had a reasonable excuse.—*BRADLEY v. FIELD* (1913), 13 S. R. N. S. W. 451; 30 N. S. W. W. N. 135.—*AUS.*

4056 ii. —.]—A person is protected against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards doing so; the person, however, or, in the case of a corpn., an officer, must pledge his oath to his belief that such would or might be the effect of his answer, & it must appear that such belief is likely to be well founded.—*D'IVRY v. WORLD NEWSPAPER CO. OF*

TORONTO (1897), 17 P. R. 387.—*CAN.*

4056 iii. —.]—Pltfs. launched a motion to commit G., the chairman of deft. board, for breach of an injunction. As witnesses for pltf. upon the pending motion, G. & certain other persons were examined before a special examiner; & pltfs. now moved for an order compelling G. & the other witnesses to attend for re-examination & to answer questions which they had refused to answer & to produce books, papers & documents relating to the payment of salaries of teachers in the employment of deft. board, & in default, for the committal to gaol of G. & the others:—*Held*: there could be no reasonable apprehension on the part of G. or the other witnesses that by answering the questions which they refused to answer they would make themselves or the board liable to a criminal prosecution; the witnesses themselves were fully protected under Evidence Act, 1914, c. 76, s. 7, & deft. board could not be proceeded against criminally; & the statement of one member of the board, made upon an examination in a civil action, could not be used against another in a criminal

But, if the fact of the witness being in danger be at once made to appear, great latitude should be allowed to him in judging of the effect of any particular question. The danger to be apprehended must be real & appreciable with reference to the ordinary operation of law in the ordinary course of things, & not a danger of an imaginary character, having reference to some barely possible contingency.

On the trial of an information, laid by the A.-G. by order of the House of Commons, against deft., for bribery at a Parliamentary election, a person, to whom it was charged that deft. had given a bribe, was called as a witness, & refused to answer any question connected with deft., on the ground that the answer would tend to criminate him; a pardon under the Great Seal was then handed to the witness, but he still refused to answer, on which the presiding judge compelled him to answer, & on his evidence deft. was convicted:—*Held*: the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned; & though the witness might still be liable to an impeachment by the House of Commons notwithstanding the pardon, by reason of Act of Settlement, 1700 (c. 2), an impeachment was so unlikely that the witness could not be said to be in any real danger, & he was rightly compelled to answer.—*R. v. BOYES* (1861), 1 B. & S. 311; 30 L. J. Q. B. 301; 5 L. T. 147; 25 J. P. 789; 7 Jur. N. S. 1158; 9 W. R. 690; 9 Cox, C. C. 32; 121 E. R. 730.

Annotations:—*Consd.* *Lamb v. Munster* (1882), 10 Q. B. D. 110. *Foldd.* *Re Reynolds, Ex p. Reynolds* (1882), 20 Ch. D. 294. *Apld.* *Re Genese, Ex p. Gilbert* (1886), 3 Morr. 223. *Refd.* *It. v. Hamilton, Kinglake & Lovibond* (1870), 22 L. T. 316; *Evans v. Evans & Blyth*, [1904] P. 378. *Mentd.* *It. v. Christie*, [1914] A. C. 545; *R. v. Cohen* (1914), 111 L. T. 77.

4057. —.]—Where a witness objects to answer questions put to him on the ground that his answers may tend to criminate him, the mere statement of his own belief that they may do so is not sufficient to excuse him from answering. To entitle him to silence, the ct. must be satisfied, from the circumstances of the case & the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. If it is apparent that the witness is in danger, great latitude must be allowed him in judging for himself of the effect of his answer to any particular

proceedings.—*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES* (1917), 40 O. L. R. 272; [1917] A. C. 62.—*CAN.*

4056 iv. —.]—In a trial for high treason, the Crown called a witness a person who at the commencement of Act 11 of 1915 was detained in custody in terms of sect. 8 (1) of the Act & against whom no criminal proceedings were pending at the date mentioned in the said sect. The witness, after being sworn, refused to answer certain questions on the ground that the answer would tend to incriminate him of seditious & treasonable acts:—*Held*: by virtue of sect. 8 he was immune from prosecution & punishment for any such acts, & was not justified in refusing to answer the questions. To entitle a witness to the privilege of silence, the circumstances of the case & the nature of the evidence which the witness is called to give must be such that there is reasonable ground to apprehend danger to him from his being compelled to answer. The danger to be apprehended must be real & appreciable, with reference to the ordinary operation of law in the ordinary course of things.—*R. v. KUYPER* (1915), T. P. D. 308.—*S. AF.*

question; but, subject to this reservation, the ct. will insist on a witness answering, unless it is satisfied that his doing so will tend to place him in peril.—*Re REYNOLDS, Ex p. REYNOLDS* (1882), 20 Ch. D. 294; 51 L. J. Ch. 756; 46 L. T. 508; 46 J. P. 533; 30 W. R. 651, 15 Cox, C. C. 108, C. A.

Annotations.—*Fold. Re Genese, Ex p. Gilbert* (1886), 3 Morr. 223. *Reid. National Assn. of Operative Plasterers v. Smithies*, [1906] A. C. 434. *Mentd. Re North Australian Territory Co.* (1890), 38 W. R. 561.

4058. ———.]—Where a question is in form an innocent one, it is not a sufficient ground of refusal to answer for a witness to say he believes his answer to such question will or may criminate him; but he must satisfy the ct. that there is a reasonable probability that it would or might do so. A witness in such a case must satisfy the ct. by some fact outside the question that his answer will or may put him in jeopardy.—*Re GENESE, Ex p. GILBERT* (1886), 3 Morr. 223, C. A.

4059. Insufficient reason given—Duty of witness to answer.—]—Whatever the rule may be as to the right of a witness to decline answering a question, on the ground that it may tend to criminate him, without giving any reason why it should tend to do so, he will be compelled to answer, where he gives his reason, & such reason is insufficient.—*Re MEXICAN & SOUTH AMERICAN CO., ASTON'S*

CASE (1859), 4 De G. & J. 320; 28 L. J. Ch. 631; 33 L. T. O. S. 229; 5 Jur. N. S. 779; 7 W. R. 539; 45 E. R. 124, L. J.

B. Grounds for Refusing to Give Evidence.

(a) Matters Tending to Incriminate.

4060. Right of witness to refuse answer.—]—*LATTERS v. SUSSEX* (1605), Noy, 151; 74 E. R. 1112.

4061. ———.]—*CHARLES I. TRIAL* (1649), 4 State Tr. 989, 1101.

4062. ———.]—*R. v. SHAFTESBURY (EARL)* (1681), 8 State Tr. 759, 817.

Annotation.—*Consd. R. v. Boyes* (1861), 1 B. & S. 311.

4063. ———.]—Plea allowed to discovery of a marriage which would subject one of the parties to punishment in the Ecclesiastical Ct., the other being dead.

No one is bound to answer so as to subject himself to punishment whether that punishment arises by the ecclesiastical law or the law of the land (*LORD HARDWICKE, C.*).—*BROWNSWORD v. EDWARDS* (1751), 2 Ves. Sen. 243; 28 E. R. 157, L. C.

Annotations.—*Mentd. Doe d. Fonnereau v. Fonnereau* (1780), 2 Doug. K. B. 487; *Doe d. Wheedon v. Lea* (1789), 3 Term Rep. 41; *Doe d. Usher v. Jessop* (1810), 12 East, 288; *Doe d. Harris v. Howell* (1829), 10 B. & C. 191; *Malcolm v. Taylor* (1831), 2 Russ. & M. 416; *Doe*

PART V. SECT. 2, SUB-SECT. 4.— B. (a).

4060 i. Right of witness to refuse to answer.—]—In a proceeding charging that the mother, in concert with the other two defts., had abducted & kept in concealment the children of pltf., the two defts. refused to answer certain questions put to them respecting the children on the ground that their answers would tend to render them liable to criminal prosecution under 32 & 33 Vict. c. 20.—*Held*: defts. were not bound to answer.—*KEITH v. LYNCH* (1872), 19 Gr. 497.—CAN.

4060 ii. ———.]—*Held*: deft. was entitled to the oath of the party that he objected to answer because he believed his answering would tend to criminate him.—*POWER v. ELLIS* (1881), 6 S. C. R. 1.—CAN.

4060 iii. ———.]—The penal provisions of 13 Eliz. c. 5, afford no excuse for a refusal by a deft. in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction.—*DUNSFORD v. CARLISLE* (1884), 10 P. R. 449.—CAN.

4060 iv. ———.]—No man can be compelled to answer a question incriminating himself.—*HALL v. GOWANLOCK* (1888), 12 P. R. 604.—CAN.

4060 v. ———.]—*NUNN v. BRANDON* (1892), 24 O. R. 385.—CAN.

4060 vi. ———.]—In an action upon promissory notes, defts. pleaded that pltf. & certain other persons had, contrary to 52 Vict. c. 41, s. 1 (c), conspired together to harass defts. & lessen trade competition, & had, procured the holders of the notes sued on to transfer them to pltf., & pltf. was suing thereon as trustee for such other persons. Upon his examination for discovery, pltf. refused to answer questions as to the names of the persons for whom he was acting as trustee, claiming privilege on the ground that to answer would tend to criminate him or render him liable to criminal prosecution under the above statute.—*Held*: he was not entitled to the privilege & must answer.—*MILLS v. MCCRACK CO.* (1893), 15 P. R. 276.—CAN.

4060 vii. ———.]—*R. v. THOMPSON* (1896), 2 Terr. L. R. 383.—CAN.

4060 viii. ———.]—Maintenance is an

indictable offence in Ontario; & in an action to recover damages for maintenance pltf. is not entitled to obtain from defts. upon examination for discovery such answers as would tend to subject them to criminal proceedings. In such an action no discovery of the matters charged could be had which would not involve defts. in matters leading up to the offence; & therefore, the examination should not be allowed to take place at all.—*HOPKINS v. SMITH* (1901), 21 C. L. T. 377; 1 O. L. R. 659.—CAN.

4060 ix. ———.]—Prisoner, a witness in a prosecution against K. for breach of Prohibition Act, 1906, refused to answer a question put to him by the stipendiary magistrate on the ground that his answer might tend to criminate himself. The magistrate adjourned the hearing & committed the witness to jail for such refusal, by warrant, ordering his detention for a period of time covering such adjournment. It was contended that prisoner's detention was illegal on the grounds that he had a right to refuse to answer the question put to him, as his answer might tend to criminate him, on a charge of procuring liquor for other persons contrary to 6 Edw. VII. c. 20, s. 2, & the magistrate had no power to adjourn the hearing.—*Held*: Criminal Code, s. 678, regulated these proceedings, & there did not appear to be any reasonable doubt as to its interpretation. Power in it is expressly given to the trial magistrate where a witness before him refuses to testify to adjourn the hearing.—*Re MORRISON* (1907), 3 E. L. R. 154.—CAN.

4060 x. ———.]—A deft. must put in a full answer in all cases, except to criminate himself, or when purchaser for valuable consideration without notice.—*LEONARD v. LEONARD* (1810), 1 Ball. & B. 325.—IR.

4060 xi. ———.]—A deft. cannot object to answer an information bill, filed against him by the A.-G., for the recovery of duties of excise, alleged to have been evaded by him, on the ground that his answer might be evidence tending to subject him to punishment for a criminal offence.—*A.-G. v. CONROY* (1838), 6 Ir. L. Rec. N. S. 281.—IR.

4060 xii. ———.]—40 & 41 Vict. c. 41, which says that, in a prosecution for an obstruction, deft. & the husband

or wife of such deft. are competent & compellable witnesses, does not affect the principle that a witness cannot in any case, civil or criminal, be compelled to admit the commission of a criminal offence.—*R. v. HALLETT* (1911), 45 L. L. T. 84.—IR.

4060 xiii. ———.]—*ROGER v. COOPER* (1823), 2 Sh. (Ct. of Sess.) 444.—SCOT.

4060 xiv. ———.]—It is competent to ask a *socius criminis* relative to a charge of murder, whether he has been guilty of or concerned in, any other murder, but the ct. is bound to warn him that he is not obliged to answer.—*BURKE & M'DOUGAL* (1828), Sh. Just. 203; *Syme* 345.—SCOT.

4060 xv. ———.]—A witness may be compelled to answer a question affecting his mercantile credit, if involving no moral guilt.—*H.M. ADVOCATE v. PENDER* (1836), 1 Swin. 25.—SCOT.

4060 xvi. ———.]—*Held*: though a witness may be asked specifically, whether or not he has committed certain crimes, he cannot be questioned circumstantially on points of conduct from which guilt might be inferred or suspected.—*H.M. ADVOCATE v. MILLAR* (1837), 1 Swin. 483.—SCOT.

4060 xvii. ———.]—A witness is not bound to answer a question inferring against him the crime of adultery.—*H.M. ADVOCATE v. STEPHENS* (1839), 2 Swin. 348.—SCOT.

4060 xviii. ———.]—A principal witness in a charge of rape or assault with intent of ravish is not bound to answer the question whether on particular previous occasions she had had criminal intercourse with other men.—*H.M. ADVOCATE v. ALLAN* (1842), 1 Broun, 500.—SCOT.

4060 xix. ———.]—Circumstances in which the objection of confidentiality was stated by a party to his being examined as a witness in reference to certain letters written by him as a law agent, & was repelled, on the ground that his client was not a party to the action & that it involved a charge of fraud against him.—*INGLIS v. GARDNER* (1843), 5 Duml. (Ct. of Sess.) 1029.—SCOT.

4060 xx. ———.]—A witness while he cannot be compelled to admit his guilt of any crime, is bound to answer the question whether he has been convicted.—*H.M. ADVOCATE v. JOHNSTON* (1845), 2 Broun, 401.—SCOT.

Sect. 2.—Privilege: Sub-sect. 4, B. (a), (b) & (c).]

d. Cadogan v. Ewart (1838), 7 Ad. & El. 636; Anon. (1847), 9 L. T. O. S. 168; Mortimer v. Hartley (1848), 6 C. B. 819; Spooner v. Payne (1848), 2 De G. & Sm. 439; Mortimer v. Hartley (1851), 3 De G. & Sm. 316; Mortimer v. Hartley (1851), 6 Exch. 47; Key v. Key (1853), 4 De G. M. & G. 73; Roberts v. Berry (1853), 3 De G. M. & G. 284; Evans v. Evans (1854), 23 L. J. Ch. 827; Grey v. Pearson (1857), 6 H. L. Cas. 61; Seccombe v. Edwards (1860), 28 Beav. 440; Cochran v. Willis (1864), 4 De G. J. & Sm. 229; Collingwood v. Russell (1864), 5 New Rep. 1; Lautour v. A.-G. (1864), 5 New Rep. 231; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; Finlason v. Tatlock (1870), L. R. 9 Eq. 258; Reed v. Braithwaite (1871), L. R. 11 Eq. 514; *In the Goods of Crippen* (1911), 80 L. J. P. 47.

4064. — Matter tending to incriminate spouse of witness.—A wife shall not be called in any case to give evidence even tending to criminate her husband. In a case of settlement, where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shows him to have been guilty of bigamy.—*R. v. CLIVIGER (INHABITANTS)* (1788), 2 Term Rep. 203; 100 E. R. 143.

*Annotations:—*Consd. *R. v. All Saints, Worcester* (1817), 6 M. & S. 194; *R. v. Bathwick* (1831), 2 B. & Ad. 639; *Stapleton v. Crofts* (1852), 18 Q. B. 367. *Reid. Aveson v. Kinnaird* (1805), 6 East, 188; *Henman v. Dickinson* (1828), 5 Bing. 183.

4065. ——[On a question of settlement, the pauper having been removed to her maiden settlement, resps. called A. to prove her marriage with C., in order to get rid of the effect of a subsequent marriage of C. with the pauper:—*Held*: A. was a competent witness, for C. not having been called as a witness, she did not contradict him, & her evidence could not be used to criminate him.

By the present decision the ct. does not mean to break in on the rule that husband & wife shall not be permitted to be witnesses for or against or to criminate each other (*LORD ELLENBOROUGH, C.J.*).—*R. v. ALL SAINTS, WORCESTER (INHABITANTS)* (1817), 6 M. & S. 194; 105 E. R. 1215.

*Annotations:—*Consd. *R. v. Bathwick* (1831), 2 B. & Ad. 639; *Stapleton v. Crofts* (1852), 18 Q. B. 367. *Reid. Henman v. Dickinson* (1828), 5 Bing. 183.

4066. ——[They [married persons] ought not to be permitted to disclose confidential communications or to criminate each other (*LORD CAMPBELL, C.J.*).—*STAPLETON v. CROFTS* (1852), 18 Q. B. 367; 21 L. J. Q. B. 247; 19 L. T. O. S. 88; 16 Jur. 408; 118 E. R. 137.

*Annotations:—*Reid. *Alcock v. Alcock* (1852), 21 L. J. Ch. 856; *McNeillie v. Acton* (1853), 17 Jur. 661.

4067. ——[A witness may object to answer a question which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of guilt.—*CATES v. HARD-ACRE* (1811), 3 Taunt. 424; 128 E. R. 168.

*Annotation:—*Reid. *Short v. Mercier* (1851), 3 Mac. & G. 205.

4068. ——[In an action for a libel in the shape of an extrajudicial affidavit sworn before a magistrate, a person who acted as the magistrate's clerk is not bound to answer whether by deft.'s orders he wrote the affidavit & delivered it to the magistrates, as he might thereby criminate himself.—*MALONEY v. BARTLEY* (1812), 3 Camp. 210, N. P.

*Annotations:—*Reid. *R. v. Garbett* (1847), 2 Cox, C. C. 448. *Mentd. Kennedy v. Hilliard* (1859), 1 L. T. 78.

4069. ——[Protection generally, in every

4064 I. — Matter tending to incriminate spouse of witness.—In an action of libel against a husband as the writer of libellous articles, & as editor of a newspaper in which they were printed, & his wife as owner & publisher of the newspaper, on examina-

tion after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, & the wife refused to answer

stage of the proceedings against answering any question, having a direct tendency to criminate the party, or subject him to penalty, etc., or forming one step towards it.—*PAXTON v. DOUGLAS* (1812), 19 Ves. 225; 34 E. R. 502, L. C.

*Annotations:—*Consd. *Green v. Weaver* (1827), 1 Sim. 404; *Maccallum v. Turton* (1828), 2 Y. & J. 183; *Glynn v. Houston* (1836), 1 Keen, 329. *Reid. Swift v. Swift* (1832), 4 Hag. Ecc. 139; *Chadwick v. Chadwick* (1852), 22 L. J. Ch. 329; *Robinson v. Kitchin* (1856), 21 Beav. 365; *Derby Corp'n. v. Derbyshire County Council* (1897), 77 L. T. 107.

4070. ——[The ct. will not restrain comrs. in their examinations, upon an allegation that the object of the examination is to procure evidence against the parties examined, as to penalties incurred by gaming.

The object of this petition is, that the general authority which the law gives to the comrs., to examine persons for the discovery of the bkpt.'s estate may, in this particular case, be restrained; & the reason given is that petitioner may by his examination be made subject to penalties. A party is only made subject to penalties where money is unfairly won at play; & I can neither assume that the comrs. will not do their duty, nor that petitioner will not find a sufficient protection in the rule of law which enables him to refuse to answer questions tending to criminate him, or to expose him to penalties (*LEACH, V.-C.*).—*Re ARTHOL, Ex p. BURLTON* (1821), 1 Gl. & J. 30.

4071. ——[A witness is not only not bound to answer a question, the answer to which would criminate him, but he is not bound to answer any question, the answer to which would tend to criminate him. A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which prosecutor had received; & though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself.—*R. v. SLANEY* (1832), 5 C. & P. 213.

4072. ——[On the trial of an indictment for arson, a witness for the prosecution was himself in custody on a charge of felony. Counsel for prisoner wished to ask him, "Have you not said that you committed the offence for which you are now in custody?"—*Held*: this question ought not to be put.—*R. v. PEGLER* (1833), 5 C. & P. 521.

4073. ——[—*COOPER v. CURRY*, No. 4093, post.

4074. ——[—*FISHER v. RONALDS*, No. 4052, ante.

4075. ——[An assignment of all a trader's stock, etc., nominally in consideration of a pretended debt, & a small additional advance, but really colourable & collusive & with intent to defeat execution creditors is fraudulent & void under 13 Eliz. c. 5, as against judgment creditors, & the assignor, being liable under that statute to criminal prosecution, is not bound to answer questions as to the true object of the transaction.—*MICHAEL v. GAY* (1858), 1 F. & F. 409, N. P.

4076. ——[We cannot allow any question to be put to a voter as to whether he has or not misconducted himself, or whether he has done that which, if he did vote, would have made him liable to a prosecution (*LUSH, J.*).—*WORCESTER*

questions as to the authorship of the newspaper articles in question, & as to the editing of the newspaper, on the like grounds as to her husband:—*Held*: defts. were justified in their refusals.—*MILLETTE v. LITTLE* (1884), 10 P. R. 265.—*CAN.*

BOROUGH CASE, FARMSWORTH, ETC. *v.* HILL & MCINTYRE (1880), 3 O'M. & H. 184.

4077. — Crime committed outside jurisdiction.]

—The common law maxim that a man cannot be forced to incriminate himself does not afford protection in the case of crimes committed outside the jurisdiction.—*Re ATTHERTON*, [1912] 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 28 T. L. R. 339; 56 Sol. Jo. 446; 19 Mans. 126.

— **In bankruptcy proceedings.]**—See *BANKRUPTCY*, Vols. IV. & V., pp. 140, 611, 619, 623, Nos. 1290, 5490–5496, 5565–5567, 5613.

— **In proceedings in ecclesiastical courts.]** See *ECCELESIASTICAL LAW*, Vol. XIX., p. 333, Nos. 1440, 1441.

— **In winding-up proceedings.]**—See *COMPANIES*, Vol. X., pp. 895, No. 6103.

4078. Production of documents tending to criminate.]—A vestry clerk who is called as a witness, cannot, on the ground that it may criminate himself, object to produce the vestry book, kept under Vestries Act, 1818 (c. 69), s. 2.—*BRADSHAW v. MURPHY* (1836), 7 C. & P. 612, N. P.

— **Before trial.]**—See *DISCOVERY*, Vol. XVIII., pp. 161–164, Nos. 1132–1168.

Right to refuse to answer interrogatories.]—See *DISCOVERY*, Vol. XVIII., pp. 238–241, Nos. 1813–1846.

(b) *Matters Exposing Witness to Penalty.*

4079. Right of witness to refuse to answer.]—No man is bound to answer any questions that will subject him to a penalty or to infamy (*TREBY, L.J.*).—*R. v. FREIND* (1696), 13 State Tr. 1, 17.

*Annotations:—*Consd. *R. v. Edmonds* (1821), 1 State Tr. N. S. 785. *Mentd.* *R. v. Horne Tooke* (1794), 25 State Tr. 1.

4080. —.]—*R. v. NEWEL* (1707), Park. 269; 145 E. R. 777.

4081. —.]—A witness is not obliged to answer whether he is a Roman Catholic.—*R. v. GORDON (LORD GEORGE)* (1781), 2 Doug. K. B. 590; 21 State Tr. 485; 99 E. R. 372.

*Annotations:—*Mentd. *Mortimer v. McCallan* (1840), 6 M. & W. 58; *R. v. Frost* (1840), 4 State Tr. N. S. 85.

4082. —.]—A broker in an illegal stock-jobbing transaction is not compellable to give evidence of it, though he is only liable to a pecuniary penalty.—*RAINES v. TOWGOOD* (1796), Peake, Add. Cas. 105.

4078 i. Production of documents tending to criminate.]—In an action against an incorporated club, for a declaration that they were using their premises as a common betting house contrary to Criminal Code, 1892:—*Held:* Evidence Act, 1897, c. 73, s. 5, applied & the president of the club was not bound to produce upon his examination for discovery the membership roll of the club, he having stated under oath that its production might lead to a criminal prosecution against him.—*A. G. FOR ONTARIO v. TORONTO JUNCTION RECREATION CLUB* (1904), 24 C. L. T. 172; 7 O. L. R. 248; 3 O. W. R. 387; 4 O. W. R. 72.—*CAN.*

4078 ii. —.]—A party claiming privilege from producing documents under an order for production, must swear that their production would criminate him. It is sufficient if he swear that production "might" criminate him.—*A. G. FOR MANITOBA v. KELLY* (1915), 33 W. L. R. 963; 9 W. W. R. 863; 10 W. W. R. 131.—*CAN.*

PART V. SECT. 2, SUB-SECT. 4.—
B. (b).

4079 i. Right of witness to refuse to answer.]—Where a witness called to J.—VOL. XXII.

prove that the consideration of a note was usurious, declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said he gave what he thought it was worth:—*Held:* he was bound on re-examination to state what he gave.—*PETERS v. IRISH* (1859), 4 All. 326.—*CAN.*

4079 ii. —.]—To entitle a witness to privilege, on the ground that his answer would expose him to a "penalty or forfeiture," he must state explicitly that his answer would have that effect.—*GRAINGER v. LATHAM* (circa 1870), 2 Ch. Ch. 313.—*CAN.*

4079 iii. —.]—Def. was convicted of selling & delivering teas as the agent of P. W., a non-resident of the county, in violation of a bye-law of the county of B. Def., against the protest of his counsel, was called as a witness, & swore that he bought the tea in question from one W. of the city of L., & that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W. but purchased that in question for the purpose of evading the bye-law:—*Held:* def. had been improperly compelled to give evidence against him-

4083. —.]—The declaration of a voter which tends to destroy his vote is admissible, whether made before or after the election, unless that declaration goes to affect that voter with penal consequences (*per CUR.*).—*LEOMINSTER CASE, WEAVER'S CASE* (1796), 2 Peck. 391.

4084. —.]—In an action on a bill of exchange, a stockbroker may refuse to give evidence that the consideration of it was stock-jobbing differences.—*RAWLINGS v. HALL* (1823), 1 C. & P. 11, N. P.; *subsequent proceedings* (1824), 1 C. & P. 335.

*Annotation:—*Refd. *Pritchett v. Smart* (1849), 7 C. B. 625.

4085. —.]—Demurrer by a witness to answering interrogatories, on the ground that he might subject himself to penalties, allowed.—*DAVIS v. REID* (1832), 5 Sim. 443; 58 E. R. 403.

Production of documents exposing party to penalty—Before trial.]—See *DISCOVERY*, Vol. XVIII., pp. 164, 165, Nos. 1169–1183.

Right to refuse to answer interrogatories.]—See *DISCOVERY*, Vol. XVIII., pp. 238, 239, Nos. 1813–1815, 1821.

(c) *Matters Exposing Witness to Forfeiture.*

4086. Right of witness to refuse to answer.]—*R. v. NEWEL* (1707), Park. 269; 145 E. R. 777.

4087. —.]—In ejectment by landlord against lessee to recover possession of premises & enforce a forfeiture by reason of deft. having underlet, the ct. will not allow pltf. under the C. L. P. Act, 1854 (c. 125), s. 51, to deliver interrogatories to deft., where the answers might subject him to a forfeiture of his interest as lessee.

It has been long recognised in our cts., as a principle of the law of evidence in the examination of witnesses, that a witness cannot be compelled to answer a question where the answer might establish a forfeiture of his estate (*CROMPTON, J.*).—*PYE v. BUTTERFIELD* (1804), 5 B. & S. 829; 5 New Rep. 117; 34 L. J. Q. B. 17; 11 L. T. 448; 29 J. P. 581; 11 Jur. N. S. 220; 13 W. R. 178; 122 E. R. 1038.

*Annotations:—*Consd. *Martin v. Treacher* (1886), 2 T. L. R. 268; *Mexborough v. Whitwood U. D. C.*, [1897] 2 Q. B. 111. *Refd.* *Jones v. Jones* (1889), 22 Q. B. D. 425; *Seaward v. Donnington* (1896), 41 W. L. 696.

Production of documents exposing party to forfeiture—Before trial.]—See *DISCOVERY*, Vol. XVIII., pp. 165, 166, Nos. 1184–1201.

self.—*R. v. McNICOL* (1886), 11 O. R. 659.—*CAN.*

4079 iv. —.]—The ct. cannot compel an attorney charged with contempt to make any statements on affidavit which would expose him to penal consequences.—*Re YOUGHAL ELECTION PETITION, Re BARRY* (1869), 17 W. R. 707.—*IR.*

PART V. SECT. 2, SUB-SECT. 4.—
B. (c).

4086 i. Right of witness to refuse to answer.]—*Saskatchewan Evidence Act*, c. 60, s. 27, being substantially identical with *Canada Evidence Act*, 1906, c. 45, s. 5, the decisions upon the latter enactment are applicable to the former; & so, even in an action to enforce a forfeiture, pltf. is entitled to discovery from deft.:—*Held:* in this action other issues were involved besides that of forfeiture; & deft. was wrong in refusing to be sworn or examined at all; he should have submitted to examination; & if there were any particular questions which he objected to, he should have proceeded under rule 194.—*BARTLEMAN v. MORETTI* (1913), 23 W. L. R. 533; 4 W. W. R. 132; 9 D. L. R. 805.—*CAN.*

Sect. 2.—Privilege: Sub-sect. 4, B. (d), (e) & (f), C. & D.]

(d) *Matters Tending to Degrade.*

4088. Right of witness to refuse to answer.]—A witness cannot be asked a question which tends to disgrace or degrade him.—*R. v. LEWIS* (1803), 4 Esp. 225.

4089. —.]—How far a witness may be examined as to matters tending to disgrace or degrade him.

I do not go so far as others may: I will not say that a witness shall not be asked to what may tend to disparage him: that would prevent an investigation into the character of the witness, which it may be often of importance to ascertain. I think those questions only should not be asked which have a direct & immediate effect to disgrace or disparage the witness (*LORD ALVANLEY*).—*MACBRIDE v. MACBRIDE* (1802), 4 Esp. 242, N. P.

4090. —.]—In an action for seducing pltf.'s daughter *per quod servitium amisit*, the daughter is not bound to answer in cross-examination, whether she had not previously been criminal, with other men.—*DODD v. NOKRIS* (1814), 3 Camp. 519, N. P.

Annotation:—Mentd. *Elliott v. Nicklin* (1818), 5 Price, 641.

4091. —.]—On indictment of a female prisoner for stealing from the person, in a house, you cannot ask prosecutor, in cross-examination, "Whether at that house anything improper passed between him & prisoner?"—*R. v. PITCHER* (1823), 1 C. & P. 85.

4092. —.]—Questions tending to degrade a witness without exposing him to punishment may be put on cross-examination.—*CUNDELL v. PRATT* (1827), Mood. & M. 108, N. P.

4093. — Discretion of Judge.]—If an answer to a question may tend to criminate the witness, it should not be put & need not be answered; but if its tendency be to degrade the witness merely, it is within the discretion of the judge whether the question shall be put & answered if the witness objects to it.—*COOPER v. CURRY* (1816), 8 L. T. O. S. 238; 11 J. P. 22, N. P.

4094. —.]—It is not competent to the counsel for deft. to ask of a witness for pltf. whether pltf. & a certain female, who is expected to be examined as a witness, were not living together at a bygone time as man & wife.—*HERRING v. HUDSON* (1817), 10 L. T. O. S. 287, N. P.

4095. —.]—(1) A prosecutrix on an indictment for rape, is not bound to answer whether it was her first connection, nor whether she had not been in the habit of walking the streets.

(2) The depositions of a witness for the prosecution cannot be put into his hands in examination-in-chief to refresh his memory.—*R. v. SWANN* (1851), 15 J. P. 420.

4096. — Questions tending to prove adultery.]—*R. v. CASTRO* (1873), cited in Halsbury's Laws of England, Vol. XIII., at p. 576, n.

Annotations:—Refd. *Evans v. Evans*, [1904] P. 378; *R. v. Watt* (1905), 70 J. P. 29. *Mentd.* *R. v. Cox & Railton* (1884), 14 Q. B. D. 153; *Williams v. Quebrada Ry. Land & Copper Co.*, [1895] 2 Ch. 751.

PART V. SECT. 2, SUB-SECT. 4.— B. (d).

4088 i. Right of witness to refuse to answer.]—It is incompetent to ask a female witness questions, the answer to which will degrade her.—*MACKELLAR v. LAMBERT* (1828), 4 Murr. 541.—*SCOT*.

4088 ii. —.]—A question tending to degrade & injure the character of a witness, though not to subject the witness to a criminal charge, allowed to be put, the witness being previously told that it was optional to her to answer or not.—*KING v. KING* (1842),

4 Dunl. (Ct. of Sess.) 590.—*SCOT*.

4093 i. — Discretion of Judge.]—Prosecutrix, in an indictment for rape, was asked in cross-examination, after she had declared she had not previously had connection with a man, other than prisoner, whether she remembered having been in the milk-house of G. with two persons named M., one after the other.—*Held*: the witness might object, or the judge might, in his discretion, tell the witness she was or she was not bound to answer the question; but the ct. ought not to have refused

— — — In matrimonial causes.]—*See* HUSBAND & WIFE.

— — — Admissibility to rebut presumption of legitimacy.]—*See* BASTARDY, Vol. III., pp. 365–367, Nos. 66–70, 82.

Cross-examination of witnesses generally.]—*See* Sect. 6, sub-sect. 2, *post*.

Impeaching credit of witnesses generally.]—*See* Sect. 8, *post*.

(e) *Matters Affecting Civil Rights and Liabilities.*

4097. Matter affecting civil right—Title.]—*TITLE v. GREVETT* (1704), 2 Ld. Raym. 1008; 92 E. R. 170.

Annotation:—Consd. *Jordaine v. Lashbrooke* (1798), 7 Term Rep. 601.

4098. —.]—Witness obliged to give testimony, though it affects his civil right.—*Ex p. CHAMBERLAIN* (1815), 19 Ves. 481; 34 E. R. 591.

4099. Matter affecting civil liability—No other direct evidence of liability.]—A witness is not bound to answer a question, the answer to which may obliquely charge him, when there can be no other direct evidence against him of a demand.—*DOXON v. HAIGH* (1795), 1 Esp. 409, N. P.

4100. —.]—The judge at a trial will not compel a witness to say where he lives, if he states that he believes that a bailable writ is out against him, at the instigation of the party whose counsel had put the question.—*WATSON v. BEVERN* (1824), 1 C. & P. 363, N. P.

4101. — Liability to qui tam action.]—In an action on a bill of exchange, if a person, called to prove the consideration, say that the bill was accepted for value received, but refuse to say of what that value consisted, on the ground that it might render him liable to a *qui tam* action, he cannot be compelled to answer; but if he persist in refusing, it will stand upon the evidence that there was no consideration.—*DANDRIDGE v. CORDEN* (1827), 3 C. & P. 11, N. P.

Annotation:—Refd. *Fisher v. Ronalds* (1852), 17 Jur. 393.

4102. — Liability in pending action.]—In the prosecution before the chief clerk of an inquiry directed by an administration decree, any person able to give information relating to the assets may be summoned by *subpoena*, & is bound to attend before a special examiner, and to answer all questions properly put to him by the receiver having the conduct of the decree; but the witness so summoned may decline to answer any questions tending to show his liability in a pending action commenced by the receiver against him.—*VENABLES v. SCHWEITZER* (1873), L. R. 16 Eq. 70; 42 L. J. Ch. 389; 28 L. T. 462; 21 W. R. 505.

Annotation:—Refd. *Massey v. Allen* (1878), 26 W. R. 908.

— — — In winding-up proceedings.]—*See* COMPANIES, Vol. X., p. 896, Nos. 6104–6106.

(f) *Other Grounds.*

4103. Matter defamatory to third party—& not material in cause.]—Demurrer of a witness to interrogatories inquiring after matter defamatory to a third person, & not material in the cause

to allow the question to be put because the counsel for the prosecution objected to the question.—*LALIBERTÉ v. R.* (1877), 1 S. C. R. 117.—*CAN.*

4096 v. — Questions tending to prove adultery.]—*INGH v. CALGARY GENERAL HOSPITAL TRUSTEES* (1899), 4 Terr. L. R. 58.—*CAN.*

PART V. SECT. 2, SUB-SECT. 4.— B. (f).

*p. Matter tending to incriminate paramour of witness.]—*Defts. having in their newspaper charged pltf. with

allowed.—*MULGRAVE v. DUNBAR* (LORD) (prior to 1765), 2 Swan. 198, n.; 36 E. R. 598.

C. Time for and Mode of Taking Objection.

4104. Time for taking objection—Not before witness sworn.]—A party to a suit, who is subpoenaed as a witness, cannot object to be sworn & examined on the ground that the only relevant questions which could be put to him are such as would tend to criminate himself; but the opposite party has a right to insist on his being sworn & examined, & he must, if he thinks fit, claim his privilege not to answer such questions.—*BOYLE v. WISEMAN* (1855), 10 Exch. 647; 3 C. L. R. 482; 24 L. J. Ex. 160; 24 L. T. O. S. 274; 1 Jur. N. S. 115; 3 W. R. 206; 156 E. R. 598; *subsequent proceedings*, 11 Exch. 360.

*Annotations:—***Refd.** *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *R. v. Austin* (1856), 25 L. J. M. C. 48; *Tupling v. Ward* (1861), 30 L. J. Ex. 222; *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Webb v. East* (1879), 5 Ex. D. 23. **Mentd.** *Stowe v. Querner* (1870), L. R. 5 Exch. 155.

Effect of objection after part of questions answered.]—*See* Nos. 4111, 4112, *post*.

4105. Who may take objection—Not counsel in action.]—The counsel in a cause have no right to object, in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture. Such objection belongs to the witness only.—*THOMAS v. NEWTON* (1827), 2 C. & P. 606; *Mood. & M.* 48, n., N. P.

*Annotations:—***Mentd.** *Jacob v. Hungate* (1834), 1 Mood. & R. 445; *Simpson v. Clarke* (1835), 2 Cr. M. & R. 342; *Mills v. Barber* (1836), 1 M. & W. 425.

4106. ———.]—If a witness objects to answer questions, on the ground that they may subject him to criminal proceedings, the counsel on the opposite side cannot argue in support of the witness's objection.—*R. v. ADEY* (1831), 1 Mood. & R. 94, K. B.

4107. — Not parties to action.]—The privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness

alone, & neither party to the suit can take any advantage therefrom.

Where a witness was called on the part of the Crown to prove bribery against deft., & he refused to give evidence on the ground that his evidence would tend to criminate himself, which objection was overruled by the judge, whereupon he gave his evidence:—**Held:** deft. could not afterwards object that such evidence was improperly received.—*R. v. KINGLAKE* (1870), 22 L. T. 335; 18 W. R. 805; 11 Cox, C. C. 499.

*Annotation:—***Mentd.** *R. v. Hulme* (1870), 18 W. R. 830.

Form of objection.]—*See* Nos. 4050–4058, *ante*.

D. Effect of Answering Incriminating Questions.

4108. Voluntary answer—Whether admissible in subsequent proceedings.]—If a witness answers questions to which he might have demurred as subjecting him to penalties, his answers may be used against him to all legal purposes; & therefore, in an action on 5 Geo. 2, c. 30, s. 21, deft.'s examination before the comrs. may be given in evidence to show that by his own confession he had concealed property of bkpt.—*SMITH v. BEADNELL* (1807), 1 Camp. 30, N. P.

4109. ———.]—Where a bkpt. was examined before a commission in bkpcy., touching a matter not relating to his trade dealings, or estate, & did not refuse to answer on the ground that the answer would tend to criminate him, but answered without any objection:—**Held:** his answers were voluntary, & his examination was admissible against him on a subsequent criminal charge.—*R. v. SLOGGETT* (1856), Dears. C. C. 656; 25 L. J. M. C. 93; 27 L. T. O. S. 142; 20 J. P. 293; 2 Jur. N. S. 476; 4 W. R. 487; 7 Cox, C. C. 139, C. C. R.

*Annotations:—***Consd.** *R. v. Coote* (1873), L. R. 4 P. C. 599; *Re Firth, Ex p. Scholefield* (1877), 37 L. T. 281. **Refd.** *R. v. Scott* (1856), Dears. & B. 47.

4110. Answer under compulsion—Whether admissible in subsequent proceedings.]—*R. v. GARBETT*, No. 4113, *post*.

immorality, pltf. sued them for libel, & defts. pleaded that the charge was true. Pltf. having required particulars, defts. set forth that pltf. lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; & that he brought to his house & kept with the members of his family a woman who had lived in a house of ill-fame. Pltf., being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, & that she bore a child of which he was not the father, but denied the other allegations of the particulars:—**Held:** pltf. was bound to disclose the name of the woman, although such disclosure might injure her.—*MACDONALD v. SHEPPARD PUBLISHING CO.* (1900), 20 C. L. T. 454; 19 P. R. 282.—**CAN.**

PART V. SECT. 2, SUB-SECT. 4.—D.

4108 i. Voluntary answer—Whether admissible in subsequent proceedings.]—The examination of deft. in a civil action arising out of the matters in question, he not having claimed privilege therein, was allowed to be used against him on his trial for criminal conspiracy.—*R. v. CONNOLLY* (1894), 25 O. R. 151.—**CAN.**

4108 ii. ———.]—*R. v. THOMPSON* (1896), 2 Terr. L. R. 383.—**CAN.**

4108 iii. ———.]—The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him, & who is subsequently charged with an offence, are receivable in

evidence against him at the trial.—*R. v. WILLIAMS* (1897), 28 O. R. 583.—**CAN.**

4108 iv. ———.]—If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him, except in the case provided for by *Canada Evidence Act*, 1893, s. 6, as amended by 61 Vict. c. 53, in any criminal proceedings against him thereafter, but if he does object he is protected.—*R. v. CLARK* (1901), 22 C. L. T. 90; 3 O. L. R. 176; 5 Can. Crim. Cas. 235.—**CAN.**

4108 v. ———.]—Evidence taken under Assignments Act, s. 52, without any objection on the part of the person giving evidence upon the ground that the answer would tend to incriminate or upon any of the grounds stated in *Alberta Evidence Act* is admissible against him in a criminal trial.—*R. v. GRAHAM* (1915), 31 W. L. R. 117; 8 W. W. R. 460; 21 D. L. R. 513.—**CAN.**

4108 vi. ———.]—Where an accused person has made a statement on oath voluntarily & without compulsion on the part of the ct. to which the statement is made, such a statement, if relevant, may be used against him on his trial on a criminal charge. If a witness does not desire to have his answers used against him on a subsequent criminal charge, he must object to answer, although he may know beforehand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, & must be overruled.—*R. v. GOPAL DOSH* (1881), I. L. R. 3 Mad.

271.—**IND.**

4108 vii. ———.]—*Evidence Act*, 1872, s. 132, makes a distinction between those cases in which a witness voluntarily answers a question & those in which he is compelled to answer, & gives him a protection in the latter of these cases only. Protection is afforded only to answers which a witness has objected to give or which he has asked to be excused from giving, & which then he has been compelled by the ct. to give.—*R. v. GANU SONBA* (1888), I. L. R. 12 Bom. 440.—**IND.**

4110 i. Answer under compulsion—Whether admissible in subsequent proceedings.]—*R. v. CLARK* (1901), 22 C. L. T. 90; 3 O. L. R. 176; 5 Can. Crim. Cas. 235.—**CAN.**

4110 ii. ———.]—*R. v. GOPAL DOSH* (1881), I. L. R. 3 Mad. 271.—**IND.**

4110 iii. ———.]—*R. v. GANU SONBA* (1888), I. L. R. 12 Bom. 440.—**IND.**

4110 iv. ———.]—A person who whilst giving evidence as a witness in ct. has made a statement which *prima facie* amounts to defamation under Indian Penal Code, s. 499, may plead one or other of the exceptions to that sect. or he may claim the protection of the proviso to sect. 132 of *Indian Evidence Act*, 1872, but in the latter case he must show that he was compelled to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it & the ct. had obliged him to answer it.—*KAILU v. SITAL* (1918), I. L. R. 40 All. 271.—**IND.**

Sect. 2.—Privilege: Sub-sect. 4, D., E. & F.; sub-sect. 5, A. (a) & (b) & B.]

4111. Answer to part—Whether waiver of right to object to subsequent questions.]—If a witness, being cautioned that he is not obliged to answer questions which tend to criminate him, still does answer such questions, he cannot afterwards take the objection to any further question, relative to that whole transaction.—*DIXON v. VALE* (1824), 1 C. & P. 278, N. P.

*Annotation:—***Consd.** *R. v. Garbett* (1847), 2 Cox, C. C. 448.

4112. ———.]—If a witness answers any questions on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout.—*EAST v. CHAPMAN* (1827), 2 C. & P. 570; *Mood. & M.* 46, N. P.

*Annotation:—***N.F.** *R. v. Garbett* (1847), 1 Den. 236.

4113. ———.]—(1) If a witness claims the protection of the ct. on the ground that the answer would tend to criminate himself, & there appears reasonable ground to believe that it would do so, he is not compellable to answer.

(2) If compelled, notwithstanding what he says after, such claim must be considered to have been obtained by compulsion & cannot be given in evidence against him.

(3) He is entitled to protection at whatever stage of the inquiry he chooses to claim it, & he is equally entitled to protection, whether he has already answered the question in part, or not at all.—*R. v. GARBETT* (1847), 2 Car. & Kir. 474; 1 Den. 236; 13 J. P. 602; 2 Cox, C. C. 448, C. C. R.

*Annotations:—**As to* (1) **Refd.** *Short v. Mercer* (1851), 3 Mac. & G. 205; *Osborn v. London Dock Co.* (1855), 10 Exch. 698; *Bickford v. Darcy* (1866), L. R. 1 Exch. 354. *As to* (2) **Consd.** *R. v. Coote* (1873), L. R. 4 P. C. 599. **Refd.** *R. v. Scott* (1856), 7 Cox, C. C. 164; *R. v. Robinson* (1867), 36 L. J. M. C. 78; *R. v. Buttle* (1870), 22 L. T. 728. *As to* (3) **Consd.** *R. v. Darby* (1847), 2 Cox, C. C. 316. **Fold.** *King of The Two Sicilies v. Willcox* (1851), 1 Sim. N. S. 301. **Refd.** *Fisher v. Ronalds* (1852), 12 C. B. 762. *Generally, Refd.* *R. v. Bickerton* (1847), 11 J. P. 604. **Mentd.** *Volant v. Soyer* (1853), 13 C. B. 231; *Phelps v. Frew* (1854), 23 L. J. Q. B. 140.

4114. ———.]—A deft. or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time notwithstanding what he has disclosed may be sufficient to convict him.—*TWO SICILIES (KING OF) v. WILLCOX* (1851), 1 Sim. N. S. 301; 7 State Tr. N. S. 1049; 20 L. J. Ch. 417; 15 Jur. 214; 61 E. R. 116.

*Annotations:—***Consd.** *U. S. v. McRae* (1867), 3 Ch. App. 79. **Refd.** *Hennessy v. Wright* (1888), 4 T. L. R. 597. **Mentd.** *Austria (Emperor) v. Day & Kossuth* (1861), 3 De G. F. & J. 217; *U. S. A. v. Prioleau* (1865), 2 Hem. & M. 559.

4115. ———.]—An order was made for examination of a witness on behalf of the liquidator in a winding up, & the witness consented to a special examiner. An action was pending against the witness by a shareholder in respect of his participation in bringing out the co., & the solr. for pltf. in the action was the same as the solr. of the official liquidator. The witness attended several appointments before the special examiner, when in the presence of his counsel he was examined by the solr., & when his examination was partially completed he signed his deposition, & the special examiner with his consent filed it. Subsequently the witness refused to attend for examination on the ground that the solr. was using his deposition for the purpose of instructing

counsel for pltf. in the action:—**Held:** by submitting to the examination the witness had waived this objection, & on motion by the official liquidator he was ordered to continue his attendances.—*Re LISBON STEAM TRAMWAYS CO.* (1876), 2 Ch. D. 575; 34 L. T. 209; *sub nom. Re ALBERT GRANT'S EXAMINATION, LISBON STEAM TRAMWAYS CO.*, 24 W. R. 516.

4116. Whether court will interfere—To restrain user of evidence in subsequent proceedings.]—Where a man submits to be examined as to matters which will be penal upon him, equity will not interpose.—*EAST INDIA CO. v. ATKINS* (1720), 1 Stra. 168; 1 Com. 346; 93 E. R. 452, L. C.

*Annotations:—***Refd.** *South Sea Co. v. Bumsted* (1728), 1 Eq. Cas. Abr. 77; *Green v. Weaver* (1827), 1 Sim. 404.

4117. ———.]—The ct. will restrain a pltf. from the use of answers, in a penal proceeding, which may tend to criminate the witness.—*JACKSON v. BENSON* (1826), 1 Y. & J. 32; 148 E. R. 574.

E. Effect of Refusal to Answer Incriminating Questions.

4118. No inference as to truth of fact sought to be inquired into.]—If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance.—*ROSE v. BLAKEMORE* (1826), Ry. & M. 382, N. P.

F. Loss of Privilege.

4119. Pardon.]—*R. v. READING* (1679), 7 State Tr. 259.

*Annotations:—***Distd.** *R. v. Boyes* (1861), 1 B. & S. 311. **Refd.** *R. v. Boyes* (1860), 2 F. & F. 157. **Mentd.** *Smyth v. Chamberlayne* (1792), *Nicolas' Law of Adulterine Bastardy*; *Gray v. R.* (1844), 11 Cl. & Fin. 427.

4120. ———.]—*R. v. BOYES*, No. 4056, *ante*.

4121. ———.]—A witness who has received a pardon under the Great Seal is not privileged from answering questions the replies to which may criminate him, on the ground that the actions for penalties under Corrupt Practices Prevention Act, 1854 (c. 102), are pending against him.—*R. v. KINGLAKE & LOVIBOND* (1870), 22 L. T. 316; *subsequent proceedings*, 22 L. T. 335.

4122. Certificate of indemnity—Under Election Commissioners Act, 1852 (c. 57).]—A witness protected by a certificate under the above Act, & refusing to answer matters criminatory of himself, but in respect of which he was protected by his certificate, may be committed for his contempt.

Such a certificate is a complete protection against all penalties, actions, prosecutions & proceedings whatever that could be taken against him, & witness is bound to answer.—*R. v. CHARLESWORTH* (1860), 2 F. & F. 326.

4123. Expiry of time for suing for penalties.]—A witness is not excused from answering a question on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty is past.—*ROBERTS v. ALLATT* (1828), *Mood. & M.* 192, N. P.

—.]—*Compare* *DISCOVERY*, Vol. XVIII., p. 183, Nos. 1348, 1349.

4124. Undertaking to stay proceedings in pending action—Answers prejudicial to defence in action.]—A witness under examination refused to answer certain questions put to him by the official receiver

been:—**Held:** misdirection, & no inference adverse to deft. should have been drawn from his refusal to answer.—*NUNN v. BRANDON* (1893), 24 O. R. 375.—**CAN.**

PART V. SECT. 2, SUB-SECT. 4.—E.

4118 i. No inference as to truth of fact sought to be inquired into.]—Deft. refused to answer a question, for fear, as he said, of incriminating himself.

The judge in his charge, after referring to deft.'s refusal to answer on his examination for discovery, & to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have

upon the ground that his answers might be used against him, & so might prejudice his defence to an action brought against him & the bkpts. by the petitioning creditor. The questions were relevant to the issues in the action, & the solr. who was employed by the official receiver was the solr. appearing for pltf. in the action:—*Held*: the examination would be allowed to proceed only on the petitioning creditor undertaking to enter a stay of proceedings in the action.—*Re DESPORTES, Ex p. OFFICIAL RECEIVER* (1893), 68 L. T. 233; 10 Morr. 40; 5 R. 221.

SUB-SECT. 5.—JUDGES AND ARBITRATORS.

*A. Judges.**(a) Of Superior Courts.*

4125. Privileged.—*R. v. ANDERSON* (1680), 7 State Tr. 811.

4126. — Facts provable equally well by other persons.—A judge of the superior cts. should not be called as a witness to prove facts which may be proved equally well by other persons.—*FLORENCE v. LAWSON* (1851), 17 L. T. O. S. 260.

4127. — Production of notes.—Judges of the superior cts. ought not to be called upon to produce their notes. If I were to be subpoenaed for such a purpose I should certainly refuse to appear. The same objection is not applicable to the judges of the inferior cts. I see no reason why they should not be called, & especially where, as in this case, the judge is willing to appear (*BYLES, J.*) — *R. v. HARVEY* (1858), 8 Cox, C. C. 99.

(b) Of Inferior Courts.

4128. Not privileged—Production of information.—*WELCH v. RICHARDS* (1756), Barnes, 468; 94 E. R. 1007.

Annotation:—*Refd. R. v. Browne* (1819), 1 Cox, C. C. 1.

4129. — But undesirable that such evidence should be given.—On an indictment for perjury, alleged to have been committed at the quarter sessions, the chairman of the quarter sessions ought not to be called upon to give evidence as to what deft. swore at the quarter sessions.—*R. v. GAZARD* (1838), 8 C. & P. 595.

4130. ——At the sitting of the compensation authority of the borough of C. as to the question of the renewal of the licence of a certain public-house which has been referred to the compensation authority by the licensing committee of the borough on the ground that the said public-house was not required for the particular neighbourhood in which it was situated, a majority of the members of the compensation authority, who had also sat on the licensing committee, refused to grant a renewal of the licence. At the same sitting, however, of the compensation authority, but some time later, the case was reopened, & one of the majority of the justices who had sat at the first hearing gave evidence, but took no part in the adjudication as to the question of the renewal of the licence on this second hearing. The justices again refused to renew the licence:—*Held*: however regrettable it might be for a justice to give evidence in the manner above stated, there was nothing in law to render such evidence inadmissible.—*MITCHELL v. CROYDON JJ.* (1914), 111 L. T. 632; 78 J. P. 385; 30 T. L. R. 520, D. C.

4131. — Production of notes.—*R. v. HARVEY, No. 4127, ante.*

B. Arbitrators.

See, generally, ARBITRATION, Vol. II., pp. 462 et seq.

4132. Whether privileged—Evidence to prove no cause of action.—Where a cause has been referred, & the arbitrator, upon inspection of pltf.'s own books, & examination of the parties, found that pltf. had no cause of action, in an action for malicious prosecution:—*Held*: the arbitrator could not be called as a witness to prove those facts.—*HABERSHON v. TROBY* (1799), 3 Esp. 38; Peake, Add. Cas. 181, D. C.

Annotations:—*Consd. Brooke v. Carpenter* (1825), 11 Moore, C. P. 59. *Refd. Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418. *Mentd. Rainy v. Sierra Leone JJ.* (1853), 8 Moo. P. C. C. 47.

4133. — Evidence to show what was submitted.—An arbitrator may be called to prove what matters were claimed before him on a reference.—*MARTIN v. THORNTON* (1802), 4 Esp. 180, N. P.

Annotation:—*Refd. Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418.

4134. ——*In an action upon an award, the arbitrator's evidence is admissible to show in respect of what matters he allowed or refused compensation, but not to explain his reasons for awarding a particular sum in respect of any particular matter.*

A. was the owner of a house & garden fronting the Thames with an exclusive easement over a causeway & jetty with steps by which the same was available at any state of the tide. Defts. under the powers conferred on them by Thames Embankment Act, 1862 (c. 93), deprived A. of the jetty by constructing the embankment on its side; & in consequence of the execution of the works, a public road was placed between the garden of A. & the river. But it was possible for A. still to have access to the river by means of landing steps which defts. built in the embankment. A. having claimed compensation for the removal of the jetty & for depreciation of the premises by the execution of the works, the matter was referred & the arbitrator awarded a lump sum of £8,325. Defts. in an action on the award called the arbitrator as a witness & he deposed that he had awarded £5,000 for the discomfort to arise from the substitution of the road for the water way. He was interrogated as to the mode by which he had arrived at that sum:—*Held*: the arbitrator's evidence was admissible to show whether or not he had taken matters into his consideration not within his jurisdiction, but not for the purpose of ascertaining his reasons for awarding a particular sum in respect of anything which was within his jurisdiction.—*BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS* (1872), L. R. 5 H. L. 418; 41 L. J. Ex. 137; 27 L. T. 1; 36 J. P. 724, H. L.

Annotations:—*Consd. O'Rourke v. Railways Comr.* (1890), 15 App. Cas. 371. *Expld. Re Whiteley & Roberts' Arbitration*, [1891] 1 Ch. 558; *Recher v. North British & Mercantile Insco.*, [1915] 3 K. B. 277. *Refd. A.-G. for Manitoba v. Kelly*, [1922] 1 A. C. 268; *Larrinaga v. Soc. Franco-Americaine des Phosphates de Medulla* (1922), 92 L. J. K. B. 45. *Mentd. City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 Sc. & Div. 78; *Holt v. Gas Light & Coke Co.* (1872), L. R. 7 Q. B. 728; *McCarthy v. Metropolitan Board of Works* (1872), L. R. 8 C. P. 191; *Ripley v. G. N. Ry.* (1875), 23 W. R. 685; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 402; *R. v. Sheward* (1880), 9 Q. B. D. 741; *Calc. Ry. v. Walker's*

PART V. SECT. 2, SUB-SECT. 5.—A. (a).

4125 i. Privileged.—*HARPER v. ROBINSONS & FORBES* (1821), 2 Murr. 383.—SCOT.

Sect. 2.—Privilege: Sub-sect. 5, B.; sub-sects. 6 & 7, A. & B.]

Trustees (1882), 7 App. Cas. 259; *R. v. Essex* (1886), 17 Q. B. D. 447; *Cowper Essex v. Acton L. B.* (1889), 14 App. Cas. 153; *Re L. T. & S. Ry. v. Gower's Walk Schools Trustees* (1889), 24 Q. B. D. 326; *R. v. Scard* (1894), 10 T. L. R. 545; *Falkingham v. Victorian Railways Comr.*, [1900] A. C. 452; *Re Tynemouth Corp. & Northumberland, Tynemouth Corp. & Trevelyan, Tynemouth Corp. & Orde* (1900), 67 J. P. 425; *London & India Dock Co. v. North London Ry.* (1903), *Times*, Feb. 6; *L. & N. W. Ry. v. Walker* (1903), 88 L. T. 705; *R. v. Mountford, Ex p. London United Tramways, 1901, Ltd.*, [1906] 2 K. B. 814; *Re L. & N. W. Ry. & Reddaway* (1907), 71 J. P. 150; *A.-G. of Southern Nigeria v. Holt* (Liverpool), [1915] A. C. 599; *Odium v. Vancouver City* (1915), 85 L. J. P. C. 95; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Rockingham Sisters of Charity v. R.*, [1922] 2 A. C. 315.

4135. — Evidence to show reasons for award.]—*ELLIS v. SALTAU* (1808), 4 O. & P. 327, n.

Annotation:—Refd. Buccleuch (Duke) v. Metropolitan Board of Works (1870), 39 L. J. Ex. 130.

4136. — —.]—BUCCLEUCH (DUKE) v. METROPOLITAN BOARD OF WORKS, No. 4134, ante.

4137. — Evidence to explain award.]—If the terms of an award be clear upon the face of it, the ct. will not admit an affidavit of one of the arbitrators to explain their intention.—*GORDON v. MITCHELL* (1819), 3 Moore, O. P. 241.

Annotation:—Refd. Re Hall & Hinds (1841), *Drinkwater*, 214.

4138. — —.]—The comr. under an Act of Parliament who has made an award may be called as a witness to prove the state of his knowledge at the time the award was made, although he could not be called to prove the meaning of the award.

A schedule to an award of comrs. determining the boundaries of mines in F. mentioned "old works"; the plan annexed to the award also showed old works; but the plan was such that it would not conveniently set out everything, there being underground & open workings. There being a dispute as to what the words "old works" in the schedule applied to:—*Held*: one of the comrs. might be called to prove that he did not know of certain old works to which it was contended that those words applied; & that evidence was properly left to the jury.—*ROBERTS v. CORBETT* (1852), 20 L. T. O. S. 66.

4139. — —.]—Where by a consent decree arbitrators were directed to return a general award on the whole declaration for a sum certain, & such award was thereby directed to be entered as a verdict whereon final judgment might be signed, & costs of the action, reference, & award were directed to follow the verdict so entered:—*Held*: appls. having thereunder obtained a verdict for a portion of the sum claimed by them, which verdict carried costs as above directed, the ct. could not give resp. a verdict for the residue of the sum claimed, & then delegate to the Taxing Master the duty of ascertaining, by the evidence of the arbitrators & others, as to what parts of applt.'s claim resp. had succeeded, with a view to the apportionment of costs; & such evidence would be inadmissible as tending to explain or contradict the award.—*O'ROURKE v. RAILWAYS COMR.* (1890), 15 App. Cas. 371; 59 L. J. P. C. 72; 63 L. T. 66, P. C.

4140. — Evidence as to matters occurring during arbitration.]—An arbitrator cannot be compelled to give evidence in a cause as to matters that occurred before him during the arbitration.—*JOHNSON v. DURANT* (1830), 4 O. & P. 327, N. P.; *subsequent proceedings* (1831), 2 B. & Ad. 925.

Annotation:—Mentd. Armitage v. Walker (1855), 2 Jur. N. S. 13.

4141. — Evidence to show state of know-

ledge—When award made.]—ROBERTS v. CORBETT, No. 4138, ante.

4142. — Evidence to impeach award—Fraud or mistake.]—On a motion to set aside an award the arbitrator's evidence is admissible to impeach the award on the ground of fraud or of mistake, either as to the subject-matter of the reference or as to some legal principle which goes directly to the basis on which the award is founded.—*Re DARE VALLEY RY. CO.* (1868), L. R. 6 Eq. 429; *sub nom. Re RHYS & RICHARDS & DARE VALLEY RY. CO.*, 37 L. J. Ch. 719.

Annotations:—Refd. Buccleuch v. Metropolitan Board of Works (1872), L. R. 5 H. L. 418; *Graham v. Turnbull* (1875), 44 L. J. Ch. 538. *Mentd. Dinn v. Blake* (1875), L. R. 10 C. P. 388; *Rhodes v. Airedale Drainage Comrs.* (1876), 1 C. P. D. 380.

SUB-SECT. 6.—JURORS.

See JURIES.

SUB-SECT. 7.—LEGAL ADVISERS.

A. In General.

4143. Whether bound to give evidence—In same cause.]—A solr. served with process to testify in a suit, ordered not to be examined.—*BERD v. LOVELEACE* (1577), Cary, 88; 21 E. R. 33.

4144. S. P. AUSTEN v. VESEY (1577), Cary, 80; 21 E. R. 34.

4145. S. P. HARTFORD v. LEE (1578), Cary, 89; 21 E. R. 34.

4146. S. P. STRELLY v. ALBANY (1582), Ch. Cas. in Ch. 163; 21 E. R. 95.

4147. — —.]—An attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness (*LORD HARDWICKE, C.*).—*MADDOX v. MADDOX* (1747), 1 Ves. Sen. 61; 27 E. R. 892.

4148. — —.]—If any matter be disclosed to an attorney in the cause, he cannot be permitted to give it in evidence, either in that or any other action. It is the privilege of the client & not of the attorney; but such privilege is confined to counsel, solrs. & attornies, when acting in their respective characters.

The privilege is confined to the cases of counsel, solr. & attorney. There are cases to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters (*BULLER, J.*).—*WILSON v. RASTALL* (1792), 4 Term Rep. 753; 100 E. R. 1283.

Annotations:—Consd. Gainsford v. Grammar (1809), 2 Camp. 9; *Greenough v. Gaskell* (1833), 1 My. & K. 98. *Folld. Doe d. Strode v. Seaton* (1834), 4 L. J. K. B. 13. *Refd. Cronack v. Heathcote* (1820), 2 Brod. & Bing. 4; *Falmouth v. Moss* (1822), 11 Price, 455; *R. v. Tilney & Tufts* (1848), 12 J. P. 645; *Calley v. Richards* (1854), 19 Beav. 401; *Pearce v. Foster* (1885), 15 Q. B. D. 114. *Mentd. Brook v. Middleton* (1808), 10 East, 268; *Gregory v. Tufts* (1834), 4 Tyr. 820; *Preston v. Collins* (1838), 2 Jur. 329; *Sharp v. Wakefield*, [1891] A. C. 173; *R. v. West Riding, Yorks County Council* (1896), 60 J. P. 550.

4149. — —.]—Declarations made by a party in the cause to a solr. whom the party had requested to act on his behalf, rejected as privileged communications.—*SMITH v. FELL* (1841), 2 Curt. 667; 163 M. R. 544.

4150. — —.]—An interrogatory being put to a solr. in the cause, as to whether pltf. had acted as adviser & agent for a certain deft. the solr. demurred, for that he had acted professionally for both parties & in the suit; & all the information he possessed which would enable him to

answer the interrogatory had been derived from communications confidentially made to him by deft. & pltf. or one of them; & he considered his answering the interrogatory would be a breach of professional confidence reposed in him by his clients. Demurrer allowed.—*GIBBON v. STRATHMORE* (1842), 11 L. J. Ch. 366.

— **Barrister.**—*See* BARRISTERS, Vol. III., p. 335, Nos. 239–241.

4151. — **As to knowledge acquired professionally.**—Counsel or a solr. is not to be examined upon any matter which came to his knowledge as a solicitor or counsel.—*CREED v. TRAP* (1578), Ch. Cas. in Ch. 121; 21 E. R. 74.

4152. — **—**—*Where an attorney has come to the knowledge of a deed or instrument having been destroyed, from the circumstance of his being employed as an attorney, he cannot be asked as to the fact, the knowledge of which was so obtained.—*ROBSON v. KEMP* (1803), 5 Esp. 52.*

Annotations.—**Consd.** *Craweour v. Salter* (1881), 18 Ch. D. 30. **Refd.** *Greenhough v. Gaskell* (1833), *Coop. temp. Brough*, 96.

4153. — **—**—*A witness may demur to answer an interrogatory which seeks for information come to his knowledge in professional confidence as a solr.*—*PARRY v. WATKINS* (1831), 9 L. J. O. S. Ch. 63.

4154. — **—**—*A solr. is not compelled, & ought not, to disclose what is confidentially communicated by his client to him in his character of solr. at any period of time. . . . An attorney may be examined as to a fact which he knew before he was consulted in his professional character; or which he knows collaterally, & was not communicated by his client; or where he has made himself a party, as a witness to the execution of a deed. . . . An attorney is not to be compelled to disclose what has come solely & entirely to his knowledge in his professional capacity by or on behalf of his client, from his client, directly or intermediately: the object of privilege being to secure to a party the benefit of secrecy in confidential communications with his legal adviser. . . . To bring a communication within the privilege, it must be shown that the matter came to the attorney's knowledge directly or intermediately through another person from the client himself, & that, as to matters which came to his knowledge collaterally, he is bound to answer (SIR H. JENNER FUST).—*MACKENZIE v. YEO* (1841), 2 Curt. 866; 1 Notes of Cases, 516; 5 Jur. 1041; 163 E. R. 612.*

4155. — **—**—*In course of legal proceedings.*—The rule as to privileged communications between counsel or attorney & client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, & a book was produced by prosecutor in which it was the duty of the person charged to have entered a sum of money received by him, & there was no such entry. On a second examination, the book was again produced when the entry was found. The

party charged having brought an action for a malicious prosecution:—*Held*: counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation.—*BROWN v. FOSTER* (1857), 1 H. & N. 736; 28 L. J. Ex. 249; 28 L. T. O. S. 274; 21 J. P. 214; 3 Jur. N. S. 245; 5 W. R. 292; 156 E. R. 1397.

Annotations.—**Consd.** *Kennedy v. Lyell* (1883), 23 Ch. D. 387. **Refd.** *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K. B. 461.

4156. — **—**—*(1) A solr. declined answering some interrogatories, on the ground that he had obtained all his information whilst acting as the solr. of his co-deft. —Held: he had not brought himself within the rule as to professional privilege. (2) A solr. said he had obtained his information either as a creditor or as the solr. of his client:—Held: this statement must be taken most strongly against the solr. & he was bound to give the discovery.*—*THOMAS v. RAWLINGS* (1859), 27 Beav. 140; 28 L. J. Ch. 829; 5 Jur. N. S. 667; 54 E. R. 54.

— **Confidential communications.**—*See* Sub-sect. 7, C. (c) ii., iii.

— **Matters of fact.**—*See* Sub-sect. 7, C. (b).

— **From collateral sources.**—*See* Sub-sect. 7, C. (d).

— **Barrister.**—*See* BARRISTERS, Vol. III., p. 335, Nos. 244–248.

Whether entitled to refuse to answer interrogatories.—*See* DISCOVERY, Vol. XVIII., pp. 242, 243, Nos. 1855, 1856.

4157. Whether client bound to disclose communication—Legal adviser within protection of privilege.—Although an attorney will not be allowed to give evidence as to communications made to him in his professional character by his client, the client himself may be compelled to do so.—*GRIFFITH v. NEW MACHINO SLATE & SLAB CO., LTD.* (1858), 1 P. & F. 373.

4158. — **—**—*In a suit by a wife for judicial separation on the ground of cruelty, the wife was asked, in cross-examination whether she had not originally instructed her attorney to institute a suit for restitution of conjugal rights. The question was objected to & the objection was overruled.*—*MACCANN v. MACCANN* (1862), 3 Sw. & Tr. 142; 32 L. J. P. M. & A. 29; 8 L. T. 175; 11 W. R. 112.

B. Who may claim Privilege.

4159. Counsel.—A lawyer who was of counsel may be examined upon oath as a witness to the matter of agreement, not to the validity of an assurance, or to matter of counsel.—*ONBIES CASE* (1640), March, 83 pl. 136; 82 E. R. 422.

—*See, further, BARRISTERS, Vol. III., pp. 335, 336, Nos. 238–253.*

4160. Foreign counsel.—(1) Necessary communications, between a solr. & client, through an unprofessional person, are privileged; but it not appearing in this case that the communica-

tion, but refers only to cases where the privilege claimed is strictly a privilege of the witness himself by which he could, if he wished, in an ordinary civil suit divest himself & give evidence.—*Re WAIRAU ELECTION PETITION* (No. 2) (1912), 31 N. Z. L. R. 962.—N.Z.

PART V. SECT. 2, SUB-SECT. 7.—B.
4159 I. Counsel.—*See* CO AN v. LAMBELL (1886), 13 Q. R. 13. CAN.

PART V. SECT. 2, SUB-SECT. 7.—A.

4151 I. Whether bound to give evidence—As to knowledge acquired professionally.—The doctrine of privileged communications as between solr. & client exists for the benefit of the client & his representatives in interest not for that of the solr., & in an action to establish the lost will of a testator, who was illegitimate & had died without issue:—*Held*: statements of testator to his solr. in reference to the making

of & provisions in the will, against the objection of those who claimed under the lost will, were admissible in evidence.—*STEWART v. WALKER* (1903), 23 C. L. T. 320; 6 O. L. R. 495; 1 O. W. R. 489; 2 O. W. R. 990.—CAN.

4151 II. — **—**—*Legislature Act, 1908, s. 202, does not apply to the case of a solr. claiming his privilege not to divulge information given to him by his client for the purpose of obtaining advice, or the advice given on such*

Sect. 2.—Privilege: Sub-sect. 7, B. & C. (a) & (b).] tions were wholly of a professional or confidential nature, such privilege was disallowed.

(2) A case submitted since the institution of the suit, for the opinion of Dutch counsel & the opinion thereon:—*Held*: privileged.—*BUNBURY v. BUNBURY* (1839), 2 Beav. 173; 9 L. J. Ch. 1; 48 E. R. 1146.

Annotations:—*As to* (1) *Consd.* *Reid v. Langlois* (1849), 2 H. & Tw. 59. *Reid*. *Ross v. Gibbs*, *Gibbs v. Ross* (1869), L. R. 8 Eq. 522.

Counsel's clerk.—*See* *BARRISTERS*, Vol. III., p. 336, Nos. 254–256.

Solicitor—Generally.—*See* Sub-sect. 7, A., *ante*.
4161. — Who has ceased to practice.—(1) Communications between a person & his legal adviser, who had been a solr., but at the time of the communications had, without his knowledge, ceased to practice, are privileged.

(2) The communications had reference to the validity of a will, & passed between pltf. & his legal adviser between the date of the will & the death of testator. It was objected that they could not have taken place in contemplation of a suit respecting the validity of the will, & were therefore not protected:—*Held*: this did not take them out of the rule.—*CALLEY v. RICHARDS* (1854), 19 Beav. 401; 24 L. T. O. S. 18; 2 W. R. 614; 52 E. R. 406.

4162. — Acting as patent agent.—An action was brought by the registered owner of two letters patent for similar inventions, dated in 1883, & 1884 against defts. for infringement of both such patents. One of defts. was the registered owner of letters patent for a similar invention. Particulars of breaches were delivered by pltf. complaining generally of the infringement of both patents without in any way distinguishing between them. Defts. delivered particulars of objections, & also their answer to interrogatories, which had been delivered by pltf. Pltf. then discontinued the action so far as related to the patent of 1884. Subsequently defts. delivered interrogatories referring to their answer to pltf.'s interrogatories & interrogating him as to which of the processes therein described infringed the letters patent of 1883, & as to which infringed the patent of 1884. They further interrogated pltf. as to documents in his possession relating to the preparation of the specifications filed under both patents. Pltf. declined to answer, alleging as a ground for such refusal that the particulars of infringement had been sufficiently stated by him; & as to the documents, that they were confidential communications between himself & his solr. & counsel, & that such documents were privileged; & that, as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. Pltf.'s solr. had also acted as his patent agent:—*Held*: pltf.'s answer as to documents was insufficient, inasmuch as it did not distinguish communications between himself & his solr. as such, & communications between himself & his solr. in his character of patent agent communications of the former class alone being privileged.—*MOSELEY v. VICTORIA RUBBER CO.* (1886), 55 L. T. 482; *Griffin's Patent Cases*, 163; 3 R. P. C. 351.

4163. Solicitor's agent.—(1) On *non est factum* pleaded to a bond it is not sufficient to prove the execution by a person who executed in the name of deft.'s attorney cannot be examined as to communications with deft. on the subject of the action in order to prove his identity.

(2) Declarations made by the attorney of a party

in conversation are not evidence against his client.—*PARKINS v. HAWKSHAW* (1817), 2 Stark. 239, N. P.

Annotations:—*Asto* (1) *Apld.* *Petch v. Lyon* (1846), 9 Q. B. 147. *Reid.* *Doe d. Huln v. Richards* (1845), 2 Car. & Kir. 216. *Generally*, *Mentd.* *Whitlock v. Musgrave* (1833), 3 Tyr. 541.

4164. Solicitor's clerk — Articled clerk.—An articled clerk to an attorney, who is bound by his articles to keep all his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interests of the master's clients; though the disclosure may go to support a civil action against the master.—*WEBB v. SMITH* (1824), 1 C. & P. 337, N. P.

4165. ——The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself.—*TAYLOR v. FORSTER* (1825), 2 C. & P. 195.

4166. ——(1) A mtgee. is not bound, in obedience to a *subpana duces tecum*, to produce the title deeds of his mortgagor.

(2) An attorney is not allowed to give evidence of the contents of a deed in his client's possession; the client refusing to produce it.

(3) The clerk of an attorney is bound equally with his master not to divulge the secrets of the client; & wherever the master should be prevented from disclosing, the clerk should also be prevented.—*R. v. UPPER BODDINGTON (INHABITANTS)* (1826), 8 Dow. & Ry. K. B. 726; 4 Dow. & Ry. M. C. 233; 5 L. J. O. S. M. C. 10.

See, also, Nos. 4206, 4231, *post*.

4167. Interpreter.—An interpreter who is present at conversations between a foreigner & his attorney is bound to the same secrecy as the attorney himself, & ought not to divulge the facts confided to him after the cause for the purpose of which the confidence was placed is at an end.—*DU BARRÉ v. LIVETTE* (1791), Peake, 108, N. P.

Annotations:—*Reid.* *Wilson v. Rastall* (1792), 4 Term Rep. 753; *Herring v. Cloberry* (1842), 11 L. J. Ch. 149.

Patent agent.—*See* No. 4162, *ante*.

4168. Pursuivant of Heralds' College.—A Pursuivant of the Heralds' College employed in the conduct & support of a protest against a pedigree sought to be inrolled in the Heralds' College is not a legal adviser, & therefore communications between him & his employer are not privileged in a court of law.—*SLADE v. TUCKER* (1880), 14 Ch. D. 824; 49 L. J. Ch. 644; 43 L. T. 49; 28 W. R. 807.

4169. Unqualified person—Wrongly believed to be solicitor.—A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is bound to give evidence of them, if called as a witness, attorneys only being so privileged as to not being bound to disclose the secrets of their clients.—*FOUNTAIN v. YOUNG* (1807), 6 Esp. 113, N. P.

Annotation:—*N.F.* *Calley v. Richards* (1854), 19 Beav. 401.

4170. ——A. had, 45 years ago, enclosed a piece of ground from the waste, & built a cottage on part of it: he died 29 years ago, & after that, his widow & daughter lived on the premises till the death of the former, a month before the trial. In rejeatment by A.'s eldest son:—*Held*: if the mother went to C., who was neither an attorney nor pretended to be one, to ask him to make a conveyance of the property, & C. wrote to a relation of his, who was an attorney, & on receiving his relation's answer, informs the mother that she cannot convey, this is not a privileged communica-

tion.—*DOE d. PRITCHARD v. JAUNCEY* (1837), 8 C. & P. 99.
Annotation :—*Mentd.* *Asher v. Whitelock* (1865), 11 Jur. N. S. 925.

C. What Matters within Protection of Privilege.

(a) *Circumstances of Employment.*

4171. By whom legal adviser employed.]—The attorney conducting a cause in ct. may be called as a witness by the opposite side, & asked who employs him, in order to show the real party, & so let in his declarations.—*LEVY v. POPE* (1829), Mood. & M. 410, N. P.

4172. When employed—Whether on specified day.]—*YOUNG & BATESON v. HUTCHINSON* (1813), 1 L. T. O. S. 59, N. P.

4173. — When first employed.]—At a private examination of the solr. to the debtor the ct. allowed the following question to be put: "Which was the first transaction in which you acted for the debtor in connection with the Pelican Club?" The solr. declined to answer this question on the ground that to do so would be to disclose communications made by his client to him for the purpose of obtaining his professional advice:—*Held*: the question was not one in respect of which any privilege could attach, & the solr. was bound to answer it.—*Re WELLS, Ex p. TRUSTEE* (1892), 9 Morr. 116.

4174. When & to whom documents handed over.]—An attorney held bound to discover when & to whom he parted with documents of title of his client, & in whose possession the same were.—*BANNER v. JACKSON* (1817), 1 De G. & Sm. 472; 63 E. R. 1154.

4175. From whom documents received.]—In the course of the examination of a solr. upon the application of the liquidator of a co., under Cos. Act, 1862 (c. 89), s. 115, the witness claimed privilege as to certain documents in his possession alleged to belong to the liquidator; & he declined to answer questions as to from whom he received the same:—*Held*: the claim of privilege was properly made, & the witness need not produce the documents.—*Re LONDON & NORTHERN BANK, LTD., HADDOCK'S CASE, HOYLE'S CASE*, [1902] 2 Ch. 73; 71 L. J. Ch. 511; 86 L. T. 430; 50 W. R. 386; 18 T. L. R. 403; 46 Sol. Jo. 358; 9 Mans. 325; *on appeal*, [1902] 2 Ch. 78, C. A.

(b) *Matters of Fact.*

4176. General rule.]—Demurrer by a witness examined by the plffs., on the ground that he had been the solr. of some of the defts., & that the interrogatory required the disclosure of confidential communications, overruled, the witness being bound to produce letters communicated to him from collateral quarters to which the interrogatory pointed, & to answer questions seeking information as to matters of fact, as distinguished from confidential communications.—*SAWYER v. BIRCHMORE* (1835), 3 My. & K. 572; 4 L. J. Ch. 249; 40 E. R. 218.

Annotations :—*Consd.* *Desborough v. Rawlins* (1838), 3 My. & Cr. 515; *Kennedy v. Lyell* (1883), 23 Ch. D. 387. *Refd.* *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162.

4177. —.]—The relation of attorney & client prevents the former from disclosing any com-

munication made to him in the ordinary course of his employment, & on the faith of the confidence which the client reposes in his legal adviser; but the privilege does not extend to matters of fact, which the attorney knows by any other means than by confidential communications with his client, though, if he had not been employed as attorney, he probably would not have known them.

In an action on a bill of exchange, to which deft. pleaded that the bill was given for a gaming debt; & it was deposed that the only bill which had been given by deft. was that upon which the action was brought; & after a request then made to pltf. to produce the bill, pltf.'s attorney was called on the part of deft., & asked whether he then had the bill with him in ct.:—*Held*: the attorney would not be guilty of any breach of professional confidence in answering the question, & it was admissible.—*DWYER v. COLLINS* (1852), 7 Exch. 639; 21 L. J. Ex. 225; 19 L. T. O. S. 186; 16 Jur. 569; 155 E. R. 1101.

Annotations :—*Expld.* *Beatson v. Skene* (1860), 29 L. J. Ex. 430. *Consd.* *Marriott v. Anchor Reversionary Co.* (1861), 3 Giff. 304. *Refd.* *Re Cutts, Ex p. Ibbetson* (1867), 16 L. T. 715. *Mentd.* *Meynell v. Bone* (1853), 21 L. T. O. S. 158.

4178. Cancellation of instrument—Breaking off seal.]—*HAVERS v. RANDOLL* (1581), Ch. Cas. in Ch. 148; 21 E. R. 88.

4179. Execution of instrument.]—*SANDFORD v. REMINGTON*, No. 4215, *post*.

4180. —.]—A solr. who is called upon as a witness, must answer as to any particular matter of fact, for the benefit of third parties; as, for example, he must prove the execution of a deed, though by doing so he may injure his client; but if he is asked as to any point which may be the result of a course of conduct or a series of transactions he is not bound to answer.—*TRISTRAM v. ROBERTS* (1846), 6 L. T. O. S. 519; 10 Jur. 125.

4181. —.]—A solr., employed to obtain the execution of a deed, & who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid.—*CRAWCOUR v. SALTER* (1881), 18 Ch. D. 30; 45 L. T. 62; *on appeal*, 18 Ch. D. 52, C. A.

Annotations :—*Mentd.* *Re Fowler, Ex p. Brooks* (1883), 23 Ch. D. 261; *Re Parker, Ex p. Turquand* (1885), 14 Q. B. D. 636; *Moult v. Halliday* (1897), 46 W. R. 318; *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808.

4182. — Whether signature witnessed.]—*R. v. PAYNE, Ex p. WOLFF* (1905), 49 Sol. Jo. 419, D. C.

Nature & contents of instrument.]—*See* Part IV., Sect. 5, *ante*.

4183. Handwriting of client.]—A knowledge of a client's handwriting, obtained by his attorney, from having witnessed his execution of the bail bond, in the action, is not such a confidential knowledge, as to privilege the attorney from answering, when called on the part of pltf. to prove deft.'s handwriting, on the trial.—*HURD v. MORING* (1824), 1 C. & P. 372, N. P.

Proof of handwriting, generally, *See* Part IV., Sect. 2, *ante*.

PART V. SECT. 2, SUB-SECT. 7.—
 C. (a).

4171 i. By whom legal adviser employed.]—Where a solr. claims privilege under Indian Evidence Act, 1872, s. 126, he is bound to disclose the name of his client on whose behalf he claims privilege. The mere fact that the

client's name had been communicated to him in the course & for the purpose of his employment as solr. by another client, affords no excuse, unless it was communicated to him confidentially on the express understanding that it was not to be disclosed.—*FRANJIBHICAJI v. MOHANANSH DHANING* (1893), 1 L. R. 18 Bom. 263.—IND.

PART V. SECT. 2, SUB-SECT. 7.—C. (b).

4176 i. General rule.]—Where a counsel in a cause is by consent allowed to go upon the stand to prove a particular fact, he becomes a witness in the cause generally, & may be cross-examined upon any fact in the cause.—*GILBERT v. CAMPBELL* (1870), 2 Han. 55.—CAN.

Sect. 2.—*Privilege: Sub-sect. 7, C. (b) & (c) i.*

4184. Condition of instrument—Whether instrument stamped.]—An attorney is not compellable to state when examined as a witness whether a document shown to him by his client in the course of a professional interview was then in the same state as when produced on the trial, *e.g.* whether it was then stamped or not.—*WHEATLEY v. WILLIAMS* (1836), 1 M. & W. 533; 2 Gale, 140; Tyr. & Gr. 1043; 5 L. J. Ex. 237; 150 E. R. 546. *Annotations:—**Refd.* Turquand v. Knight (1836), 2 M. & W. 98; Cleave v. Jones (1852), 21 L. J. Ex. 105. *Mentd.* Jarvis v. Wilkins (1841), 7 M. & W. 410; Spang v. Wright (1842), 9 M. & W. 629; Fryer v. Roe (1852), 12 C. B. 437.

4185. ———.]—*BROWN v. FOSTER*, No. 4155, *ante*.

4186. Evidence given in former proceedings.]—(1) In support of an indictment for perjury, committed on the trial of a plaintiff in a county ct., it is not necessary to produce the judge's notes, if proof of the perjury can be established by witnesses who were present at the trial.

(2) *Semble*: it is no objection to a witness called for that purpose, that he acted as advocate & attorney against prisoner at the trial of the plaintiff in the county ct.—*R. v. MORGAN* (1852), 6 Cox, C. C. 107.

Address—Of client.]—*See* Nos. 4228, 4229, *post*.

—Of ward of court.]—*See* Nos. 4278, 4279, *post*.

4187. Names of trustees.]—Judgment having been signed against a married woman in an action, an inquiry was directed before a master whether she was possessed of any separate estate. The solr. to the trustees of her marriage settlement, being subpoenaed by the judgment creditor upon the inquiry as a witness, & to produce documents, stated that the deed of settlement was in his possession as solr. to the trustees, but refused to state the names of the trustees or produce the deed on the ground of professional privilege:—*Held*: he must state the names of the trustees & produce the deed.—*BURSILL v. TANNER* (1885), 16 Q. B. D. 1; 55 L. J. Q. B. 53; 53 L. T. 445; 34 W. R. 35; 2 T. L. R. 9, C. A.

*Annotation:—**Expld.* Hood Barrs v. Heriot, *Ex p.* Blyth, [1896] 2 Q. B. 338.

4188. Payment of income to cestui que trust.]—On a husband's petition for divorce it appeared that resp. had separate estate, but she was restrained from anticipation under the marriage settlement, & the solr. to the trustees was called to prove that some of resp.'s income passed through his hands to her, but he had not received the trustees' consent that he should give evidence:—*Held*: the witness could not give evidence on the matter without the leave of the trustees.—*HUMPHREY v. HUMPHREY & WAKE* (1917), 33 T. L. R. 433.

PART V. SECT. 2, SUB-SECT. 7.— C. (c) i.

4189 i. Whether privilege limited to litigation pending or contemplated—Or extended to all communications between solicitor & client.]—A communication made to an attorney in his professional character is privileged although no suit concerning the subject matter be pending or contemplated.—*BATTERSBY v. HAYCOCK* (1839), 2 Ont. Dig. 2345.—*CAN.*

4189 ii. ———.]—The law relating to professional communications between a solr. & client is the same in India, as in England. It is not every communication made by a client to an attorney that is privileged from disclosure. The privilege extends only to communications made to him con-

fidentially, & with a view to obtaining professional advice.—*FRAMJI BHICAJI v. MOHANSING DHANING* (1893), 1 L. R. 18 Bom. 263.—*IND.*

4189 iii. ———.]—A communication made to an attorney, in order to be privileged must not necessarily relate to or concern a cause.—*R. v. HAYDN* (1825), 2 Fox & S. Ir. 379.—*IR.*

4189 iv. ———.]—It is not incompetent to call for production of confidential communication to an agent if not made *in causa*. B. alleged it was a condition of the bargain that the father of R. should grant a new charter of property to him as vassal, taxing the entry money, but J. R. refused to admit this. Pursuer having obtained a diligence cited B. F. the

Knowledge acquired professionally—Generally.]—*See* Sub-sect. 7, A., *ante*.

Confidential communications.]—*See* Sub-sect. 7, C. (c), *post*.

(c) *Communications.*

i. *In General.*

4189. Whether privilege limited to litigation pending or contemplated—Or extended to all communications between solicitor & client.]—If I employ an attorney & entrust to him secrets relative to the suit, that trust is not to be violated; but when I depart from that subject wherein I employed him, he is no more than another man, especially when the clause I did employ him in is over; because he is not to be supposed as an attorney to be a general confidant (*BOWES, C.B.*).—*ANNESLEY v. ANGLESEA (EARL)* (1743), 17 State Tr. 1139.

*Annotations:—**Consd.* Gartside v. Outram (1856), 26 L. J. Ch. 113. *Refd.* R. v. Cox & Railton (1884), 14 Q. B. D. 153. *Mentd.* Stapleton v. Crofts (1852), 18 Q. B. 367; Moriarty v. L. C. & D. Ry. (1870), L. R. 5 Q. B. 314; R. v. Watt (1905), 70 J. P. 29.

4190. ———.]—An attorney is not restrained by any rule of law from giving evidence of a conversation between him & his client touching the justice of his suit after a writ of inquiry executed on an interlocutory judgment, & a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause.—*CODDEN v. KENDRICK* (1791), 4 Term Rep. 431; 100 E. R. 1102.

*Annotations:—**Refd.* Gainsford v. Grammar (1809), 2 Camp. 9; Greenhough v. Gaskell (1833), *Coop. temp.* Brough. 96. *Mentd.* Hamlet v. Richardson (1833), 9 Bing. 644.

4191. ———.]—*WADSWORTH v. HAMSHAW & ASPINAL* (1819), 2 Brod. & Bing. 5, n.; 129 E. R. 858.

*Annotations:—**Consd.* Greenough v. Gaskell (1833), 1 My. & K. 98. *Refd.* Herring v. Cloberry (1842), 11 L. J. Ch. 149.

4192. ———.]—Communications made by a party to an attorney are confidential, although they do not relate to a cause existing or in progress at the time they were made. Therefore, where an attorney was applied to by a father, to prepare a deed by which his property was to be assigned to his son, & stated, that there was no consideration for the assignment, on which the attorney refused to prepare it, & it was afterwards drawn by another:—*Held*: such attorney was precluded from giving evidence of that fact, in an action brought by the son, in which the validity of the deed was attempted to be disputed, although he was not employed in the cause.—*CROMACK v. HEATHCOTE* (1820), 2 Brod. & Bing. 4; 4 Moore C. P. 357; 129 E. R. 857.

*Annotations:—**Fold.* Doe d. Shellard v. Harris (1833), 5 C. & P. 592. *Apprvd.* Herring v. Cloberry (1842), 1 Ph. 91. *Distd.* R. v. Cox & Railton (1884), 14 Q. B. D. 153. *Refd.* Greenough v. Gaskell (1833), 1 My. & K. 98; Moore v.

law-agent of defender, as a haver & called on him to produce all papers in his custody relative to the bargain in question:—*Held*: communication made to an agent & confidentially was no sufficient reason why production of them should not be called for. It was only in communication *in causa* which had any privilege in this respect.—*BOWER v. RUSSEL* (1810), 15 Fac. Coll. 675.—*SCOT.*

q. Whether communication privileged—Matter for court to decide.]—Whether communications between solr. & client are privileged is for the Ct. to determine on the facts given or proposed to be given in evidence. In determining that question unnecessary disclosures to the jury will, as far as possible, be prevented by the ct.—

Terrell (1833), 4 B. & Ad. 870; Taylor v. Blacklow (1836), 3 Bing. N. C. 235; Pearce v. Pearce (1846), 1 De G. & Sm. 12; Minet v. Morgan (1873), 21 W. R. 467.

4193. ———.]—An attorney is bound to disclose communications made to him, which do not regard either the bringing or defending an action.—**WILLIAMS v. MUDIE** (1824), 1 C. & P. 158; Ry. & M. 34, N. P.

Annotations :—**Extd.** Clark v. Clark (1830), 1 Mood. & R. 3. **N.F.** Doe d. Shellard v. Harris (1833), 5 C. & P. 592. **Consd.** Greenough v. Gaskell (1833), 1 My. & K. 98. **Refd.** Bland v. Wainwright (1835), 4 L. J. Ex. Eq. 19.

4194. ———.]—No communications made to an attorney are privileged, but such as are made for the purpose of the attorney's either commencing or defending a suit.

I think this confidence in the case of attorneys is a great anomaly in the law. The privilege does not apply to clergyman. . . . A man is not acting as an attorney when he is consulted about a deed (**BEST, C.J.**).—**BROAD v. PITT** (1828), 3 C. & P. 518; Mood. & M. 233, N. P.

Annotations :—**Expld.** Greenough v. Gaskell (1833), 1 My. & K. 98. **Dbtd.** Herring v. Cloberry (1842), 1 Ph. 91. **Refd.** Dwyer v. Collins (1852), 21 L. J. Ex. 225.

4195. ———.]—Communications made to an attorney respecting a matter in dispute & controversy are privileged, though no cause was then commenced.—**CLARK v. CLARK** (1830), 1 Mood. & R. 3, N. P.

Annotations :—**Consd.** Greenough v. Gaskell (1833), Coop. temp. Brough. 96. **N.F.** Herring v. Cloberry (1842), 11 L. J. Ch. 149. **Refd.** Moore v. Terrell (1833), 4 B. & Ad. 870.

4196. ———.]—Communications made to an attorney by his client respecting the sale of estates are privileged. The privilege is not limited to suits existing or expected.—**MYNN v. JOLIFFE** (1834), 1 Mood. & R. 326, N. P.

Annotations :—**Mentd.** Ireland v. Thomson (1847), 4 C. B. 149; Drakeford v. Piercy (1866), 7 B. & S. 515.

4197. ———.]—Where an attorney is employed by a client professionally to transact professional business, all the communications which pass between them in the course & for the purpose of that business, & not those only which relate to litigation commenced or in contemplation, are privileged communications.—**HERRING v. CLOBERRY** (1842), 1 Ph. 91; 11 L. J. Ch. 149; 6 Jur. 202; 41 E. R. 565, L. C.

Annotations :—**Refd.** Walsingham v. Goodricke (1843), 3 Hare, 122; Pearce v. Pearce (1846), 1 De G. & Sm. 12; Reynell v. Sprye (1846), 16 L. J. Ch. 117; Follett v. Jefferys (1849), 18 L. J. Ch. 389; Calley v. Richards (1854), 19 Beav. 401; Charlton v. Coombes (1863), 4 Giff. 372; Minet v. Morgan (1873), 8 Ch. App. 361; Wheeler v. Le Marchant (1881), 17 Ch. D. 675.

4198. ———.]—**MACKENZIE v. YEO**, No. 4154, ante.

4199. ———.]—The privilege of communications between solr. & client extends to all matters within the scope of the ordinary duties of a solr. & the sale of estates being one of such matters :—**Held** : a solr. was not at liberty to disclose what

had passed in conversations which he had had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.—**CARMAEL v. POWIS** (1846), 1 Ph. 687; 15 L. J. Ch. 275; 41 E. R. 794, L. C.

4200. ———.]—**DWYER v. COLLINS**, No. 4177, ante.

4201. ———.]—(1) The protection of communications made by a client to his attorney applies to all cases in which the relation of attorney & client subsists, & to all cases where the client applies to the attorney in his professional capacity.

(2) An attorney cannot be asked whether A. applied to him to draw a certain deed, nor whether A. asked his advice for a lawful or unlawful purpose.—**DOE d. SHELLARD v. HARRIS** (1833), 5 C. & P. 592, N. P.

Annotations :—**As to** (1) **Refd.** Moore v. Terrell (1833), 4 B. & Ad. 870; Taylor v. Blacklow (1836), 3 Scott, 614; R. v. Cox & Ralston (1884), 14 Q. B. D. 153. **As to** (2) **Refd.** Shore v. Bedford (1843), 12 L. J. C. P. 138.

4202. ———.]—**CALLEY v. RICHARDS**, No. 4161, ante.

4203. ———.]—Claimant who deposed that obstacles having arisen in granting a second lease, one only was granted was asked on cross-examination whether the obstacles were suggested by him to his solr., or by his solr. to him :—**Held** : not bound to answer though the communication was before any litigation was contemplated.—**TURTON v. BARBER** (1874), L. R. 17 Eq. 329; 43 L. J. Ch. 468; 22 W. R. 438.

Annotations :—**Refd.** Ainsworth v. Wilding, [1900] 2 Ch. 315; Daily Express (1908), Ltd. v. Mountain (1916), 60 Sol. Jo. 654.

4204. ———.]—The doctrine of privilege is now extended to all communications from a client to his solr. in his professional capacity.—**KADIE v. ADDISON** (1882), 52 L. J. Ch. 80; 47 L. T. 543; 31 W. R. 320.

Communications relating to litigation pending or contemplated.—*See* Sub-sect. 7, C. (c) iii., post.

Communications relating to matters within scope of solicitor's duties.—*See* Sub-sect. 7, C. (c) ii., post.

Secondary evidence of privileged communications.—*See* Part IV., Sect. 5, sub-sect. 3, D. (a) i., ante..

ii. Relating to Matters within Scope of Legal Adviser's Duty.

4205. General rule.—An attorney is not at liberty to disclose in evidence what has been confidentially communicated to him by a client, although the latter be no party to the cause before the ct.—**R. v. WITHERS** (1811), 2 Camp. 578, N. P. *Annotation* :—**Refd.** Ramsbotham v. Senior (1869), L. R. 8 Eq. 575.

feesional capacity are not privileged, & are properly receivable in evidence.—**RUPD v. FRANK** (1889), 17 O. R. 752.—**CAN.**

4205 v. ———.]—The ct. will not permit a solr. to disclose any communications made to him in that character, & will not speculate about their materiality.—**RIGGS v. HEAD** (1837), 1 Sau. & Sc. 333.—**IR.**

4205 vi. ———.]—In an action for damages for illegal distress plff. cannot require deft.'s solr. to give evidence as to what written communications had taken place between himself & his client with regard to the instructions which he had received when acting as agent in respect of the distress which had been levied.—**NELSON v.**

JONAS v. FORD (1885), 11 V. L. R. 240.—**AUS.**

r. Effect of loss of possession by adviser.—A letter from a client to his legal adviser, though a privileged communication while in the possession of the attorney, may, if such letter has been obtained even though improperly, from the attorney be produced as evidence, if relevant to the issue.—**WILLIAMS v. SHAW** (1884), 4 E. D. C. 105.—**S. AF.**

PART V. SECT. 2, SUB-SECT. 7.—C. (c) ii.

4205 i. General rule.—A solr., when questioned as a witness with regard to matters involving his client's interests, should decline to answer unless directed

or at least permitted by the ct.—**LIVINGSTONE v. GARTSHORE** (1863), 23 U. C. R. 166.—**CAN.**

4205 ii. ———.]—Communications between solr. & client are privileged, no matter at what time made, so long as they are professional & made in a professional character.—**HAMELYN v. WHYTE** (1874), 6 P. R. 143.—**CAN.**

4205 iii. ———.]—Certain questions put to deft. as to communications between himself & his attorneys with a view to showing his responsibility for their action in issuing & enforcing a *fi. fa.* goods :—**Held** : to be privileged.—**DEDERICK v. ASHDOWN** (1887), 4 Man. L. R. 174.—**CAN.**

4205 iv. ———.]—Communications to solrs. not made to them in their pro-

Sect. 2.—*Privilege: Sub-sect. 7, C. (c) ii.]*

4206. —.]—A conversation between a client, who afterwards becomes bkpt., & his attorney's clerk, on the subject of his affairs, is a privileged communication, & cannot be given in evidence in an action by his assignees, for the purpose of showing his motives.—*BOWMAN v. NORTON* (1831), 5 C. & P. 177, N. P.

4207. —.]—The privilege of confidential communications, extends to all knowledge acquired by an attorney when acting in that capacity. An attorney employed by a bkpt. to raise money for him, will not be allowed to state whether a certain document was at that time in the bkpt.'s possession.—*TURQUAND v. KNIGHT* (1836), 2 M. & W. 98; 2 Gale, 192; 6 L. J. Ex. 4; 150 E. R. 685.

*Annotation:—***Refd.** *Warde v. Warde* (1851), 3 Mac. & G. 365.

4208. —.]—An attorney is not justified in refusing to answer questions on the ground of privilege, unless the questions relate to matters communicated to him in his capacity of legal adviser.—*Ex p. HAWLEY* (1853), 20 L. T. O. S. 258; *sub nom. Re HAWLEY*, 1 W. R. 128.

4209. —.]—(1) The privilege of an attorney as to communications with his client, may extend to communications which he had with him before he was himself admitted an attorney, & while he was managing clerk to the party who was then the attorney; but it does not extend to communications relating to matters not within his proper business & duty as an attorney; & an attorney for debt, in an action by assignees of a bkpt. was allowed to prove notice by himself to debt. of the act of bkpy. before his seizure under a bill of sale, the witness then having been acting for him & for the bkpt.

(2) The question ["Did bkpt. ask you to take care of his wife & children previously to his going away?"] relates to something which cannot be said to be part of the proper business of an attorney, but the question, ["Did he ask you to take care of his books?"] may have been professional, & within the claim of privilege (*BRAMWELL, B.*).—*NICHOLSON v. COOPER* (1858), 1 F. & F. 209, N. P.

4210. —.]—On the cross-examination of one of pltf.'s witnesses, who had been a former solr. for pltf. he was asked whether he did not procure a survey to be made of the ship, which was the subject-matter of the suit. He replied that he did not, that he then made an application to certain parties in the city on the subject, but that he did so as the solr. of pltf. The witness was then asked "To whom did you make the application?" He refused to answer the question, on the ground that it was a privileged communication. The witness was not asked from whom he received instructions as to the person to whom he was to apply. Motion on behalf of defts. that the witness might be ordered to attend before the examiner & answer the question, refused with costs.—*MARRIOTT v. ANCHOR REVERSIONARY CO., LTD.* (1861), 3 Giff. 304; 30 L. J. Ch. 571; 5 L. T. 545; 8 Jur. N. S. 51; 1 Mar. L. C. 91; 66 E. R. 425.

4211. —.]—A solr., although acting primarily for the trade assignee of a bkpt. is not thereby precluded from acting as solr. for a purchaser at a

sale of the property of the bkpt.; & communications between the purchaser & his solr. in such a case are privileged.—*Re UBSDELL, Ex p. ASSIGNEES* (1872), 27 L. T. 460; 21 W. R. 70.

4212. What are—Communication before retainer.]—*CUTTS v. PICKERING* (1872), 3 Keb. 2; Nels. 81; 3 Rep. Ch. 66; 84 E. R. 560; *sub nom. CUTTS v. PICKERING*, 1 Vent. 197.

*Annotations:—***Consd.** *Greenough v. Gaskell* (1833), 1 My. & K. 98. **Refd.** *Annesley v. Anglesea* (1743), 17 State Tr. 1139.

4213. — — — **Solicitor not in fact retained.]**—*BROWNE v. DUNN*, No. 4818, *post*.

4214. — — — **Communication not made to solicitor in professional character.]**—*ANON.* (circa 1788), cited in 1 Mood. & R. at p. 5.

*Annotation:—***Consd.** *Herring v. Cloberry* (1842), 1 Ph. 91.

4215. — — — **Reason for making deed.]**—Attorney examined as a witness must disclose acts done in his presence by his client, as execution of a deed, etc.; not private confidential conversation with him, as the reasons for making it, etc., on motion to suppress the depositions referred, to see, what part came to his knowledge as confidential attorney; in order to have that suppressed.—*SANDFORD v. REMINGTON* (1793), 2 Ves. 189; 30 E. R. 587, L. C.

*Annotations:—***Refd.** *Parkhurst v. Lowten* (1818), 3 Madd. 121; *Tippins v. Coates* (1847), 6 Hare, 16.

4216. — — — **Instructions to negotiate with third party.]**—A. having a demand upon B., B. before A. commenced any action, employed C., his attorney, to make certain propositions to A. upon the matters in difference between them:—**Held:** C. could not be examined as to what B. said upon the occasion, for this was to be considered a privileged communication between attorney & client; but what C. said when he made the propositions to A. is good evidence against B. without further proof of C. being authorised by him than the fact of C. being his attorney.—*GAINSFORD v. GRAMMAR* (1809), 2 Camp. 9, N. P.

*Annotations:—***Consd.** *Greenough v. Gaskell* (1833), *Coop. temp. Brough*, 96; *Griffith v. Davies* (1833), 5 B. & Ad. 502. **Refd.** *Weeks v. Argent* (1847), 16 M. & W. 817.

4217. — — — **Communication to obtain information on question of fact.]**—A communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, & may be disclosed by the attorney, if called as a witness in a cause.—*BRAMWELL v. LUCAS* (1824), 2 B. & C. 715; 4 Dow. & Ry. K. B. 367; 2 L. J. O. S. K. B. 161; 107 E. R. 560.

*Annotations:—***Consd.** *Clark v. Clark* (1830), 1 Mood. & R. 3; *Greenough v. Gaskell* (1833), *Coop. temp. Brough*, 96; *Sawyer v. Birchmore* (1835), 3 My. & K. 572; *Dosborough v. Rawlins* (1838), 3 My. & Cr. 515; *Mackenzie v. Yeo* (1842), 1 Notes of Cases, 516. **Refd.** *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162.

4218. — — — **Purposes for which money raised.]**—(1) What a mtgor., in treaty to raise money, says to the attorney of the mtgee., is not a privileged communication.

(2) In an action against a mtgor., the attorney of the mtgee., who has the mtge. deed, cannot be compelled to produce it, if he objects to do so; nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised; & secondary evidence may be given of the contents of the mtge. deed.—

BUCHANAN (1897), 16 N. Z. L. R. 60.—**N.Z.**

s. What are—Communications as to compromise with creditors.]—The communications from a debtor to his solr. as to a compromise, which the debtor desired his solr. to effect with

his creditors, & on which communications the solr. acted, & at length effected the compromise, are not privileged, & the solr.'s evidence of them is admissible.—*FRASER v. SUTHERLAND* (1851), 2 Gr. 442.—**CAN.**

t. — Client directing line of

action.]—Where a debt. desired her attorney to adopt a certain course in reference to a writ in the hands of the sheriff, which course was accordingly pursued:—**Held:** this was not a privileged communication.—*WALTON v. BERNARD* (1851), 2 Gr. 344.—**CAN.**

MARSTON v. DOWNES (1834), 6 C. & P. 381, N. P.; *subsequent proceedings*, 1 Ad. & El. 31.

Annotations.—As to (2) *Consd.* Davies v. Walters (1842), 9 M. & W. 608. *Expld.* Hibbert v. Knight (1848), 2 Exch. 11. *Refd.* Doe d. Gilbert v. Ross (1840), 7 M. & W. 102; Doe d. Egremont v. Date (1842), 3 Q. B. 609; Weeks v. Argent (1847), 16 M. & W. 817; Newton v. Chaplin (1850), 14 Jur. 1121; Cleave v. Jones (1852), 7 Exch. 421; Phelps v. Prew (1854), 23 L. J. Q. B. 140; Boyle v. Wiseman (1855), 10 Exch. 647.

4219. — **Information in abstract obtained by client.**—A person being desirous of raising money on mtge. to pay off a previous mtge. debt, applied to an attorney to advance the money, & obtained for him an abstract of the title, & an inspection of the title deeds, from the mtgee. In an action of ejectment against the mtgee.:—*Held*: the abstract thus delivered, & the information thus obtained by the attorney, were privileged communications, of which he ought not to be allowed to give evidence, to impeach deft.'s title, & establish that of the lessor of pltf.—*DOE d. PETER v. WATKINS* (1837), 3 Bing. N. C. 421; 4 Scott, 155; 6 L. J. C. P. 107; 1 Jur. 41; 132 E. R. 472; *sub nom.* *DOE d. THOMAS v. WATKINS*, 3 Hodg. 25.

Annotations.—*Refd.* Perry v. Smith (1842), 9 M. & W. 681; Doe d. Egremont v. Langdon (1848), 13 Jur. 96.

4220. — **Communication through unprivileged person.**—*BUNBURY v. BUNBURY*, No. 4160, *ante*.

4221. — **Information as to custody of document.**—A solr. will not be allowed to disclose in whose possession or custody a particular document is, or when or where he saw the same, if he came to the knowledge of the fact inquired after, in the course of confidential communications with his client, in his professional capacity.—*COTMAN v. ORTON* (1840), 9 L. J. Ch. 268.

4222. — **Waiver of objections to title.**—*TRISTRAM v. ROBERTS*, No. 4180, *ante*.

4223. — **Application for advance on property in forged will.**—The wife of A. went to B., an attorney, & produced a forged will to him, & asked him to advance money to A. on the property mentioned in it. B. was not then the attorney of A., or in any way acting as his solr. A.'s wife left the forged will with B., who made a copy of it. A. afterwards called on B., who told A. all that had occurred, & returned him the forged will, declining to advance any money:—*Held*: the conversation between A.'s wife & B. was not a privileged communication; & on the trial of A. for forgery, evidence might be given of it, & also the copy of the forged will made by B. might be given in evidence, notice having been given to A. to produce the original.—*R. v. FARLEY* (1846), 2 Car. & Kir. 313; 1 Den. 197; 8 L. T. O. S. 235; 11 J. P. 535; 2 Cox, C. C. 82, C. C. R.

Annotation.—*Refd.* R. v. Tynley, Tufts, etc. (1848), 18 L. J. M. C. 36.

4224. — **Book given solicitor for collecting tithes.**—(1) At the trial of an ejectment to recover land claimed as parcel of the glebe of a rectory, a book describing the lands, subject to tithes, & a map stating the glebe lands, were produced by an attorney, who stated that he had received them from a former rector, who was also owner of the advowson. The book being given to him for the purpose of collecting the tithes, & the map with a view to the sale of the advowson, which was afterwards effected, & the lessor of pltf. appointed to the rectory by the purchaser:—*Held*: the map was not a privileged communication.

(2) *Semle*: the book was not.

(3) The heir & exors. of deceased rector having authorised the production of these documents:—*Held*: they were competent parties to waive the privilege if any existed.—*DOE d. MARRIOTT v. HERTFORD* (MARQUESS) (1849), 19 L. J. Q. B. 526;

13 Jur. 632; *sub nom.* *DOE d. MARRIOTT v. BEDFORD* (DUKE), 13 L. T. O. S. 323.

4225. — **Letter authorising solicitor to pay creditor.**—A letter written by deft. to his attorney, requesting him to pay pltf. the whole amount of his bill, is not a privileged communication between attorney & client, & is evidence under the count for an account stated of the delivery of all the goods embraced in pltf.'s demand.—*JOHNSON v. SCHLENKER* (1850), 15 L. T. O. S. 562, N. P.

4226. — **Request to take care of bankrupt client's wife & children before absconding.**—*NICHOLSON v. COOPER*, No. 4209, *ante*.

4227. — **Request to take care of bankrupt client's books before absconding.**—*NICHOLSON v. COOPER*, No. 4209, *ante*.

4228. — **Communication of client's address—Address required for service of process.**—It is no objection to an order on pltf.'s attorney to disclose his client's address, that deft. wants the information for the purpose of executing against him an attachment for a debt.—*COX v. BOCKETT* (1865), 18 C. B. N. S. 239; 5 New Rep. 244; 34 L. J. C. P. 125; 11 L. T. 620; 11 Jur. N. S. 88; 13 W. R. 292; 144 E. R. 434.

4229. — — — — —]—The ct. will not make an order upon a solr. compelling him to disclose the address of his client, deft., who has absconded, & whom pltf. seeks to serve with a *subpoena duces tecum* to compel his appearance at the hearing with documents material to pltf.'s case.—*HEATH v. CREALOCK* (1873), L. R. 15 Eq. 257; 42 L. J. Ch. 455; 28 L. T. 101; 37 J. P. 357; 21 W. R. 380.

4230. — — — — —]—A witness who was being examined under Bkpcy. Act, 1861 (c. 134), s. 216, was asked where bkpt.'s father was residing. The witness, who was the father's solr., declined to answer, & stated that the place of residence of his client came to his knowledge in his professional capacity, & in the course & in consequence of the professional employment in which he was engaged on his client's behalf, & in no other way:—*Held*: (1) the witness had not made a case for excusing himself from answering on the ground of professional privilege; (2) the question was one which was authorised by the Act.—*Re CATHCART, Ex p. CAMPBELL* (1870), 5 Ch. App. 703; 23 L. T. 289; 18 W. R. 1056, L. J.

Annotations.—As to (1) *Apld.* Bursill v. Tanner (1885), 16 Q. B. D. 1. *Foll.* *Re* Arnott, *Ex p.* Chief Official Receiver (1888), 60 L. T. 109. *Refd.* Crawcour v. Salter (1881), 18 Ch. D. 30. *Generally, Mentd.* Young v. Gentle, [1915] 2 K. B. 661; Colchester Brewing Co. v. Tendring Licensing JJ., [1916] 2 K. B. 126.

4231. — — — — —]—A client's address, communicated to his solr. when applying to him for advice, is privileged from disclosure unless the solr. & his client were jointly engaged in the commission of some wrongful act, & the address was communicated to the solr. while so engaged. On July 31 debtor departed from his dwelling-house & took with him all his furniture. On Aug. 1 he had an interview with his solr., who was at that time unaware that an act of bkpcy. had been committed. On Oct. 4 debtor communicated by letter with his solr. In the proceedings that ensued the solr.'s clerk was examined as a witness, & declined to disclose debtor's address, on the ground that it had been communicated confidentially to his employer, as debtor's solr., for the purpose of advising his client in reference to these proceedings, & that such address had not been, so far as he believed, communicated by debtor to the rest of the world. On application being made to compel the witness to disclose the address:—*Held*: the address was under the circumstances a privileged communication, & as

Sect. 2.—Privilege: Sub-sect. 7, C. (c) ii., iii., iv., v. & vi.]

such need not be disclosed.—*Re ARNOTT, Ex p. CHIEF OFFICIAL RECEIVER* (1888), 60 L. T. 109; 37 W. R. 223; 5 MOTT. 286.

4232. ———.]—*ANON.* (1904), 39 L. Jo. 662.

— Communications of address of ward of court.]—*See Nos.* 4278, 4279, *post*.

4233. — Communications between co-adventurer & solicitor of other co-adventurer—*Statements at joint consultations.*—(1) Where two persons, each employing his own solr. are engaged in a joint adventure, & one of them, who is desirous of retiring from the adventure, suggests that his solr. should be consulted by his co-adventurer in regard to the matter, the statements made at an interview with his solr. by or to the co-adventurer are privileged, & cannot be admitted as evidence against him in an action by a third person brought in connection with the joint adventure.

(2) *Semble*: statements made at joint consultations between parties & their counsel or their solrs. would be similarly privileged.—*ROCHE-FOUCAULD v. BOUSTEAD* (1896), 65 L. J. Ch. 794; 74 L. T. 783; *reversd.* on other grounds, [1897] 1 Ch. 196, C. A.

Annotations:—*Generally*, *Mentd. Re Gallard, Ex p. Gallard*, [1897] 2 Q. B. 8; *Isaacs v. Evans* (1899), 16 T. L. R. 113; *Brooks v. Muckleston*, [1909] 2 Ch. 519; *Taylor v. Davies*, [1920] A. C. 636.

iii. Relating to Litigation Pending or Contemplated.

4234. General rule.—Communications from a party in a suit to his solr. with reference to the suit are privileged communications.—*LLOYD v. LLOYD* (1839), 2 Curt. 262; 163 E. R. 405.

4235. ———.]—(1) Where exceptions to the evidence of a witness were proposed to be established by the testimony of persons consulted by the party in the cause as proctors in another cause:—*Held*: the communications were privileged.

(2) Whether such persons can, under such circumstances, be permitted to prove a negative, without making disclosures.—*CASEY v. SHAUNESSY* (1845), 4 Notes of Cases, 150.

4236. ———.]—When interrogatories have been administered in a cause they cannot afterwards be used on the trial with a view to contradict the person to whom they were administered on his examination in ct. on the ground that such would be an inquiry into the client's instructions to his

attorney, which are privileged communications.—*CARWELL v. GEES* (1866), 15 L. T. 217.

4237. — Application to divorce suits.]—In showing cause why a decree *nisi* obtained by the husband for dissolution of marriage on the ground of the wife's adultery ought not to be made absolute, petitioner's solr. was called as a witness on behalf of the Queen's Proctor, & it was proposed to ask the witness whether, in the course of the proceedings in the cause petitioner had not made an admission to him respecting a matrimonial offence:—*Held*: the evidence was inadmissible, the communications between solr. & client in divorce suits as in all civil actions being privileged.—*BRANFORD v. BRANFORD* (1879), 4 P. D. 72; 48 L. J. P. 40; 40 L. T. 659; 27 W. R. 691.

— *See, generally*, *HUSBAND & WIFE*.

4238. What are—Statement of intention to waive forfeiture.—An attorney cannot allege that his client has declared before action brought he will waive a forfeiture on which he supports his action.—*GOODLIGHT v. BRIDGE* (1772), Loftt. 27; 98 E. R. 515.

4239. — Communication as to defence likely to be raised.]—It is not competent to ask pltf. on cross-examination whether he did not tell his attorney that his drunkenness would be set up by deft. in answer to the action.—*BYRANT v. SHORT & ELDREDGE* (1852), 19 L. T. O. S. 209.

iv. Not Intended as Confidential.

4240. Communication intended for publication.—*DOE d. MARIOTT v. HERTFORD* (MARQUESS), No. 4224, *ante*.

4241. Communication to third party.—A solr. may be called upon to give evidence as to a communication made by his client to a third person although such evidence would establish an act of bkpey. against his client.—*Re MULLENS, Ex p. MULLENS* (1849), Fonbl. 11; 14 L. T. O. S. 137.

v. With or in Presence of Other Party.

4242. Communications between parties.—*GAINSFORD v. GRAMMAR*, No. 4216, *ante*.

4243. — Offer to compound with creditors.]—A debtor, being in prison, wrote to the town agents of his creditors' attorneys, requesting them to send a confidential clerk to him, with whom he might communicate on the subject of his creditors' claim. In an action by the creditors to recover the claim:—*Held*: what debtor said to the person who went to him in consequence of his latter, was

PART V. SECT. 2, SUB-SECT. 7.—C. (c) iii.

4234 i. General rule.—Deft.'s counsel at the trial desired to ask pltf.'s attorney what his client told him about the note sued upon when he gave instructions for the suit:—*Held*: such evidence was rightly rejected.—*HARRIS v. MCLEOD* (1856), 14 U. C. R. 164.—*CAN.*

4234 ii. ———.]—The rule of evidence that a communication respecting a suit between the agent of the client & his attorney is privileged, is not altered by 19 Vict. c. 41, s. 1, allowing the parties to be examined as witnesses.—*LAWTON v. CHANCE* (1859), 4 All. 411.—*CAN.*

4234 iii. ———.]—Letters written by one of deft.'s servants to another for the purpose of obtaining information with a view to possible future litigation are not privileged, even though they might, under the circumstances, be required for the use of deft.'s solr. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of solr.—*BIPRO DOSS DEY v.*

SECRETARY OF STATE FOR INDIA IN COUNCIL (1885), 1 L. R. 11 Cal. 655.—*IND.*

4239 i. What are—Communications as to defence likely to be raised.—An attorney is not obliged to answer as to contents of deeds, etc., placed in his hands by deft. for the purposes of his defence.—*LYNCH v. O'HARA* (1859), 6 C. P. 259.—*CAN.*

4239 ii. ———.]—Scroll of defences prepared by a party against a criminal charge, but never lodged, & recovered from the hands of a third party:—*Held*: confidential, & therefore not admissible as evidence against another party, in a reduction of the same bill to which the criminal charge referred.—*GAVIN v. CRAWFORD* (1830), 6 Fac. Coll. 135.—*SCOT.*

PART V. SECT. 2, SUB-SECT. 7.—C. (c) iv.

4240 i. Communication intended for publication.—A witness will not, on the ground of privilege, be allowed to refuse to answer the question whether he authorised or directed his solr.

to make to the solr. of the opposite party a communication which was intended by him to be made known to a third party in adverse interest in anticipated or pending litigation.—*R. v. PRENTICE & WRIGHT* (1914), 29 W. L. R. 665; 7 W. W. R. 271; 23 Can. Crim. Cas. 436; 20 D. L. R. 791; 7 Alta. L. R. 479.—*CAN.*

PART V. SECT. 2, SUB-SECT. 7.—C. (c) v.

4242 i. Communications between parties.—*Semble*: a letter written before action by solr. of defts. to solr. for pltf., was improperly received in evidence.—*MCBRIDE v. HAMILTON PROVIDENT & LOAN SOCIETY* (1898), 29 O. R. 161.—*CAN.*

4242 ii. ———.]—A communication by a party to a legal proceeding directly to the solr. of the other party, that communication being reasonably necessary for the purpose of enclosing money & settling an outstanding claim, must be regarded as a privileged one.—*WARD v. MCINTYRE* (1920), 49 N. B. R. 233; 56 D. L. R. 208.—*CAN.*

receivable in evidence, even though the subject-matter of the communication was an offer of 10s. in the pound.—*HILL v. ELLIOTT* (1832), 5 C. & P. 436.

4244. — *Negotiations for compromise.*—A witness may be called upon by pltf. to state a conversation in which deft. proposed a compromise to pltf. although the witness attended on that occasion as attorney for deft.—*GRIFFITH v. DAVIES* (1833), 5 B. & Ad. 502; 110 E. R. 876; *sub nom.* *RIPON v. DAVIES*, 2 Nev. & M. K. B. 310.

Annotations:—*Consd.* *Weeks v. Argent* (1847), 16 M. & W. 817; *Foakes v. Webb* (1881), 28 Ch. D. 287. *Refd.* *Davies v. Waters* (1842), 9 M. & W. 608; *Shore v. Bedford* (1843), 5 Man. & G. 271; *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K. B. 461.

4245. — *—*—*DOE d. STARLING v. HILLIER* (1844), 3 L. T. O. S. 50.

4246. — *—*—*—*—Where the clerk of pltf.'s attorney went to deft.'s attorney for the object of effecting a compromise, & what he said was said with the wish of effecting it:—*Held:* all that passed was privileged, as being a negotiation to bring about a compromise.—*JARDINE v. SHERIDAN* (1846), 2 Car. & Kir. 24, N. P.

4247. — *—*—*MARSTON v. DOWNES*, No. 4218, ante.

4248. — *—*—(1) A bill filed by the insurers of a life against insured, to which the solr. of the insured was a party as deft. stated that, on a particular day, an agent of a co. with whom insured wished to effect an insurance, came to the office of insured, & told their agent that the life was bad, handing to the agent at the same time an unfavourable medical report upon the life. Deft., the solr. of the insured, was present at this interview, but in his answer to the bill refused to state what passed, because he was then the solr. & attorney, & was present as the solr. & attorney of insured, & acquired his information, touching the matters which he refused to answer, solely from the fact of his being present at the time, in the capacity of solr. & attorney, & professional & confidential adviser of insured:—*Held:* this answer was insufficient.

(2) Principles upon which some communications are held to be privileged from disclosure.—*DESBOROUGH v. RAWLINS* (1838), 3 My. & Cr. 515; 7 L. J. Ch. 171; 2 Jur. 125; 40 E. R. 1025, L. C.

Annotations:—*As to* (1) *Consd.* *Mackenzie v. Yeo* (1841), 2 Curt. 866; *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162. *Refd.* *Walsingham v. Goodricke* (1843), 3 Hare, 122; *Re Mullens, Ex p. Mullens* (1849), Fombl. 11. *As to* (2) *Consd.* *Kennedy v. Lyell* (1883), 23 Ch. D. 387. *Refd.* *Herring v. Globbery* (1842), 1 Ph. 91.

4249. — *—*—A. having a claim against B., they went together to the office of A.'s attorney, who had never acted as attorney for B. A statement was made by B. relating to A.'s claim; & it was arranged that the attorney should, on behalf of B., write to a third party in respect of the subject-matter of the claim. An action having been afterwards brought by A. against B.:—*Held:* (1) the statement by B. was not a privileged communication; (2) the letter, being an act done, might be proved by the attorney.—*SHORE v. BEDFORD* (1843), 5 Man. & G. 271; 12 L. J. C. P. 138; 134 E. R. 567.

4250. — *—*—A person is not entitled to professional protection for any communication, not with his own client, but with a person opposed

to his client. . . . Any communication which the solr. of one party has with a party opposed to him in the cause is extremely unprofessional (Dr. PHILLIMORE).—*JONES v. JONES* (1817), 5 Notes of Cases, 131.

4251. — *—*—The attorney who prepared an assignment of mtge. from A. to B. was previously B.'s attorney, & on this occasion acted upon B.'s retainer, & at his instance only. He, however, received information from A., & delivered to him his bill of costs, & no other attorney was employed in the business:—*Held:* the communications made to such attorney by A. were not privileged.—*R. v. HOUNSFIELD* (1849), 13 J. P. 460.

4252. — *—*—The rule of privilege protecting confidential communications does not extend to communications between the solrs. of opposite parties.

A bill was filed to set aside a deed, on the ground of alterations having been improperly made in it after execution. Deft. examined the solr. of pltf. as a witness to prove communications between them, showing that the solr. was aware of the alteration in the deed. To the interrogatory on this point the witness demurred, because he alleged that it inquired about matters only known to him as solr. for pltf.:—*Held:* this could not protect him from the necessity of disclosing his communications with deft.—*GORE v. BOWSER* (1851), 5 De G. & Sm. 30; 64 E. R. 1004; *sub nom.* *GORE v. HARRIS*, 21 L. J. Ch. 10; 18 L. T. O. S. 104; 15 Jur. 1168.

Annotations:—*Consd.* *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162. *Refd.* *Kennedy v. Lyell* (1883), 23 Ch. D. 387.

4253. — *—*—Where a solr. had been employed by residuary legatees with reference to a proposed purchase by the exors. of part of the trust estate:—*Held:* the exors. could not use the solrs. depositions as to what took place between them & him upon the subject, for the purpose of showing a participation on the part of the residuary legatees in the sale.—*LODGE v. PRICHARD* (1851), 4 De G. & Sm. 587; 17 L. T. O. S. 203; 15 Jur. 1147; 64 E. R. 969.

4254. Communication in presence of other party.—Conversation between party & legal adviser.—A communication between an attorney & his client is not confidential, if made in the presence & within hearing of the opposite attorney.—*SORDEN v. COWTON* (1839), 3 Jur. 1027.

4255. — *—* **Relating to agreement between parties.**—Where an act is done in pursuance of a bargain between two parties in the presence of the attorneys for each of them, the communication by one party to his attorney relating to that act, is not privileged, so as to prevent the attorney from giving evidence of it.—*WEEKS v. ARGENT* (1847), 16 M. & W. 817; 2 New Pract. Cas. 235; 16 L. J. Ex. 209; 9 L. T. O. S. 129; 11 Jur. 525; 153 E. R. 1422.

When ground for resisting production of documents.—*See* DISCOVERY, Vol. XVIII., p. 143, Nos. 919–925.

vi. In Furtherance of Illegal or Criminal Purpose.

4256. General rule.—(1) A bill impeached a deed on the ground of fraud, & interrogated deft. as to the contents of certain letters which had

4254 i. Communication in presence of other party.—Conversation between party & legal adviser.—To be privileged under Evidence Act, 1872, s. 126, a communication by a party to his attorney must be of a confidential or private nature. Where defts. at an interview, at which pltf. was present,

admitted their partnership to their attorney, who was then also acting as attorney for pltf.:—*Held:* the attorney was not precluded by the above sect. from giving evidence of this admission to him, because defts.' statements, having been made in presence & hearing of pltf., could not be regarded as con-

fidential or private.—*MEMON HAJEE HAROON MAHOMD v. ABDUL KARIM* (1878), 1 L. R. 3 Bom. 91.—**IND.**

PART V. SECT. 2, SUB-SECT. 7.—C. (c) vi.

4256 i. General rule.—There is no privilege in communications between

Sect. 2.—Privilege: Sub-sect. 7, C. (c) vi., vii., viii. & ix. & (d).]

passed between her & her solr. & which, it stated, showed that the deed was prepared & executed for the alleged fraudulent purpose. Deft. in her answer declined to set forth the contents of the letters, as being privileged communications:—*Held*: the transaction, according to the account of it given in the bill & answer was not a fraud; & therefore, deft. was not bound to set forth the contents of the letters.

(2) Communications between a solr. & his client relative to a fraud contrived between them, are not exceptions to the general rule, they do not fall within the rule itself, for the rule applies not to all that passes between a solr. & his client, but only to what passes between them in professional confidence; & no ct. can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solr.—*FOLLETT v. JEFFERYES* (1850), 1 Sim. N. S. 3; 20 L. J. Ch. 65; 15 Jur. 118; 61 E. R. 1.

Annotations:—*As to* (1) *Conad. Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722. *Reid. Mornington v. Mornington* (1861), 2 John. & H. 697. *As to* (2) *Conad. R. v. Cox & Railton* (1884), 14 Q. B. D. 153. *Reid. Thompson v. Falk* (1852), 1 Drew. 21; *Charlton v. Coombes* (1863), 4 Giff. 372; *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751.

4257. —.]—(1) The reasons of the rule which protects from disclosure communications made in professional confidence, apply in cases of conflict between the client or those claiming under him & third persons, but do not apply in cases of testamentary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the exors. as against the next of kin, but following the legal interest is subject to the trusts & incidents to which the legal interest is subject.

On a bill by the next of kin of deceased against his exors., who were his residuary devisees & legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the solr. of testator, who was also, after the death of testator, the solr. of defts., the exors., was examined, as a witness for pltf. On a motion by defts. to suppress the depositions of the solr. on the ground of professional confidence:—*Held*: the communications between testator & the solr. might be read, & the communications between defts., the exors., & the solr. after the death of testator, were privileged.

(2) A privilege given for the protection of the client cannot have the effect of excluding evidence of a trust which he had intended to create, & thus defeat a claim by the parties who accepted the trust, to hold the trust property beneficially.

(3) Communications between solr. & client, through the medium of an agent, are protected equally with communications had directly with the principal.

(4) *Semble*: the existence of an illegal purpose would prevent any privilege from attaching to the communications between solr. & client.—*RUSSELL*

v. JACKSON (1851), 9 Hare, 387; 21 L. J. Ch. 146; 18 L. T. O. S. 166; 15 Jur. 1117; 68 E. R. 558.

Annotations:—*As to* (1) *Conad. R. v. Cox & Railton* (1884), 14 Q. B. D. 153; *O'Rourke v. Darbishire*, [1920] A. C. 581. *Reid. Bullivant v. A.-G. for Victoria*, [1901] A. C. 198. *As to* (4) *Reid. Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722; *Williams v. Quebrada Ry., Land & Copper Co.*, [1895] 2 Ch. 751. *Generally, Mentd. Proby v. Landor* (1860), 28 Beav. 504.

4258. —.]—It must not be understood that I give the slightest sanction for there being any privilege of a client who consults an attorney as to the concoction or with respect to the committing of a crime or a fraud. I believe the law is, & properly is, that if a party consults an attorney & obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed if any such privilege should be contended for or existed it would work most grievous hardship on an attorney who after he had been consulted upon what subsequently appeared to be a manifest crime & fraud would have his lips closed & might place him in a very serious position of being suspected to be a party to the fraud & without his having an opportunity of exculpating himself. . . . There is no privilege in the case which I have suggested of a party consulting another, a professional man, as to what may afterwards turn out to be a crime of fraud & the best mode of accomplishing it (*BOVILL, C.J.*).—*TICHBORNE v. LUSHINGTON* (1872), Notes of Proceedings, p. 5212.

Annotations:—*Reid. R. v. Cox & Railton* (1884), 14 Q. B. D. 153. *Mentd. Tichborne v. Mostyn* (1872), L. R. 8 C. P. 29.

4259. —.]—All communications between a solr. & his client are not privileged from disclosure, but only those passing between them in professional confidence & in the legitimate course of professional employment of the solr. Communications made to a solr. by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.

C. & R. were partners under a deed of partnership. M. brought an action against R. & Co. & obtained judgment therein, & issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, & upon the trial of this issue, the partnership deed was produced on C.'s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the partnership prior to the commencement of the action by M. Subsequently C. & R. were tried & convicted upon a charge of conspiring to defraud M., & upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. & C. was in truth subsisting when it was given, & that the memorandum of dissolution indorsed on the deed was put there

solr. & client made for the purpose of guidance or assistance in the commission of a crime or fraud.—*JONAS v. FORD* (1885), 11 V. L. R. 240.—*AUS.*

4256 ii. —.]—If a man should confide to a professional person that he had a treasonable or felonious intention, & wished to know how he might execute it so as to escape punishment, such communication, which might make the person consulted guilty of misprision if not disclosed, would not be privileged; but if a man meditates

an act which, exceeding certain limits, would become criminal, & confined within certain bounds would be perfectly justifiable, the person asking the advice must be considered as seeking how he may avoid, & not how he may commit a crime; & such communication is privileged.—*R. v. HAYDN* (1825), 2 Fox & S. R. 379.—*IR.*

4256 iii. —.]—In an action to set aside certain deeds made to the prejudice of creditors, defender's solr. was called on to produce a corre-

spondence between him & his client. Objected on the ground of confidentiality. The ct. after inquiry as to the description of the letters repelled the objection. The proceedings labelled amounted to fraud, & therefore to a moral wrong. Letters passing between the bkpt. & his professional adviser in connection with the contemplated fraud were of the very marrow of the necessary inquiry & certainly not privileged.—*McCOWAN v. WRIGHT* (1853), 1 W. R. 184.—*SCOT.*

after M. had obtained judgment, & fraudulently ante-dated, the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solr. was called on behalf of the prosecution to prove that after M. had obtained the judgment C. & R. together consulted him as to how they could defeat M.'s judgment, & as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, & that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solr. & client, & privileged, the evidence was received but the question of whether it was properly received was reserved for this ct.:—*Held*: the evidence was properly received.—*R. v. COX & RAILTON* (1884), 14 Q. B. D. 153; 51 L. J. M. C. 41; 52 L. T. 25; 49 J. P. 374; 33 W. R. 396; 1 T. L. R. 181; 15 Cox, C. C. 611, C. C. R.

Annotations:—*Consd.* *Ward v. Marshall* (1887), 3 T. L. R. 578; *Williams v. Quebrada Ry., Land & Copper Co.* [1895] 2 Ch. 751; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520. *Reffd.* *Proctor v. Smiles* (1886), 2 T. L. R. 845; *Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman* (1887), 35 Ch. D. 722; *R. v. Smith* (1915), 84 L. J. K. B. 2153; *O'Rourke v. Darbishire*, [1920] A. C. 581.

4260. Whether legal adviser compelled to give evidence.—To prove usurious contract.—Deed prepared by witness.—An attorney who prepared deeds which are granted on an usurious consideration, may be called as a witness to prove the usury.—*DUFFIN v. SMITH* (1792), Peake, 146, N. P.

Annotations:—*Consd.* *Greenough v. Gaskell* (1833), 1 My. & K. 98. *Appl.* *Weeks v. Argent* (1847), 16 M. & W. 817. *Mentd.* *Herring v. Cloberry* (1842), 11 L. J. Ch. 149.

4261. —As to whether advice sought for lawful or unlawful purpose.—*DOE d. SHELLARD v. HARRIS*, No. 4201, *ante*.

Whether legal adviser bound to produce documents.—*See DISCOVERY*, Vol. XVIII., pp. 143-145. **In criminal proceedings.**—*See CRIMINAL LAW*, Vol. XIV., pp. 427-429.

vii. Voluntarily Revealed.

4262. Privileged document produced for inspection.—A case laid before counsel on behalf of deft. which has been produced for the inspection of pltf. under the usual order, may be read in support of pltf.'s motion for a receiver.—*GEORGE v. EVANS* (1810), 4 Y. & C. Ex. 211; 160 E. R. 982.

viii. Client not within Protection of Privilege.

4263. Duty of legal adviser to disclose communication.—A solr. is bound to answer as to all matters confided to him by his client which the client himself would be bound to answer.—*Re ELLIOTT* (1850), Fombl. 74; 14 L. T. O. S. 508.

4264. ——The solr. to bkpt. may be examined upon communications made to him professionally by bkpt. relating to his property or dealings. Bkpt. being compelled to disclose them, his attorney possesses no greater privilege than himself.—*Re CHANCELLOR* (1850), 16 L. T. O. S. 323.

PART V. SECT. 2. SUB-SECT. 7.—C. (c) ix.

4266 i. General rule.—The privilege of a client that his solr. must not be admitted to disclose confidential communications does not extend to the nonadmission of evidence of instructions given to a common solr. in the presence of both parties.—*WILSON v. MCLELLAN*, [1919] 3 W. W. R. 62.—*CAN.*

4266 ii. ——Where defts. at an J.—VOL. XXII.

interview, at which pltf. was present, admitted their partnership to their attorney, who was then also acting as attorney for pltf. —*Held*: the attorney was not precluded by Evidence Act, 1872, s. 126, from giving evidence of this admission to him, because those statements did not appear to have been made to the attorney exclusively in his character of attorney for defts., but to have been addressed to him also as attorney for pltf.—*MEMON HAJER HAROON MAHOMED v. ABDUL KARIM*

4265. ——(1) A solr., in the presence of his client, objected to produce a document, on the ground of professional confidence:—*Held*: the document was not privileged as regarded the client himself, & its production would be ordered.

(2) A witness is bound to produce a document, in order that it may be given in evidence, notwithstanding he may have a lien on it.—*Re CAMERON'S COALBROOK, ETC. RY. CO.* (1857), 25 Beav. 1; 53 E. R. 535.

Annotations:—*As to* (2) *Reffd.* *Re South Essex Estuary Reclamation Co., Ex. p. PALME & LAYTON* (1869), 38 L. J. Ch. 305; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96.

Whether client bound to disclose communication.—Legal adviser within protection of privilege.—*See* No. 4157, *ante*.

ix. Legal Adviser Common to Both Parties.

4266. General rule.—Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other.—*BAUGH v. CRADOCKE* (1832), 1 Mood. & R. 182, N. P.

Annotation:—*Fold.* *Perry v. Smith* (1842), 9 M. & W. 681.

4267. ——Communications made to an attorney, acting as such between two parties, are not privileged from disclosure against either party.—*CLEVE v. POWEL* (1832), 1 Mood. & R. 228, N. P.

4268. ——Where, upon the sale of an estate, the same attorney was employed by the vendor & by the purchaser:—*Held*: a communication from the purchaser to the attorney, asking for time to pay the purchase-money was not privileged.—*PERRY v. SMITH* (1842), 9 M. & W. 681; 11 L. J. Ex. 269; 152 E. R. 288; *previous proceedings*, *Car. & M.* 554, N. P.

Annotations:—*Mentd.* *Re Bayley-Worthington & Cohen's Contract*, [1909] 1 Ch. 648; *British & Beningtons v. North Western Cachar Tea Co.*, [1923] A. C. 48.

4269. Solicitor employed by trustee.—In matters of trust.—Solicitor acting for cestui que trust.—Although looking to trustee for costs.—In an action by a *cestui que trust* against a trustee, a communication was made by deft. to an attorney, who had been employed by him in the matters of the trust, & only relating to such matters. It appeared that the witness, though he looked to deft. for his costs, pltf. at the time being a married woman, yet was acting for pltf., & did not consider deft. as his client; his employment having been only in getting in the monies due on the securities assigned to deft. under the trusts of a separation deed, & which formed the subject of the trusts:—*Held*: the communication was not privileged, & the real interest was in the *cestui que trust*, pltf.—*SHEAN v. PHILIPS* (1859), 1 F. & F. 449, N. P.

(d) Information acquired from Collateral Sources.

4270. General rule.—*KELWAY v. KELWAY* (1580), Cary, 89; 21 E. R. 47.

4271. ——An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client extending to exclude the

(1878), 1 L. R. 3 Bom. 91.—*IND.*

4266 iii. ——An agent for a party found obliged to produce correspondence between himself & the country agent & factor, relative to possession of an estate claimed by the other party, for whom the country agent had also been factor, although said to be confidential, & for the purpose of giving information for reducing the title of the other party.—*HAMILTON (DUKE) v. HAMILTON* (1819), 19 Fac. Coll. 740.—*SCOT.*

Sect. 2.—Privilege: Sub-sect. 7, C. (d) & (e), D. & E.; sub-sects. 8 & 9.]

disclosure of any fact communicated confidentially to the witness in the character of his attorney.—*SPENCELEY v. SCHULENBURGH* (1806), 7 East, 357; 3 Smith, K. B. 325; 103 E. R. 138.

*Annotations:—*Consd. *Sawyer v. Birchmore* (1835), 3 My. & K. 572; *Desborough v. Rawlins* (1838), 3 My. & Cr. 515; *Ford v. Tennant* (No. 2) (1863), 32 Beav. 162; *Kennedy v. Lyell* (1883), 23 Ch. D. 387.

4272. ———.]—*SAWYER v. BIRCHMORE*, No. 4176, *ante*.

4273. ———.]—*MACKENZIE v. YEO*, No. 4154, *ante*.

4274. ———.]—The privilege which protects confidential communications between solr. & client from disclosure, does not extend to information acquired by a solr., not from his client, but from collateral sources, even though such information was obtained by the solr. in his character of solr. & solely by reason of his occupying that position.—*FORD v. TENNANT* (No. 2) (1863), 32 Beav. 162; 1 New Rep. 303; 32 L. J. Ch. 465; 7 L. T. 733; 27 J. P. 211; 9 Jur. N. S. 292; 11 W. R. 324; 55 E. R. 63.

*Annotations:—*Consd. *Kennedy v. Lyell* (1883), 23 Ch. D. 387. *Refd.* *Ainsworth v. Wilding*, [1900] 2 Ch. 315.

4275. Information from client & other sources.]—If a solr. obtains information from his client, & also from other sources, it is not privileged, & the solr. if made a party to a suit with his client, is bound to answer interrogatories respecting it, though his client made the communications to him confidentially.—*LEWIS v. PENNINGTON* (1800), 29 L. J. Ch. 670; 2 L. T. 314; 6 Jur. N. S. 478; 8 W. R. 465.

*Annotations:—*Consd. *Kennedy v. Lyell* (1883), 23 Ch. D. 387. *Refd.* *Tournier v. National Provincial & Union Bank of England*, [1924] 1 K. B. 461.

(e) Matters Essential to Justice.

4276. Non-disclosure defeating client's intention—Validity of deceased client's will.]—An attorney who prepared a testamentary paper, at the instance of the party benefitted by it, is not privileged, on the ground of professional confidence, to withhold from the court, facts relating to contemporaneous acts, upon which he founded his opinion of the testamentary capacity of the party making the will.—*JONES v. GODRICH* (1845), 5 Moo. P. C. C. 16; 3 Notes of Cases, 487; 9 Jur. 313; 13 E. R. 391, P. C.

*Annotations:—*Mentd. *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301; *Anon.* (1855), 9 Moo. P. C. C. 434; *Moloney v. Casey* (1863), 9 L. T. 57.

4277. ——— Enforcement of trust created by client.]—*RUSSELL v. JACKSON*, No. 4257, *ante*.

4278. Address of ward of court.]—B. being made a ward of ct. on bill filed, & a guardian appointed, the mother resisted the order, & removed B. to Spain. The mother subsequently came to England & an order was made for delivery up of the ward in a limited time, & her former solr. was examined in ct. as to her residence & other matters, & claimed professional privilege:—*Held:* (1) he was bound to answer such questions; (2) no solr. or officer of the ct. or other person, can refuse to answer any questions, or do, or abstain from doing anything, whereby the ct. is prevented from discovering the residence of its ward.—*BURTON v. DARNLEY (EARL)* (1869), L. R. 8 Eq. 576, n.; 21 L. T. 292; 17 W. R. 1057.

*Annotations:—*As to (2) *Expld.* *Ramsbotham v. Senior* (1869), L. R. 8 Eq. 575. *Refd.* *Heath v. Crealock* (1873), L. R. 15 Eq. 257.

4279. ———.]—A solr. is bound to give to the ct. any information which may lead to the discovery of the residence of a ward of the ct. whose

residence is being concealed from the ct., although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the ct. had absconded with the wards, her solr. was ordered to produce the envelopes of letters which he had received from her as her solr., with the object of discovering her residence from the postmarks.—*RAMSBOTHAM v. SENIOR* (1869), L. R. 8 Eq. 575; 21 L. T. 293; 31 J. P. 85; 17 W. R. 1057.

*Annotations:—*Refd. *Heath v. Crealock* (1873), L. R. 15 Eq. 257; *Crawcour v. Salter* (1881), 18 Ch. D. 30; *Rosenberg v. Lindo* (1883), 48 L. T. 478.

4280. Material facts in divorce suit.]—The plea of privilege cannot be relied upon to keep back material facts from the ct. in a divorce suit; nor by a client who has attacked the character of her solrs. in order to prevent them from vindicating it.—*LAMBART v. LAMBART* (1907), 51 Sol. Jo. 345.

4281. ———.]—*Semble:* a solr. who has acted for resp. in a divorce suit is a compellable witness, & his evidence as to statements made by resp. may be accepted by the ct. in coming to a conclusion as to the truth of a confession of adultery made by resp.—*GETTY v. GETTY*, [1907] P. 334; 76 L. J. P. 158; 98 L. T. 60.

*Annotation:—*Mentd. *Weinberg v. Weinberg* (1910), 27 T. L. R. 9.

———.]—*See, further, HUSBAND & WIFE.*

D. Duration of Privilege.

4282. Permanent.]—*WILSON v. RASTALL*, No. 4148, *ante*.

4283. ———.]—The attorney for deft. in a former action cannot be called as a witness to prove the debt, in an action against the sheriff for an escape, where he became acquainted with the business only by the information of his client.—*SLOMAN v. HERNE* (1798), 2 Esp. 695, N. P.

4284. ———.]—*FISHER v. HEMING* (1809), *Phillipps & Arnold on Law of Evidence* 10th ed., Vol. 1, p. 116.

*Annotations:—*Dttd. *Lloyd v. Mostyn* (1842), 12 L. J. Ex. 1. *Refd.* *Calcraft v. Guest* (1898), 67 L. J. Q. B. 505.

4285. ———.]—Letters between deft. or his solr. & the solrs. of his predecessor in title admitted as secondary evidence of contents of deeds in the possession of deft. & which he refused to produce.—*SUTCLIFFE v. JAMES* (1879), 40 L. T. 875; 27 W. R. 750.

E. Waiver of Privilege.

4286. What amounts to—Witness allowed to be examined—Waiver of privilege as regards cross-examination.]—Where at land the party calls upon his attorney for a witness the other side may cross-examine him to the point in the cause.—*VAILLANT v. DODEMEAD* (1743), 2 Atk. 524; 26 E. R. 715, L. C.; *subsequent proceedings*, 2 Atk. 592, L. C.

*Annotations:—*Refd. *Lloyd v. Lloyd* (1839), 2 Curt. 262. *Mentd.* *Parkhurst v. Lowten* (1819), 2 Swan. 194.

4287. Effect of—Duty of legal adviser to give evidence.]—*LEA v. WHEATLEY* (1878), 20 State Tr. 574, n.

4288. ———.]—*BAILLIE'S CASE* (1779), 21 State Tr. 1.

*Annotations:—*Mentd. *Harrison v. Bush* (1856), 5 E. & B. 344; *R. v. Goodwin* (1857), 21 J. P. 742.

4289. ———.]—In an action by the assignees of bkpt. communications made by bkpt. to his attorney may be given in evidence, to prove the act of bkpcy. if bkpt. consents; & it does not lie in the mouth of deft. to take the objection to their

disclosure.—*MERLE v. MOORE* (1828), 2 C. & P. 275; *Ry. & M.* 390, N. P.
Annotation:—*Refd.* *Re Chancellor* (1850), 16 L. T. O. S. 323.

4290. ———.]—*Solr.* for prisoners, authorised by one of them to give his confidential statement in evidence, called by the ct.—*R. v. REEN & LINTOTT* (1909), 2 Cr. App. Rep. 310, C. C. A.

4291. Refusal to waive privilege—Effect of—No adverse presumption against party refusing.]—There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solr. of knowledge professionally acquired.—*WENTWORTH v. LLOYD* (1864), 10 H. L. Cas. 589; 33 L. J. Ch. 688; 10 L. T. 767; 10 Jur. N. S. 961; 11 E. R. 1154, H. L.
Annotation:—*Mentd.* *A-G. v. Richmond* (No. 1), [1908] 2 K. B. 729.

SUB-SECT. 8.—MINISTERS OF RELIGION.

4292. Obligation to disclose confidential communications.]—*BROAD v. PITT*, No. 4194, *ante*.

4293. ———.]—*WILSON v. RASTALL*, No. 4148, *ante*.

4294. ———.]—A chaplain to a workhouse had in his spiritual capacity frequent conversations there with prisoner, who was charged with the murder of her child, but who was too ill to be removed from the workhouse; *semble*: these conversations ought not to be adduced in evidence on the trial.—*R. v. GRIFFIN* (1853), 6 Cox, C. C. 219.

4295. ——— *Statement received in confessional.]*—*Semble*: statements made to a priest or clergyman in sacramental or quasi-sacramental confession are privileged, but anything said or done out of confession is not so, even although its disclosure may incidentally disclose the identity of the party.—*R. v. HAY* (1860), 2 F. & F. 4.

4296. ———.]—There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, & which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honour or reputation, are not protected (*JESSEL, M.R.*).—*WHEELER v. LE MARCHANT* (1881), 17 Ch. D. 675; 50

L. J. Ch. 793; 44 L. T. 632; 45 J. P. 728; 30 W. R. 235, C. A.

Annotations:—*Refd.* *Kennedy v. Lyell* (1883), 23 Ch. D. 387; *Westinghouse v. Mid. Ry.* (1883), 48 L. T. 462; *Proctor v. Smiles* (1886), 55 L. J. Q. B. 467; *Kyshe v. Holt, Childs & Brotherton*, [1888] W. N. 128; *Lowden v. Blakey* (1889), 23 Q. B. D. 332; *Sammon v. Bennett* (1892), 8 T. L. R. 235; *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686; *Calcraft v. Guest*, [1898] 1 Q. B. 759; *R. v. Bullivant*, [1900] 2 Q. B. 163. *Mentd.* *Pearce v. Foster* (1885), 15 Q. B. D. 114.

4297. ———.]—*RUTHVEN v. DE BOUR* (1901), 45 Sol. Jo. 272.

4298. ———.]—In a suit by the husband it appeared that, subsequently to the discovery by petitioner of an alleged act of adultery between resp. & co-respondent, resp. had an interview with a clergyman, who, at the trial, was called as a witness on behalf of petitioner, but objected, on the ground of privilege, to disclose the conversation or anything that took place at the interview:—*Held*: the clergyman had no right to withhold the information.—*NORMANSHAW v. NORMANSHAW & MEASHAM* (1893), 69 L. T. 468.

In criminal proceedings.—Confessions made to ministers of religion.]—*See CRIMINAL LAW*, Vol. XIV., p. 421, Nos. 4401, 4404.

SUB-SECT. 9.—MEDICAL ADVISERS.

4299. Obligation to disclose confidential communications.—Suits for jactitation of marriage.]—*R. v. KINGSTON (DUCHESS)* (1776), 20 State Tr. 355, 573.

Annotations:—*Refd.* *Wilson v. Rastall* (1792), 4 Term Rep. 753; *Doe d. Peter v. Watkins* (1837), 4 Scott, 155. *Mentd.* *Galbraith v. Neville* (1789), 1 Doug. K. B. 6, n.; *Kennell v. Abbott* (1799), 4 Ves. 802; *White v. Hall* (1806), 12 Ves. 321; *R. v. Knaptoft* (1824), 3 B. & C. 883; *Staford v. Clark* (1824), 9 Moore, C. P. 724; *Bland v. Lynam* (1827), 5 L. J. O. S. C. P. 87; *Martin v. Nicolls* (1830), 3 Sim. 458; *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266; *Bandon v. Beecher* (1835), 9 Bl. N. S. 532; *R. v. Wye* (1838), 7 Ad. & El. 761; *R. v. Caley* (1841), 5 Jur. 709; *Hill v. Barry* (1842), 7 Jur. 10; *R. v. Sow* (1843), 4 Q. B. 93; *Meddowcroft v. Huguenin* (1844), 4 Moo. P. C. C. 386; *Robertson v. Struth* (1844), *Dav. & Mor.* 772; *Barrs v. Jackson* (1845), 1 Ph. 582; *Terry v. Newman* (1846), 15 M. & W. 645; *De Bode v. R.* (1848), 13 Q. B. 364; *Bailey v. Harris* (1849), 13 Jur. 341; *O'Brien v. R.* (1849), 3 Cox, C. C. 360; *R. v. Basingstoke* (1850), 14 Q. B. 611; *Bank of Australasia v. Nisus* (1851), 16 Q. B. 717; *R. v. Blakenore* (1852), 2 Den. 410; *R. v. Haughton* (1853), 1 E. & B. 501; *Shedden v. Patrick* (1854), 23 L. T. O. S. 194; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780; *Cammell v. Sewell* (1858), 3 H. & N. 617; *Liverpool Bank v. Foggo* (1860), 2 L. T. 594; *Routledge v. Hislop* (1860), 2 E. & E. 549; *Accidental Death Insce. v. Mackenzie* (1861), 5 L. T. 20; *Howlett v. Tarte* (1861), 10 C. B. N. S. 813; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168; *The Justyn* (1862), 6 L. T. 553; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *Rogers v. Hadley* (1863), 9 Jur. N. S. 898; *Simpson v. Fogo* (1863), 8 L. T. 61; *Nawab Sidhee Nazur Ally Khan v. Ojoodhyaran Khan* (1866), 10 Moo. Ind. App. 540; *R. v. Fanning* (1866), 10 Cox, C. C. 411; *Patch v. Ward* (1867), 3 Ch. App. 203; *Finney v. Finney* (1868), 1 L. R. 1 P. & D. 483; *Ochsenhelm v. Papeller* (1873), 8 Ch. App. 695; *Flitters v. Allfrey* (1874), L. R. 10 C. P. 29; *Dover v.*

PART V. SECT. 2, SUB-SECT. 9.

a. Obligation to disclose.]—*BROWN v. CARTER* (1865), 9 L. C. J. 163.—*CAN.*

b. ———.]—On a question by a medical man while under examination as a witness, the ct. ruled that he need not disclose what had passed between himself & his patient in professional confidence.—*KILIAN v. KILIAN* (1908), E. D. C. 379.—*S. AF.*

c. ———.]—A medical practitioner, subpoenaed to give evidence in a divorce case, on being asked whether he had treated deft., a patient of his, for a venereal disease, claimed privilege:—*Held*: he was bound to answer the question.—*PARKES v. PARKES* (1916), C. P. D. 702.—*S. AF.*

d. Disclosure prohibited by statute.—Without consent of patient.]—Held: the prohibition in Evidence Act, 1890 (Vict.), s. 55, extends to anything which comes to the knowledge of the physician or surgeon with regard to the health or physical condition of the patient, as well as anything said by the patient to him, while the relationship of medical adviser & patient continues, provided that it was reasonably necessary for the purpose stated.—*NATIONAL MUTUAL LIFE ASSOCN. OF AUSTRALASIA, LTD. v. GODRICH* (1909), 10 C. L. R. 1.—*AUS.*

e. ———.]—The tendering by a patient of any part of his person for examination, with a view to medical treatment, to a physician is a com-

munication within Evidence Further Amendment Act, 1895, s. 9 (2), & cannot be divulged in any civil proceedings without the consent of the patient.—*STACK v. STACK* (1905), 25 N. Z. L. R. 209.—*N.Z.*

f. Extent of privilege.]—The privilege attaching to communications made by a patient to a physician or surgeon in his professional capacity is restricted to communications, oral, written, or by signs, necessary to enable such physician or surgeon to prescribe or act for such person, & does not extend to matters discovered by such physician or surgeon on examination of the patient's body or during operation, or to communications of any kind made by such physician or surgeon to the

Sect. 2.—*Privilege: Sub-sects. 9, 10 & 11. Sect. 3:**Sub-sect. 1, A. (a) i.]*

Child (1876), 34 L. T. 737; Leggett v. G. N. Ry. (1876), 1 Q. B. D. 599; R. v. Hutchings (1881), 6 Q. B. D. 300; Abouloff v. Oppenheimer (1882), 10 Q. B. D. 295; Priestman v. Thomas (1884), 9 P. D. 70; Caird v. Moss (1886), 33 Ch. D. 22; Seton v. Lafone (1886), 18 Q. B. D. 139; Borough v. Collins (1890), 15 P. D. 81; Kingston-upon-Hull Corp. v. Harding (1892), 62 L. J. Q. B. 55; A.-G. for Trinidad & Tobago v. Eriché, [1893] A. C. 518; Wallis v. Hands (1893), 62 L. J. Ch. 586; Boswell v. Coaks (1894), 86 L. T. 365, n.; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Dalton v. Fitzgerald (1897), 66 L. J. Ch. 604; N. E. Ry. v. Dalton Overseers, [1898] 2 Q. B. 66; Bynoe v. Bank of England, [1902] 1 K. B. 467; Turley v. Daw (1906), 94 L. T. 216; Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236; Burdett v. Horne (1911), 27 T. L. R. 402; *In the Estate of Crippen*, [1911] P. 108; Bedford v. Cowtan, [1916] 1 K. B. 980; Isaacs v. Salbstein, [1916] 2 K. B. 139; C. (otherwise H.) v. C., [1921] P. 399; Ord v. Ord, [1923] 2 K. B. 432; Port of London Authority v. Woolwich Corp., [1924] 1 K. B. 30.

4300. —.]—*WILSON v. RASTALL*, No. 4148, *ante*.

4301. —.]—A witness [a surgeon] upon cross-examination, is compellable, if required by the ministrant, to produce all written communications addressed to him, the witness, by the solicitor or other agent of the producent relative to his examination as a witness in the cause.—*ATKINSON v. ATKINSON* (1825), 2 Add. 408; 162 E. R. 366; *subsequent proceedings*, 2 Add. 484.

Annotation:—Mentd. Davidson v. Davidson (1856), Dea. & Sw. 167.

4302. —.]—Medical persons are bound to reveal confidential communications, when called upon in cts. of justice.—*R. v. GIBBONS* (1823), 1 C. & P. 97.

Annotation:—Refd. Doe d. Peter v. Watkins (1837), 4 Scott, 155.

4303. —.]—Statements in writing by a patient to a medical man, describing the symptoms of the illness upon which the medical man has advised the patient are not admissible in evidence.—*WITT v. WITT & KLINDWORTH* (1862), 3 Sw. & Tr. 143; 32 L. J. P. M. & A. 179; 8 L. T. 175; 9 Jur. N. S. 207; 11 W. R. 154; 164 E. R. 1228.

4304. —.]—*WHEELER v. LE MARCHANT*, No. 4296, *ante*.

4305. —.]—*Discretion of court.*—*KITSON v. PLAYFAIR* (1896), *Times*, Mar. 28.

4306. —.]—*Treatment of patient under national scheme for dealing with venereal disease.*—A medical man, who in the course of treating a patient under the national scheme for dealing with venereal disease ascertains that the patient is suffering from such a disease, may be compelled to give evidence to that effect, although the statutory regulations to the scheme enjoin absolute secrecy on the medical man.—*GARNER v. GARNER* (1920), 36 T. L. R. 196.

patient.—*LUCENA v. NATIONAL MUTUAL LIFE ASSOC. OF AUSTRALASIA, LTD.* (1911), 31 N. Z. L. R. 481.—*N.Z.*

g. —.]—The privilege afforded by Evidence Act, 1908, s. 8 (2), to communications made by patients to their medical men in their professional capacity is not destroyed by the subsequent communication by such medical advisors in the course of their duty to other persons, & such latter communications cannot therefore be divulged without the consent of the patients. Such privilege extends to inquiry under Commissions of Inquiry Act, 1908.—*Re ST. HELENS' HOSPITAL* (1913), 32 N. Z. L. R. 682.—*N.Z.*

h. —.]—*Statement made by medical man to chemist.*—A doctor in making a complaint to a chemist that he had not dispensed a medicine in accordance with the prescription, is in a privileged

position, & anything said or written by the doctor to the chemist, pertinent to the occasion, will be protected unless malice is proved.—*GALL v. SLESSOR*, [1907] S. C. 708.—*SCOT.*

PART V. SECT. 2, SUB-SECT. 10.

k. *Whether bound to disclose communications between each other.*—Communications made since marriage between husband & wife are not privileged from discovery.—*DEE v. DALL* (1919), S. A. L. R. 167.—*AUS.*

l. —.]—A statement made to a wife by her husband, who was travelling under an assumed name, as to his reasons for doing so, is a privileged communication, & she is not bound to answer it in an action brought by her husband wherein the fact of his commission of a crime is involved.—*ELLIS v. POWER* (1880), 20 N. B. R. 40; 6 S. C. R. 1.—*CAN.*

SUB-SECT. 10.—HUSBAND AND WIFE.

Whether bound to disclose communications between each other—General rule.—*See Evidence Amendment Act, 1853 (c. 83), s. 3; Criminal Evidence Act, 1898 (c. 36), s. 1 (d).*

4307. —.]—*Marriage tie severed—By divorce.*—Where man & wife are divorced by Act of Parliament, the wife is not competent to prove a contract made by her husband previous to the divorce.—*MONROE v. TWISLETON* (1802), Peake, Add. Cas. 219, N. P.

Annotations:—Consd. Aveson v. Kinnaird (1805), 6 East, 188. *Apld.* Doker v. Hasler (1824), Ry. & M. 198. *O'Connor v. Marjoribanks* (1842), 4 Man. & G. 435.

4308. —.]—*By death.*—A widow cannot be asked to disclose conversations between herself & her late husband.—*DOKER v. HASLER* (1824), Ry. & M. 198, N. P.; *subsequent proceedings* (1825), 2 Bing. 479.

4309. —.]—In an action by administrators, in a matter affecting the estate of the intestate, his widow is not an admissible witness, even against her own interest, to prove any acts or declarations of her deceased husband.—*O'CONNOR v. MARJORIBANKS* (1842), 4 Man. & G. 435; 5 Scott, N. R. 394; 11 L. J. C. P. 267; 6 Jur. 509; 134 E. R. 179; *subsequent p* (1843), 12 L. J. C. P. 161.

Annotations:—Distd. Davies v. Pritchard (1853), 20 L. T. O. S. 316. *Refd.* Barbat v. Allen (1852), 21 L. J. Ex. 155; Stapleton v. Crofts (1852), 18 Q. B. 367.

4310. —.]—*Marriage void.*—A woman who was married to a man, but whose marriage to him is void by reason of her having a former husband living, who had been supposed dead, may be examined against him to prove his declarations made while she lived with him as his wife.—*WELLS v. FISHER* (1831), 1 Mood. & R. 99; *sub nom.* *WELLS v. FLETCHER*, 5 C. & P. 12, N. P.

4311. *Whether evidence of third party admissible as to conversations between husband & wife.*—Evidence of what occurred during a conversation between husband & wife, if given by a third person, is receivable as evidence of a fact.—*HAMP v. ROBINSON* (1865), 16 L. T. 29.

—.]—*In criminal proceedings.*—*See CRIMINAL LAW*, Vol. XIV., pp. 392-394, 427, Nos. 4135, 4139, 4140, 4509.

In matrimonial causes.—*See HUSBAND & WIFE.*

SUB-SECT. 11.—OTHER PERSONS.

4312. *Person to whom secret entrusted.*—*WHEELER v. LE MARCHANT*, No. 4296, *ante*.

4313. *Executor.*—On an inquiry in an action for criminal conversation into the circumstances

PART V. SECT. 2, SUB-SECT. 11.

m. *Bank manager.*—The manager of a branch bank at W., having its head office at M., laid an information against plff., who subsequently brought an action against the bank for malicious arrest. On an examination of the manager:—*Held:* he was right in refusing to answer the following question: "Did you from time to time communicate the facts previously stated in your examination as they occurred?"—*McLEAN v. MERCHANTS BANK* (1884), 1 Man. L. R. 178.—*CAN.*

n. *Agent—Waiver of privilege.*—A party, by calling his agent, as a witness, waives the privilege of secrecy in the agent.—*FORTFORTH v. FIFE (EARL)* (1821), 2 Murr. 463.—*SCOT.*

o. —.]—The former agent of a party is bound not to disclose con-

of deft., the exor. of a deceased relation is bound to answer a question, which requires him to state the amount of property deft. acquired under the will of his testator.—*PETER v. HANCOCK* (1824), 1 C. & P. 375, N. P.

4314. Peer.]—SHIREWSBURY'S (COUNTESS) CASE (1612), 12 Co. Rep. 91; 2 State Tr. 769; 77 E. R. 1369.

Annotation:—Mentd. Grand Opinion for the Prerogative Concerning the Royal Family (1717), Fortes. Rep. 401.

4315. Scrivener.]—HARVEY v. CLAYTON (1675), 2 Swan. 221, n.; 36 E. R. 599.

Annotations:—Consd. Greenhough v. Gaskell (1833), Coop. temp. Brough. 96; Jones v. Pugh (1842), 1 Ph. 96. *Refd.* Turquand v. Knight (1836), 2 Gale, 192.

Telegraph company.]—See Part IV., Sect. 11, sub-sect. 10, *ante*.

SECT. 3.—ATTENDANCE.

SUB-SECT. 1.—SUBPŒNA AD TESTIFICANDUM.

A. Witnesses within Jurisdiction.

(a) Issue of Subpœna.

i. In General.

4316. May be issued before complaint made.]

—*R. v. VICKERY*, No. 4691, *post*.

4317. May be issued at any stage of proceedings—Subject to control of court.]—Any party may without leave of the ct. issue a subpœna for the examination of a witness at any stage of an action; but the ct. will exercise a control over this privilege to prevent its being oppressively used. In an action for the redemption of a mtge. the usual judgment was obtained & deft., the mtgee., proceeded to vouch his accounts in chambers. Pltfs. subpœnaed a solr. who had acted for both parties in the mtge. transactions, in order to examine him with respect to the moneys received by him on account of both parties:—*Held*: pltf. was entitled to issue the subpœna & to examine the witness. —*RAYMOND v. TAPSON* (1882), 22 Ch. D. 430; 48 L. T. 403; 31 W. R. 394, C. A.

Annotation:—Refd. Rosenberg v. Lindo (1883), 48 L. T. 478.

4318. ———.]—The ct. will not permit the rules of procedure to be oppressively used, & although a suitor has the privilege of issuing a subpœna for the cross-examination of a witness at any stage of the action, the privilege will be controlled in a proper case.

Pltf. in an administration action, who was also residuary legatee & extrix. under the will the trusts of which it was sought to execute, took out an ordinary summons for accounts under R. S. C., Ord. 15, r. 1, & in support of the summons, & by direction of the chief clerk, made & filed an affidavit to formally prove her title. Defts., who were her co-exors. & also residuary legatees, served her with a notice to attend before the examiner for the purpose of being cross-examined upon the

affidavit, but alleged no reason for believing that any useful result would be obtained, except that it was unnecessary & contrary to the wishes of their testatrix that the estate should be administered by the ct.:—*Held*: defts. were abusing the process of the ct., & a motion to compel the attendance of pltf. was refused with costs.—*Re MUNDELL, FENTON v. CUMBERLEGE* (1883), 52 L. J. Ch. 756; 48 L. T. 776.

4319. ———.]—Although as a general rule a writ of subpœna may be served at any stage of the proceedings in an action, yet service at a time when, to the knowledge of the parties, the action cannot possibly be tried during the current sittings amounts to an abuse of the process of the ct., & ought to be set aside.—*LONDON & GLOBE FINANCE CORPN. v. KAUFMAN* (1899), 69 L. J. Ch. 196; 48 W. R. 458; 16 T. L. R. 62.

4320. Issue of subpœna merely to compel witness to stand up in court for identification—Abuse of process of court.]—A person, who attends in ct. on subpœna cannot against his will be asked to stand up in ct. for identification.

It is an abuse of the process of the ct. that any one should be brought to the ct. by subpœna solely for the purpose of being compelled to stand up for identification (*SHEARMAN, J.*).—*FARULLI v. FARULLI & PEDERZOLI*, [1917] P. 28; 86 L. J. P. 35; 116 L. T. 18.

—*J.—See, also*, No. 4319, *ante*.

4321. Setting aside subpœna—Jurisdiction of court—Issue abuse of process.]—*LONDON & GLOBE FINANCE CORPN. v. KAUFMAN*, No. 4319, *ante*.

4322. ——— Issue not bonâ fide.]—(1) The K. B. Div. of the High Ct. of Justice has jurisdiction to set aside a subpœna issued in a criminal proceeding.

(2) A witness served with a subpœna cannot get it set aside by merely swearing that he can give no material evidence. But the ct. being satisfied that writs of subpœna *ad testificandum* had been issue not bonâ fide for the purpose of obtaining relevant evidence & that the witnesses named in them were in fact unable to get relevant evidence set the subpœnas aside.—*R. v. BAINES*, [1909] 1 K. B. 258; 78 L. J. K. B. 119; 100 L. T. 78; 25 T. L. R. 79; 21 Cox. C. C. 756; *sub nom.* *R. v. BAINES, Ex p. ASQUITH*, 72 J. P. 524; *sub nom.* *R. v. BAINES*, 53 Sol. Jo. 101.

4323. Effect of issue of subpœna—Breach of undertaking not to molest.]—By an undertaking deft., whose wife was another deft., & his solr. undertook that no attempt should be made, directly or indirectly, by reason of the production of the wife before the examiner, to discover her residence, or in any way to molest her. The husband & his solr. signed the registrar's book at the foot of the undertaking. When the wife attended before the examiner, the husband's solr., upon the conclusion of her examination, served her with a writ of subpœna to attend as a

fidential information.—*WRIGHT v. EWING* (1828), 4 Murr. 584.—*SCOT.*

p. Public servant—Postmaster.]—The postmaster of D. having been summoned as a witness in a cause & asked whether he had or not then in the office a letter addressed to petr. & an advice of a post office order for money to be paid to him which petr. had not yet claimed, the witness appealed to the ct. whether he was bound to answer in view of his oath of secrecy as a servant of the post office:—*Held*: he might answer whether he had the letter or the advice but no further.—*JAMES v. CLARK* (1841), Blucet, 226.—*I. of M.*

q. ——— Officer of police.]—An officer of police is not bound to disclose the names of persons who have given information concerning a crime.—*ISAACS v. FROMBERG* (1894), 15 N. L. R. 110.—*S. AF.*

r. University professor.]—A professor in a university bound to disclose statements made at a meeting of the *Senatus Academicus*.—*HAMILTON v. HOPE* (1827), 4 Murr. 222.—*SCOT.*

PART V. SECT. 3. SUB-SECT. 1.—A. (a) i.

s. Time of issuing.]—A subpœna should not be dated prior to the time at which the party taking out

such subpœna is entitled to examine the party or witness served.—*McMURRAY v. GRAND TRUNK RY. CO.* (1870), 3 Ch. Ch. 130.—*CAN.*

t. Who may issue—Magistrate before whom case is to be heard.]—Under Summary Convictions Act, s. 16, only a justice before whom the case is to be heard has authority to issue a summons for a witness.—*BYRNE v. ARNOLD* (1884), 24 N. B. R. 161; *affd.* *Cass. Dig.* 107.—*CAN.*

u. ——— Discretion of magistrate.]—Under Criminal Code, s. 671, a magistrate has some discretion, & may refuse to summon as a witness one whose evidence would not, in his

Sect. 3.—Attendance: Sub-sect. 1, A. (a) i., ii., iii., (b) & (c) i., i.

witness in another cause. On motion to commit the solr. to prison for breach of the undertaking, the solr. appearing in person & stating that he did not intend to commit any contempt of ct., or any breach of the undertaking, the ct. would not commit the solr. but made him pay the costs of the application.—*LAWFORD v. SPICER, Re SOLICITOR OF THE COURT* (1856), 27 L. T. O. S. 75; 2 Jur. N. S. 564; 4 W. R. 497.

Annotation:—Refd. Heath v. Creelock (1873), 21 W. R. 380.

4324. — Jurisdiction of court to restrain witness from obeying subpoena.]—I am quite satisfied that I could not, under any circumstances, grant an injunction to restrain deft. from obeying a subpoena to attend as a witness in ct. & answering questions which might be properly put to him in the course of examination as a witness, the refusal to answer which might lead to his committal to prison for contempt of ct. (NORTH, J.).—*LONDON & LEICESTER HOSIERY CO. v. GRISWOLD* (1886), 2 T. L. R. 676; *Griffin's Patent Cases* (1884-1886) 154; 3 R. P. C. 251.

Failure of witness to obey subpoena.]—See Sub-sect. 7, A., *post*.

ii. Against Whom issued.

4325. Executor—Refusal to obey citation to bring in will.]—A will not being forthcoming after testator's death the exor., who was supposed to have the custody of it, was cited to bring it in, but disobeyed the citation. The ct. issued a subpoena under Court of Probate Act, 1877 (c. 77), s. 26, to compel his attendance to be examined in ct. as to his knowledge of the will.—*In the Goods of JAWS* (1872), L. R. 2 P. & D. 458; 41 L. J. P. & M. 41; 26 L. T. 530; 36 J. P. 503; 20 W. R. 572.

See, further, EXECUTORS.

4326. Witness refusing to swear affidavit.]—*WINFIELD v. SHOOLBRED*, [1880] W. N. 192.

iii. In What Proceedings issued.

4327. Attendance before judge—Or commissioner.]—ANON. (1569), Toth. 156; 21 E. R. 153.

4328. Attendance before master.]—SHORTER v. SCORTIN (1724), Bunb. 169; 145 E. R. 635.

4329. Attendance at assizes—Issue from Crown Office.]—A subpoena may be issued from the Crown Office, requiring a witness to attend at the assizes in the county to give evidence in support of an intended prosecution for a felony; & the ct. will grant an attachment against him for not attending in obedience to the subpoena.—*R. v. RING* (1800), 8 Term Rep. 585; 101 E. R. 1560.

Annotation:—Refd. R. v. Brownell (1834), 1 Ad. & El. 598.

opinion, if given, be material.—*R. v. ALLERTON* (1814), 27 W. L. R. 894; 19 B. C. R. 493.—**CAN.**

b. Subject to control of court—To prevent abuse of process.]—A litigant's privilege of taking out summonses to witnesses is subject to the control of the tribunal, which is called upon to enforce their attendance, though such control will be exercised sparingly & only in exceptional cases. This control is an instance of the authority of every ct. of competent jurisdiction to prevent abuse, of its process.—*VEERABADRAN CHETTY v. NATARAJA DESIKAR* (1905), 1 L. R. 28 Mad. 28.—**IND.**

PART V. SECT. 3, SUB-SECT. 1.—
A. (a) ii.

c. Prisoner.]—The attendance of a prisoner to give evidence at the trial of a civil action may be secured by

order of the ct.—*SESSIONS v. SESSIONS* (1920), 1 W. W. R. 722; 15 Alta. L. R. 241.—**CAN.**

d. Governor or Lieutenant-Governor—Judge—Application for leave to issue subpoena.]—Where application is made under Rule of Ct. 57 (b) for leave to subpoena the Governor or Lieutenant-Governor, notice of such application should be given to the A.-G. Such leave will not be granted, if the evidence required can be given by some other person. *Semble*: same rule applies to an application for leave to subpoena a judge, but notice should in such a case be given to the Registrar.—*Ex p. AARON* (1904), T. S. 487.—**S. AF.**

PART V. SECT. 3, SUB-SECT. 1.—
A. (a) iii.

e. Attendance before local registrar—
On motion for new trial—Before

4330. Taxation of costs.]—The ct. will not compel the attendance of a witness before the prothonotary to enable him to tax a bill of costs arising in this ct. referred to him for that purpose by a master in chancery.—*PROTHEROE v. THOMAS* (1819), 8 Taunt. 670; 3 Moore, C. P. 3; 129 E. R. 544.

4331. Application for removal order.]—On an application before magistrates in petty sessions for an order to remove a pauper to parish A., where it is sought to show a settlement by rating, a *subpoena ad testificandum* & a *subpoena duces tecum* may issue from the Crown Office to the parish officer of A., commanding him to attend the examination at petty sessions, give evidence, & produce the parish rate books; & if he disobeys, this ct. will grant an attachment.—*R. v. GREENAWAY, R. v. CAREY* (1845), 7 Q. B. 126; 2 New Sess. Cas. 103; 1 New Mag. Cas. 393; 14 L. J. M. C. 190; 5 L. T. O. S. 370; 9 J. P. 837; 9 Jur. 1009; 115 E. R. 436.

Annotations:—Consd. R. v. Wiltshire Appeal Tribunal, Ex p. Thatcher (1916), 86 L. J. K. B. 121. *Refd. Paine v. Strand Union Grdns.* (1846), 15 L. J. M. C. 89; *R. v. Vickery* (1848), 11 L. T. O. S. 221; *R. v. Stuart* (1885), 2 T. L. R. 144; *Eccles v. Louisville & Nashville Railroad Co.* (1911), 81 L. J. K. B. 445.

—*See, generally, MAGISTRATES; POOR*

4332. Motion for decree.]—The ct. has jurisdiction under 15 & 16 Vict. c. 86, to issue a *subpoena ad testificandum* or a *subpoena duces tecum*, requiring the attendance of witnesses on a motion for a decree.—*WIGAN v. ROWLAND* (1853), 10 Hare, App. 1, xviii; 23 L. J. Ch. 69; 17 Jur. 816; 68 E. R. 1123.

Annotation:—Refd. Wilhelm v. Reynolds (1860), 8 W. R. 625.

4333. Probate proceedings—Refusal of attesting witness—To make affidavit.]—Testator left a will without an attestation clause, & the attesting witnesses refused to make the usual affidavit. Whereupon the ct. directed a subpoena to issue under Ct. of Probate Act, 1857 (c. 77), s. 24, to compel their attendance to give evidence as to the execution.—*In the Goods of HAMER* (1872), 25 L. T. 951; 36 J. P. 121; 20 W. R. 303.

4334. — Executor—Examination as to knowledge of will—Will not forthcoming.]—In the Goods of JAWS, No. 4325, ante.

—*See, further, EXECUTORS.*

4335. Appeal—Before Court of Appeal.]—In appeals before the Ct. of Appeal, it is not the practice, save in very exceptional cases, to issue subpoenas for the attendance of persons, except for the purpose of cross-examining such persons as have made affidavits in the cause or matter.—*R. v. ROURKE* (1891), 56 J. P. 292; 8 T. L. R. 74, C. A.

Divisional Court.]—Pltf., having given notice of motion for a new trial subpoenaed three witnesses under R. 491, for examination before a local registrar upon the motion for a new trial:—*Held*: R. 491 applies to motions for a new trial pending before a Divisional Ct.—*RUSHTON v. GRAND TRUNK RY. CO.* (1903), 23 C. L. T. 295; 6 O. L. R. 425; 2 O. W. R. 654.—**CAN.**

f. Commission appointed by Government of another province.]—Comrs. appointed by the Govt. of another province under an Act of its legislature to conduct an inquiry constitute a ct. or tribunal within Manitoba Evidence Act, 1902, s. 57, as re-enacted by 4 & 5 Edw. VII., c. 11, & an order may be made under that sect. at the request of such comrs. requiring the attendance of witnesses in Manitoba to testify as to matters

4336. Tribunal under Military Service Act, 1916 (c. 104).—*R. v. WILTSHIRE APPEAL TRIBUNAL, Ex p. THATCHER*, No. 4730, *post*.

Arbitration proceedings.]—*See* ARBITRATION, Vol. II., p. 432.

Bankruptcy proceedings.]—*See* BANKRUPTCY, Vol. V., p. 616.

Proceedings in ecclesiastical courts.]—*See* ECCLESIASTICAL LAW, Vol. XIX., p. 333, No. 1438.

Discovery in aid of execution.]—*See* EXECUTION, Vol. XXI., pp. 674–676, Nos. 2537–2552.

Matrimonial causes.]—*See* HUSBAND & WIFE.

(b) *Form and Contents of Subpœna.*

4337. Place of attendance—Where cause pending.]—*PRICE v. TENCH* (1579), Cary, 95; Ch. Cas. in Ch. 141; 21 E. R. 51.

4338. Time for attendance—No particular notice when cause would come on.]—The ct. refused an attachment against a witness, who being subpœnaed without particular notice when the cause would come on, in the course of his third day's attendance left the ct. to attend to urgent business of his trade although the case was tried in his absence & pltf. non-suited, which his evidence would have prevented. So, though the witness was induced to leave the ct. by the representation of the adverse attorney.—*BLANDFORD v. DE TASTET* (1813), 5 Taunt. 260; 1 Marsh. 42; 128 E. R. 689.

4339. — Omission of "from day to day."—(1) A subpœna requiring the party to attend the trial of a cause on the commission day of the assizes, extends to the whole assizes, & it need not go on to require his attendance from day to day until the cause is tried.

(2) *Semle*: it is not sufficient, in answer to an application for an attachment against a witness for disobedience to a subpœna, to show that his evidence was not material.

(3) In answer to a motion for an attachment, the witness swore, that he had been for some time in bad health; that on the day before the trial came on, he had been in readiness to attend & give evidence; that on the morning of the trial he was unwell, & did not rise until ten o'clock, & that on going shortly afterwards to his office, which was in his way to the ct., he found the cause had been tried:—*Held*: rule discharged.

We think there is no sufficient ground . . . for coming to the conclusion, that the absence of the witness was voluntary in contempt of the process of the ct. that ought to have been clearly shown & we cannot presume it (*LORD ABINGER, C.B.*).—*SCHOLES v. HILTON* (1842), 10 M. & W. 15; 2 Dowl. N. S. 229; 11 L. J. Ex. 332; 152 E. R. 362. *Annotation*:—*As to* (3) *FOLLAD. Hadden v. Parker* (1849), 14 J. P. Jo. 4.

4340. Omission of name of witness in original subpœna—Time for insertion of name.]—The name of a witness, though not in the original subpœna, may be inserted therein at any time, if she have been regularly served with a copy.—*WAKEFIELD v. GALL* (1817), Holt, N. P. 526. *Annotation*:—*Refd.* *Taylor v. Willans* (1830), 4 Moo. & P. 59.

4341. Discrepancy between original & copy served—As to date of attendance.]—If the original writ of subpœna requires the witness to appear on May 27, & the copy served requires him to

appear on May 24, an attachment for disobedience cannot be obtained.—*DOE d. CLARKE v. THOMSON* (1841), 9 Dowl. 918.

4342. Alteration of subpœna—Validity.]—A subpœna cannot be altered after it has left the office sealed, although a practice has prevailed of permitting the process to be altered by postponing the day of the return.

Where pltf. had obtained an injunction for want of appearance to a writ so altered, by changing the return day from June 30 to July 2, the ct., on motion, quashed the subpœna, & set aside the attachment & injunction which had been granted thereon, on the ground of the irregularity.—*PARKER v. EWART* (1821), 9 Price, 441; 147 E. R. 144.

4343. — — —.]—*BARBER v. WOOD*, No. 4353, *post*.

4344. Effect of mistake—As to date of attendance.]—A subpœna, tested May 9, & served on May 19, required deft. to appear "on Monday, the 21st day of March instant":—*Held*: the ct. would refuse to set aside the service.—*PAGE v. CAREW* (1831), 1 Cr. & J. 514; 9 L. J. O. S. Ex. 192; 148 E. R. 1527.

Waiver of irregularity.]—*See* Sub-sect. 1, A. (f), *post*.

(c) *Service of Subpœna.*

i. *In General.*

4345. Personal service—Necessity for.]—There must be personal service of a witness to warrant an attachment.—*SMALT v. WHITMILL* (1736), 2 Stra. 1054; 93 E. R. 1028. *Annotation*:—*Refd.* *Miller v. Knox* (1838), 4 Bing. N. C. 574.

4346. — — — Witness avoiding service.]—Difficulty in serving a subpœna will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service.—*BARNES v. WILLIAMS* (1832), 1 Dowl. 615.

4347. — — — Personal service impossible.]—The obligation of producing a witness lies with the cross-examining party, & personal service unnecessary, where impossible.—*WINTHROP v. ELDERTON* (1853), 1 W. R. 318.

4348. — — —.]—*DYSON v. FOSTER* (1908), cited Yearly Supreme Court Practice, 1925, at p. 588, n.

Substituted service.]—*See* Sub-sect. 1, A. (c) v., *post*.

Sufficiency of service.]—*See* Sub-sect. 1, A. (c) iv., *post*.

ii. *On Whom Service effected.*

4349. Wife of witness—At house of witness.]—*BARLOW v. BAKER* (1576), Cary, 54; 21 E. R. 29.

4350. Servant.]—Delivery of a subpœna to a servant, who said he had delivered it to his master, who declared he would attend, is not sufficient to ground an attachment against the master. On moving for an attachment for not obeying a subpœna, an affidavit as well of tendering the shilling, as of reasonable charges, is necessary.—*WAKEFIELD'S CASE* (1736), *Lee temp. Hard.* 313; 95 E. R. 202.

iii. *Time for Service.*

4351. Reasonable time before trial.]—*GEORGE v. BOLINGTON* (1558), Cary, 41; 21 E. R. 22.

within the scope of their commission.—*Re ALBERTA & GREAT WATERWAYS RY. Co.* (1911), 20 Man. L. R. 697.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—
A. (b).

g. *Indorsement.*—Where a General

Order required that the name or firm & registered place of business of the solicitor issuing a subpœna should be indorsed thereon, & for twenty years the almost invariable practice in the Record & Writ Office had been to issue subpœnas having these particulars stated merely at the

foot, but separate from the body of the writ:—*Held*: this was a sufficient indorsement.—*KANE v. KANE* (1867), 16 W. R. 99.—*IR.*

PART V. SECT. 3, SUB-SECT. 1.—
A. (c) iii.

h. *Statutory requirement.*—A notice

Sect. 3.—Attendance: Sub-sect. 1, A. (c) iii., iv., v. & vi.]

4352. —.]—*SMITH v. WEARE* (1579), Cary, 88; 21 E. R. 47.

4353. —.]—A witness is not bound to obey a subpoena altered by the attorney from the sittings for which it was originally sued out to subsequent sittings without being re-sealed. Whether a subpoena has been served in reasonable time before the trial is matter for the ct. Service on a person living close to the place of trial, at half past eleven o'clock in the morning, for a cause called on at two o'clock, is not a sufficient time.—*BARBER v. WOOD* (1838), 2 Mood. & R. 172.

4354. —.]—The question as to whether a subpoena *ad testificandum* is served within a reasonable time depends upon the circumstances of each particular case; therefore, where deft. was served at 12 o'clock while standing on the steps of the ct.-house, & was told that the trial would come on the same day, which it did, at 5 o'clock:—*Held*: the service was sufficient.—*MAUNSELL v. AINSWORTH* (1840), 8 Dowl. 869; 11. & W. 5.

4355. On Sunday.—Subpoena, served on Sunday, irregular. Attachment & injunction therefore set aside, before appearance, on entering appearance with the register.—*MACKRETH v. NICHOLSON* (1815), 19 Ves. 367; 34 E. R. 551, L. C.

4356. After day of attendance specified in subpoena.—The ct. refused to grant an attachment against a witness who omitted to attend a trial after being served on July 3, with a subpoena dated June 18, & calling on him to attend trial on July 2.—*ALEXANDER v. DIXON* (1823), 1 Bing. 306; 8 Moore, C. P. 387; 2 L. J. O. S. C. P. 22; 130 E. R. 147.

Annotation:—*Consd.* *DAVIS v. LOVELL* (1839), 7 Dowl. 178.

Waiver of irregularity.—*See* Sub-sect. 1, A. (f), *post*.

iv. Sufficiency of Service.

4357. Service at house—Where witness resided—On wife of witness.—*BARLOW v. BAKER* (1576), Cary, 51; 21 E. R. 29.

4358. ——— **Hanging subpoena on door.**—*STONE v. LEVESON* (1579), Ch. Cas. in Ch. 126; 21 E. R. 76.

4359. ———.]—*WOODWARD v. JOANES* (1583), Ch. Cas. in Ch. 167; 21 E. R. 97.

4360. ——— **Leaving subpoena in hall.**—*ANON.* (1580), Cary, 91; 21 E. R. 48.

4361. ——— **Witness outside jurisdiction.**—Service of a subpoena to appear, & of an order for a sequestration *nisi*, upon a peer, at a time when he was beyond the jurisdiction, by leaving them at the peer's town residence:—*Held*: in the circumstances, to be good service.—*THOMAS v. JERSEY (EARL)* (1834), 2 My. & K. 398; 39 E. R. 996.

Annotations:—*Refd.* *ROBINSON v. ELTON* (1835), 4 L. J. Ch. 197; *Blackstone v. LAURIE* (1845), 2 Holt, Eq. 23.

4362. ———.]—Service of an ordinary subpoena at the house of deft. is good service, & no special order is necessary.—*ROBINSON v. ELTON* (1835), 4 L. J. Ch. 197.

— **Under cover of letter.**—*See* No. 4368, *post*

4363. — **Where witness resorted—Hanging subpoena on door.**—*JEAMES v. MORGAN* (1576), Cary, 56; 21 E. R. 30.

4364. — **Where witness lodged once pre-**

viously.—If a necessary deft. be prosecuted regularly to a sequestration, pltf. may go on without him against other defts.; but serving a subpoena at a place where he lodged but once, & that two years before such service, is not good.—*PARKER v. BLACKBOURNE* (1699), Prec. Ch. 99; 2 Vern. 369; 1 Eq. Cas. Abr. 351; 24 E. R. 48. *Annotation*:—*Mentd.* *VANESSEN v. SOUTH SEA CO.* (1750), 1 Ves. Sen. 395.

4365. Service in court.—If deft.'s attorney who is a subscribing witness to an agreement upon which pltf. brings his ejection, refuse to give evidence of his attestation, etc., upon service of a subpoena upon him in ct. for that purpose, the ct. out of which the record issues will grant an attachment against him.—*DOE d. JUPP v. ANDREWS* (1778), 2 Cowp. 815; 98 E. R. 1393. *Annotation*:—*Consd.* *GREENOUGH v. GASKELL* (1833), 1 My. & K. 98.

4366. ———.]—(1) In order to obtain an attachment against a witness, the original writ of subpoena must be shown at the time of the service of the copy.

(2) Where the witness, a managing clerk to an attorney, was served with a subpoena in ct. about an hour before the trial came on & whilst he was attending to the winding up of a cause in which he was engaged, & which stood next but one on the list before the cause in question. *Semble*: this was not a sufficient service to warrant the granting an attachment.—*PITCHER v. KING* (1845), 2 Dow. & L. 755; 14 L. J. Q. B. 99; 9 Jur. 348.

4367. Service under cover of letter—At address given for letters.—Service by sending the subpoena to deft. under cover to the person, to whom he had directed his letters to be sent, ordered to be good service.—*HUNT v. LEVER* (1799), 5 Ves. 147; 31 E. R. 517, L. C.

Annotation:—*Refd.* *HOPE v. HOPE* (1854), 19 Beav. 237.

4368. — **At residence of witness.**—Service of a subpoena by leaving a copy at deft.'s residence sealed up in a letter, at the same time producing the original:—*Held*: regular.—*CHESTERFIELD (EARL) v. BOND* (1840), 2 Beav. 263; 48 E. R. 1181.

Annotation:—*Mentd.* *HARBOROUGH v. WARTNABY* (1844), 1 Ph. 364.

4369. Whether production of original subpoena necessary.—It is not the practice of this ct. [of Exchequer] to serve a subpoena *ad respondendum*, by leaving the body of the writ with deft., where there is but one, as is the practice in the Ct. of Ch. It is sufficient if a copy be left, & the original produced.—*BLAND v. BUCKLEY* (1818), 6 Price, 31; 146 E. R. 733.

4370. ———.]—In order to found an attachment against a witness for not obeying a subpoena, the application must be made in the term succeeding the trial; & it seems that the original subpoena must be shown to the party at the time of the service.—*THORPE v. GRAHAM* (1825), 3 Bing. 223; 130 E. R. 498; *sub nom.* *THORPE v. GIBBOURNE*, 11 Moore, C. P. 55; 4 L. J. O. S. C. P. 57.

4371. ———.]—An attachment will not be granted against a witness for not obeying a subpoena, unless the original subpoena has been shown, or if the witness has a reasonable ground for believing that he will not be wanted.—*R. v. SLOMAN* (1832), 1 Dowl. 618.

4372. ———.]—In order to obtain an attachment for disobedience to a subpoena requiring the attendance of a witness, the original subpoena must be shown at the time of serving a copy.—*R. v. WOOD* (1832), 1 Dowl. 509.

to attend as a witness, under Consolidated Statute of Upper Canada,

c. 32, s. 15, served on Oct. 25 for Nov. 1, is too late, not being

eight days.—*YOUNG v. O'REILLY* (1864), 24 U. C. R. 172.—**CAN.**

4373. — **Party serving not asked to produce subpoena.**—Where, at the time of the service of a *subpœna ad testificandum*, the original subpoena was not shown to the witness:—*Held*: an attachment would not lie for disobedience to such subpoena, although the party serving it was not asked to produce it.—*WADSWORTH v. MARSHALL*, (1832), 1 Cr. & M. 87; 3 Tyr. 228; 2 L. J. Ex. 10; 149 E. R. 325.

Annotation:—*Refd.* *Pitcher v. King* (1845), 2 Dow. & L. 755.

4374. — **Party serving asked to produce subpoena.**—*MULLETT v. HUNT*, No. 4704, *post*.

4375. — **—**—(1) A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shown at the time of service.

(2) No conduct money need be tendered to a witness in town in a town cause.—*JACOB v. HUNGATE* (1835), 3 Dowl. 456.

Annotation:—*As to* (1) *Refd.* *Pitcher v. King* (1845), 2 Dow. & L. 755.

4376. — **—**—An affidavit to ground a rule *nisi* for an attachment for not obeying a subpoena, must state that at the time of the service the original subpoena was shown; & it is a sufficient answer to such a rule that the affidavit does not so allege.—*GARDEN v. CRESWELL* (1837), 2 M. & W. 319; 5 Dowl. 461; *Murp. & H.* 44; 6 L. J. Ex. 84; 1 Jur. 56; 150 E. R. 778.

Annotation:—*Refd.* *Smith v. Truscott* (1843), 6 Man. & G. 267.

4377. — **—**—The ct. will not grant an attachment against a party served with a *subpœna ad testificandum*, unless, at the time of the delivery of the copy, the writ itself is produced; even when the witness, being an attorney, has previously evaded the service of such subpoena.—*SMITH v. TRUSCOTT* (1843), 6 Man. & G. 267; 1 Dow. & L. 530; 6 Scott, N. R. 808; 12 L. J. C. P. 336; 1 L. T. O. S. 314; 134 E. R. 894.

4378. — **—**—*PITCHER v. KING*, No. 4366, *ante*.

4379. — **—**—Upon discharging a rule *nisi* for attachment against a witness for disobedience to a subpoena, a copy of which had been tendered to him enclosed in an envelope, the ct. refused to allow the costs of showing cause, though the witness swore that the original writ of subpoena was not shown, or the nature of the document explained to him at the time of the alleged service.

It must also appear that the original writ of subpoena was shown to the party at the time the copy was served upon him (*JERVIS, C.J.*)—*MARSHALL v. YORK, NEWCASTLE & BERWICK RY. CO.* (1851), 11 C. B. 398; 17 L. T. O. S. 168; 138 E. R. 527.

Waiver of irregularity.—*See* Sub-sect. 1, A. (f), *post*.

v. Substituted Service.

4380. General rule.—*DYSON v. FOSTER* (1908), cited Yearly Supreme Court Practice 1925, at p. 588, n.

4381. On what persons allowed—Proctor.—*HALLETT v. SUTTON* (1716), 12 Sim. 145, n.; 59 E. R. 1087.

4382. — **Partners.**—An order that service of a

subpœna to appear & answer upon deft.'s partners at the house of business, deft. himself being abroad:—*Held*: under the circumstances, to be regular.—*KINDER v. FORBES* (1840), 2 Beav. 503; 9 L. J. Ch. 288; 4 Jur. 430; 48 E. R. 1277.

Annotation:—*Refd.* *Pinnock v. Rigby* (1842), 11 L. J. Ch. 408.

4383. — **Solicitor.**—Substitution of service of subpoena to appear ordered upon one who had acted all along as the solr. & agent of pltf. in the transactions out of which the suit had arisen.—*HORNBY v. HOLMES* (1845), 4 Hare, 306; 9 Jur. 796; 67 E. R. 664.

Annotation:—*Dbtd.* *Cope v. Russell* (1847), 16 L. J. Ch. 369.

4384. — **—**—Application for substituted service of a *subpœna ad testificandum*, or, in the alternative, that a solr. might produce his client before the examiner, refused.—*SPICER v. DAWSON* (1856), 22 Beav. 282; 52 E. R. 1116.

Annotation:—*Mentd.* *Heath v. Creelock* (1873), 21 W. R. 380.

4385. — **Brother.**—*STEPHEN v. COOK* (1851), 17 L. T. O. S. 275.

4386. — **Receiver of rents.**—*STEPHEN v. COOK* (1851), 17 L. T. O. S. 275.

vi. Proof of Service.

4387. Admission of service.—*PERRY v. GATTER* (1578), Cary, 110; 21 E. R. 58.

4388. — **—**—*STOW v. MADDOCK* (1579), Cary, 81; 21 E. R. 43.

4389. Evidence of spectator—That subpoena served in his presence.—*VAUX v. GLASIER* (1579), Cary, 80; 21 E. R. 43.

4390. Mayor's certificate—That subpoena shown & offered.—*PERIS v. THOMAS* (1579), Cary, 94; 21 E. R. 50.

4391. — **Of service.**—*LEA v. STANBURY* (1583), Ch. Cas. in Ch. 172; 21 E. R. 100.

4392. Affidavit of service—Contents—Sufficiency.—The affidavit of service of subpoena on a bill filed for obtaining an injunction to stay process served on the attorney of pltf., must state positively that neither the attorney nor his client knew where to find deft., nor where he might be served with the process, or it will be considered insufficient on a motion for that purpose, however full it may be in all other respects.—*JARDINE v. HAYES* (1819), 7 Price, 239; 146 E. R. 959.

4393. — **—**—**—**—The affidavit of service of a subpoena must state the service of a copy of the writ, & of the indorsement thereon.—*JERSEY (EARL) v. JENKINS* (1836), 5 L. J. Ch. 218.

4394. — **—**—**—**—*CALVERT v. BOOTH* (1837), 1 Jur. 378.

4395. — **—**—**—**—(1) An attachment issued upon an insufficient affidavit of the service of the subpoena, will be set aside & discharged.

(2) The affidavit of the service of the subpoena upon deft. is defective if it does not clearly show where the service was made.—*BICKFORD v. SKEWES* (1838), 9 Sim. 428; 8 L. J. Ch. 61; 2 Jur. 1037.

4396. — **—**—**—**—The affidavit of service of the subpoena on a motion for leave to enter

PART V. SECT. 3, SUB-SECT. 1.—

A. (c) v.

k. On what persons allowed—Agent in relation to subject matter of suit.—Where a pltf. desires to effect service of a subpoena by serving the agent of an absent deft., he must show that the person to be served is the agent of deft. in relation to the subject matter of the suit, to such an extent as to satisfy the ct. that the acceptance of a subpoena by such agent will fall within

the authority conferred upon him by his principal.—*PASSMORE v. NICOLLS* (1850), 1 Gr. 130.—*CAN.*

1. — Attorney of corporation aggregate.—A corpn. aggregate was not bound to appear at the trial as witness under a notice served on their attorney under 16 Vict. c. 19, s. 2.—*DUNWICH SCHOOL TRUSTEES v. M'BEATH* (No. 2) (1854), 4 C. P. 228.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—

A. (c) vi.

m. Certificate of examiner.—Upon a motion by deft. to compel pltf. to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination the only material filed was a certificate of the examiner, which did not show that due service of subpoena & appointment & payment of conduct money had been made. *Scmble*: the certificate

Sect. 3.—Attendance: Sub-sect. 1, A. (c) vi., (d), (e) & (f), B. (a) i., ii. & iii. & (b); sub-sects. 2 & 3. A. (a).]

an appearance for deft. under Ord. 8, Aug. 1841, omitted to mention the place of service:—*Held*: a second affidavit, showing that deft. had for the last six years resided in one particular place, supplied the omission.—*LLOYD v. WARING* (1843), 2 L. T. O. S. 146; 7 Jur. 1125.

—*J.—See, now, R. S. C., Ord. 37, r. 33.*

4397 Evidence of solicitor—That subpoena served.—*SMITH v. WINDER* (1858), 1 F. & F. 95.

(d) *Resealing Subpoena.*

4398. When necessary.—When a witness is subpoenaed to attend at the sittings, & the cause is made a *remand*, the subpoena must be resealed & reserved, & if the witness is only served with a notice to attend at the last sittings, the ct. will not grant an attachment.—*SYDENHAM v. RAND* (1784), 3 Doug. K. B. 429; 90 E. R. 732.

4399. —*J.—BARBER v. WOOD*, No. 4353, *ante*.

(e) *Calling Witness on Subpoena.*

4400. Time for—Before jury sworn.—Counsel for pltf. has a right on the cause being called on to have a witness called on his subpoena without swearing the jury.—*HOPPER v. SMITH* (1827), Mood. & M. 115, N. P.

Annotation:—Refd. Mullett v. Hunt (1833), 1 Cr. & M. 752.

4401. Mode of—Production in court of subpoena—Necessity for.—*LONGLEY v. FAIRCROSS* (1844), 4 L. T. O. S. 121, N. P.

4402. ———. **No necessity for writ to be held by officer of court.**—It is not indispensably necessary that when a witness is called on his subpoena, the officer of the ct. should hold the writ in his hands; it is sufficient that the writ should be exhibited in ct., & the officer call him three times.—*R. v. FENN* (1835), as reported in 3 Dowl. 546.

Annotations:—Refd. Gough v. Miller (1844), 8 Jur. 758. *Menid. Miller v. Knox* (1838), 4 Bing. N. C. 574.

Whether condition precedent—To order for attachment or committal.—*See Sub-sect. 7, A. (b), post.*

— **To action for damages against witness.**—*See Sub-sect. 7, C., post.*

(f) *Irregularity in Subpoena.*

As to form & contents of subpoena.—*See Sub-sect. 1, A. (b), ante.*

of the examiner as to these points would not have been sufficient.—*MCLEAN v. BRUCE* (1888), 12 P. R. 602.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—A. (e).

n. Party called as witness.—A pltf. or deft. called as a witness under 16 Vict. c. 19, is not entitled to any other notice or to be subpoenaed differently from any other witness.—*NASH v. BUSH* (1856), 5 C. P. 300.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—B. (a) i.

o. How application made—Necessity for affidavit—That testimony unobtainable *alibi*—& attendance of witness necessary.—A party seeking to obtain writs of subpoena to enforce the attendance of witnesses from England, must, in his affidavit, satisfy the ct., & show facts indicating that the attendance of the witnesses required is necessary, & that the testimony they are expected to afford cannot be obtained from other quarters.—*DAVIS v. REEVES* (1855), 7 Ir. Jur. 291.—*IR.*

As to service of subpoena.—*See Sub-sect. 1, A. (c), ante.*

4403. Waiver—Effect of.—The solr. of pltf. in the cause was served with a subpoena to attend & be examined before comrs. as a witness for defts., & he thereupon attended & delivered to the comrs. a written refusal to be examined on the ground of his being professionally employed by pltf. —*Held*: a witness who has attended to be examined, in pursuance of a subpoena, cannot then refuse to be examined, on the ground of irregularity in the service of the subpoena.—*WISDEN v. WISDEN* (1849), 6 Hare, 549; 13 L. T. O. S. 546; 67 E. R. 1281.

4404. ———. **Deft., whom pltf. desired to cross-examine upon an affidavit verifying accounts, was not served personally with the subpoena to attend at the examiner's office, nor was the notice requiring his attendance, which was sent to his solrs., given within the fourteen days limited by Order 19, Feb. 5, 1861, nor did the notice state the points on which it was desired to cross-examine deft. He, however, attended at the examiner's office, & without raising any of the above objections, refused to be sworn, because he was not satisfied with the amount tendered for his expenses:—Held**: he should attend at his own expense to be cross-examined.—*LAWTON v. PRICE* (1868), 16 W. R. 666, L. JJ.

B. Witnesses out of Jurisdiction.

(a) *Issue of Subpoena.*

i. *In General.*

4405. How application made—Ex parte.—The rule for a *subpoena ad testificandum*, commanding the attendance at the trial of a witness in another part of the kingdom, is obtained *ex parte*. & is absolute in the first instance.—*REDMAN v. BROERN* (1855), 26 L. T. O. S. 79; 4 W. R. 24; *sub nom.* *READMAN v. BROERS*, 1 Jur. N. S. 1052.

Necessity for affidavit—That attendance of witness reasonably necessary.—*See Nos. 4406, 4407, post.*

ii. *Against Whom issued.*

4406. Witness resident in Scotland.—On an affidavit that a witness residing in Scotland was a necessary witness, the ct. ordered a subpoena to issue for his attendance at the trial.—*BRUCE v. MEASOR* (1856), 4 W. R. 230.

4407. ———. **A rule for a subpoena to bring up a witness from Scotland, under 17 & 18 Vict. c. 34,**

to grant an order for a subpoena to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause.—*McKERCHIE v. MONTGOMERY* (circa 1862), 1 Ch. Ch. 225.—*CAN.*

a. — Upon appeal to sessions.—Under Criminal Code, 1892, ss. 584 & 843 it is competent for a Judge of the high ct. or county ct. to make an order for the issue of a subpoena to witnesses in another province to compel their attendance upon an appeal to the general sessions from the action of the justices of the peace under sects. 879 & 881.—*R. v. GILLESPIE* (1894), 16 P. R. 155.—*CAN.*

PART V. SECT. 3, SUB-SECT. 1.—B. (a) ii.

b. Witness resident in Scotland—Or in England.—The ct. has jurisdiction to order a subpoena to issue to compel the attendance of a witness resident in England or Scotland.—*ROSS v. BURKE* (1872), 6 I. R. Eq. 328.—*IR.*

c. ———.—*See* *UNDERWOOD v.*

p. ———.—*See* *NERWICH v. GREGORY* (1855), 7 Ir. Jur. 144.—*IR.*

q. ———.—*See* *DUNNE v. LEWIS* (1859), 8 I. C. L. R. App. liv.—*IR.*

r. ———. **d. Evidence material.**—Before the ct. will grant a *subpoena ad testificandum* to compel the attendance of a witness resident out of the jurisdiction it must be satisfied by affidavit that the evidence is material, & cannot be proved *alibi*.—*LAWDER v. LAWDER* (1855), 7 Ir. Jur. 28.—*IR.*

s. Subpoena issued by court of nisi prius—Whether binding outside county where court is sitting.—B. having been served at Niagara with a subpoena issued by the clerk of assize, to attend at the assizes then sitting in Toronto:—*Held*: a subpoena issued by the ct. of nisi prius, which is of local jurisdiction, is not binding out of the county where such ct. is then sitting.—*GRANTHAM v. BISHOP* (1851), 1 C. P. 237.—*CAN.*

t. Power of court to order—Although evidence not intended to be used at trial.—The ct. has authority

will not be granted unless the affidavit disclose facts to show that the attendance of the proposed witness is reasonably necessary.—*ALLEN v. HAMILTON* (DUKE) (1867), L. R. 2 C. P. 630; 15 W. R. 866.

4408. Witness resident in Ireland.—Pltf., resident in Ireland, may be compelled by a *subpœna ad testificandum*, under 17 & 18 Vict. c. 34, issued on the part of deft., to attend at the trial of a cause in this country.—*HARRIS v. BARBER* (1855), 25 L. J. Q. B. 98.

iii. In What Proceedings issued.

See Attendance of Witnesses Act, 1854 (c. 34); Judicature Act, 1884 (c. 61).

Arbitration proceedings.—See ARBITRATION, Vol. II., p. 432, Nos. 820, 821.

(b) Service of Subpœna.

See Attendance of Witnesses Act, 1854 (c. 34); Judicature Act, 1884 (c. 61).

SUB-SECT. 2.—HABEAS CORPUS AD TESTIFICANDUM.

See CROWN PRACTICE, Vol. XVI., pp. 272–274.

SUB-SECT. 3.—SUBPŒNA DUCES TECUM.

A. The Subpœna.

(a) In General.

4409. Nature of subpœna.—The writ of *subpœna duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded which he has in his possession, & which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the ct., & not the witness, is to judge; & in an action against a sheriff's bailiff, for disobeying such writ, who having been subpœnaed, in a former action by pltf. against another, to produce the warrant under which he acted, had neglected so to do, whereby pltf. was non-suited, his ability to produce the warrant & his want of just excuse for not producing it, are sufficiently alleged by stating, that he could & might in obedience to the said writ of subpœna have produced at the trial of the said warrant, & that he had no lawful or reasonable excuse or impediment to the contrary.—*AMEY v. LONG* (1808), 9 East, 473; 103 E. R. 653; *previous proceedings* (1807), 1 Camp. 14, N. P.

Annotations:—*Consd.* *Crowther v. Appleby* (1873), L. R. 9 C. P. 23. *Expld.* *R. v. Stuart* (1885), 2 T. L. R. 144. *Refd.* *Summers v. Moseley* (1834), 4 Tyr. 158; *R. v. Russell* (1839), 3 Jur. 604; *R. v. Greenaway* (1845), 7 Q. B. 126; *Eccles v. Louisville & Nashville Railroad Co.* (1911), 56 Sol. Jo. 74; *R. v. Wiltshire Appeal Tribunal, Ex p. Thatcher* (1916), 86 L. J. K. B. 121. *Mentd.* *Davis v. Lovell* (1839), 3 Jur. 225.

4410.—Distinguished from summons of justices.—Requiring witness to attend & produce documents.]—The summons of a justice, requiring

a party possessed of documents to attend as a witness & produce such documents on the hearing of an application for an order of removal, is not equivalent to a *subpœna duces tecum*; & secondary evidence is not admissible on proof that such summons has been served & disobeyed.—*R. v. ORTON* (INHABITANTS) (1815), 7 Q. B. 120; 1 New Mag. Cas. 243; 1 New Sess. Cas. 567; 14 L. J. M. C. 89; 5 L. T. O. S. 53; 9 J. P. 520; 9 Jur. 441; 115 E. R. 433.

4411. Necessity for—Solicitor in possession of documents.—An attorney, a witness to a deed, & in possession of the same, cannot be compelled to attend with the deed at the hearing of the cause, otherwise than by a *subpœna duces tecum*.—*BUSK v. LEWIS* (1821), 6 Madd. 29; 56 E. R. 1000.

4412.—In court.]—Where the attorney of a deft. on a criminal trial holds, as attorney for another person, a document which he admits to have with him in ct., & the production of which is requisite for the purposes of the trial, he is bound to produce it, although he has not been served with a *subpœna duces tecum*.—*R. v. NORTH* (1815), 5 L. T. O. S. 538; 1 Cox, C. C. 258.

4413.—(1) The holder of a bill, put it into the hands of an attorney to sue upon it in the name of another person, who was really trusted by the attorney for the costs, & regarded as his client:—*Held*: he was not entitled to sue the attorney for negligence in the action.

(2) Where deft.'s attorney was not bound to produce the bill on a notice to produce:—*Held*: he was bound to produce it on *subpœna duces tecum*.—*MOSS v. SOLOMON* (1858), 1 F. & F. 342, N. P.

4414.—Witness with documents in court.]—A witness being sworn, & having then in ct. a document in his possession, is bound to produce it, if required, though he has not received any notice to produce, nor has been served with a *subpœna duces tecum*.—*SNELGROVE v. STEVENS* (1812), Car. & M. 508; 6 J. P. 525, N. P.

4415. Whether necessary to swear witness merely producing documents.—If a person having the custody of papers be subpœnaed to produce them on the trial of a cause, he may be called on to put them in without being sworn as a witness.—*DAVIS v. DALL* (1830), 4 C. & P. 335; *Mood. & M.* 514, N. P.

Annotation:—*Consd.* *Summers v. Moseley* (1834), 3 L. J. Ex. 128.

4416.—A person producing documents under a *subpœna duces tecum* need not be sworn, if the party by whom he is called does not wish to examine him.—*PERRY v. GIBSON* (1831), 1 Ad. & El. 48; 3 Nev. & M. K. B. 462; 3 L. J. K. B. 158; 110 E. R. 1125.

4417.—A party served with a *subpœna duces tecum* is bound to produce the required document in ct., & need not be sworn. Thus in an action against a sheriff upon Debtors' Imprisonment Act, 1759 (c. 28), for a penalty incurred by

DARRACOTT (1873), 8 I. R. Eq. 348.—IR.

d. Witness resident in any part of the United Kingdom.—The Probate Division has jurisdiction to order a subpœna to issue to compel the attendance of witnesses residing in any part of the United Kingdom.—*BAGOT v. BAGOT* (1878), 1 L. R. Ir. 1.—IR.

e. Whether against party.—*Semble*: C. S. C., c. 79, s. 4 authorising the issue of a subpœna to Lower Canada, does not apply to a party to the suit, as C. S. U. C., c. 32, s. 16, apparently contemplates a commission in such case.—*YOUNG v. O'REILLY* (1864), 21 U. C. R. 172.—CAN.

PART V. SECT. 3, SUB-SECT. 1.—B. (b).

f. Affidavit of service abroad.—Whether commission to authorise taking necessary.]—It is unnecessary to take a commission to authorise the taking of the affidavit of service in a foreign country.—*SNYDER v. O'LONE* (1853), 4 Gr. 148.—CAN.

g. Party temporarily within jurisdiction.—When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment & subpœna, as in the case of resident litigants, is sufficient to compel his attendance.—*COMSTOCK v. HARRIS* (1887), 12 P. R.

17.—CAN.

PART V. SECT. 3, SUB-SECT. 3.—A. (a).

4414 i. Necessity for—Witness with documents in court.—Pltf.'s witness stated that work was done upon a written agreement, which he had in ct., but refused to produce. He had not been subpœnaed:—*Held*: he was as much bound to produce the writing as if in attendance under a *subpœna duces tecum*.—*FAILEY v. GRAHAM* (1852), 9 U. C. R. 438.—CAN.

h.—When a *subpœna duces tecum* has been directed by counsel, & is necessary to enforce the production

day to day."]—A writ of *subpœna duces tecum* required deft.'s attorney to appear on a particular day, but did not command him to appear "from day to day," after that day. The cause was postponed at the instance of deft., & the attorney did not appear on the day when the cause was called on:—**Held:** attachment for disobedience to the subpœna refused.—**VAUGHTON v. BRINE** (1840), 9 Dowl. 179; Woll. 41; 4 Jur. 1061.

(d) *Service of Subpoena.*

4432 Sufficiency—Personal attendance of officer of court required—Necessity for so informing witness.]—When an officer of the ct. is served with a *subpoena duces tecum* to produce a judgment book, if the personal attendance of the officer be necessary, he must be informed so, or the ct. will not grant an attachment against him, his clerk having attended with the book, though ptff. was nonsuited in consequence.—**BENNETT v. JONES** (1815), 2 Chit. 403.

(e) *Irregularity in Subpœna.*

4433. Effect of—Witness may disregard sub-pœna.]—An irregular *subpœna duces tecum* may be disregarded by a witness. —TIPPLIN v. COATES (1848), 17 L. J. Ch. 337; 13 L. T. O. S. 441; 12 Jur. 339, L. C.; *previous proceedings* (1847), 6 Hare, 16.

4434 ———.]—On an inquiry in chambers to ascertain the next of kin of a person dead, partially intestate, one of the claimants, not a party to the suit, served upon deft., the administrator, & also one of the claimants of kinship, a summons to attend for examination, & a *subpoena duces tecum* to compel him to produce all letters from persons named in the subpoena, to intestate, & other documents; deft. admitted possession of some such letters & documents, but declined to produce them. Upon motion:—*Held*: without deciding whether the description was too general, this was an improper mode of attempting to obtain evidence to support the claim.—*NEWLAND v. STEER* (1805), 13 L. T. 111; 11 Jur. N. S. 596; 13 W. R. 1014.

— Subpœna set aside.]—See Nos. 4427, 4428,

B. What Documents must be Produced.

(a) Documents of which Witness has Custody only.
i. In General.

4435. General rule.—(1) Upon a *subpoena duces tecum*, a witness is bound to produce a paper which he has in his actual custody, though the legal right & property in such paper belong to another. The ct., however, in all such cases will exercise their discretion, in deciding what papers shall be produced; & under what qualifications, as respects the interest of the witness.

(2) Such witness is bound to produce them, though there be a regular way prescribed by law for obtaining such documents.—*CORSEN v. DUBOIS* (1816), Holt, N. P. 239, N. P.

4436. Documents in possession of witness only as employee—Steward of manor.]—Possession of a steward of documents, as leases, etc., is the possession of his employer, & therefore, not affected by a *subpoena duces tecum* served on the steward to produce them on the part of a deft. on the trial of an action at law, in which his employer was plff. The steward may, however, be

examined as a witness to give evidence of the existence & contents of a particular document, if due notice have been given to produce it specifically.—*FALMOUTH (EARL) v. MOSS* (1822), 11 Price, 455; 147 E. R. 530.

Annotation :—**Refd.** Crowther v. Appleby (1873), L. R. 9 C. P. 23.

4437. — — —.]—An attorney & steward of a lord of a borough is bound to produce under a *subpœna duces tecum* public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough.—*R. v. WOODLEY* (1834), 1 Mood. & R. 390, N. P.

Annotation :—**Refd.** Doe d. Egremont v. Langdon (1848), 13 Jur. 96.

4438. ----- No permission by master to produce
—Clerk in public office—Permission of head of
office not obtained.]—A party nonsuited for non-
production of a document from a public office, is
not entitled to a new trial on the ground of sur-
prise, where he has served a clerk in the office
with a *subpoena duces tecum* to produce the docu-
ment, but has omitted to apply to the head of the
office for permission for its production.—AUSTIN
v. EVANS (1841), 2 Man. & G. 430 ; 9 Dowl. 408 ;
Drinkwater, 77 ; 133 E. R. 814.

Annotations:—**Refd.** *Crowther v. Appleby* (1873), L. R. 9 C. P. 23. **Mentd.** *Cockrell v. Van Diemen's Land Co.* (1855), 25 L. T. O. S. 70.

4439. ——— Secretary & solicitor of company—Refusal of directors to allow production.]—The ct. refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Ct. of Pleas at Lancaster, & of an arbitrator, which required the witness to produce before the latter in London a large number of books & documents belonging to a railway co. in Lincolnshire, of which he was the secretary & solr., & which the directors who were no parties to the reference refused to allow him to bring.—CROWTHER v. APPLEBY (1873), L. R. 9 C. P. 23; 43 L. J. C. P. 7; 22 W. R. 265; *sub nom.* CROWTHER v. APPLEBY, *Re* SHARPLEY, 29 L. T. 580; 38 J. P. 21.

Annotations.—**Consd.** *Eccles v. Louisville & Nashville Ry.*, [1912] 1 K. B. 135. **Refd.** *Forbes v. Samuel*, [1913] 3 K. B. 706.

4440. ——— **Books taken out of his custody.]**—The secretary of a co. was called upon to produce the books of his co. in obedience to a *subpoena duces tecum*. * He did not produce them, & stated that, by a resolution passed by his directors subsequently to the service of the subpoena upon him, the books had been taken out of his custody :—*Held* : no writ of attachment for disobedience to his subpoena ought to issue against him.—*R. v. STUART* (1885), 2 T. L. R. 144, D. C.

4441. — — — — —]—A witness, who was the manager of one branch of T.'s business, & in whose possession were, it was said, certain documents relating to dealings that had taken place between debtor & T., was ordered to attend & produce on subpoena the documents. The witness had no authority to produce the documents, & refused to do so:—*Held*: as the witness was a mere servant & had no authority from his master to produce the documents, he could not under the circumstances of the case be ordered to do so.—*Re HIGGS, Ex p. LEICESTER* (1892), 66 L. T. 296; 40 W. R. 432, D. C.

4442. — Accountant.]—PRICE v. DUNN (1844),
2 L. T. O. S. 308.

PART V. SECT. 3, SUB-SECT. 3.—
B. (a) i.

m. *Public documents* — In posses-

sion of clerk of the peace—Records of sessions.)]—A clerk of the peace is not bound to produce the records of the sessions in his possession as such

clerk, in compliance with a *subpoena duces tecum*.—WETMORE v. HARDING (1878), 2 P. & B. 338.—CAN.

Sect. 3.—Attendance: Sub-sect. 3, B. (a) i. & ii., (b) & (c).]

4443. Public documents.]—Pltf.'s counsel have admitted, that the officers of excise were not bound to produce the public books; & indeed it would be highly inconvenient if they were liable to be called upon by every individual for that purpose (ASHHURST, J.).—*ATHERFOLD v. BEARD* (1788), 2 Term Rep. 610; 100 E. R. 328.

Annotations:—Mentd. Good v. Elliott (1790), 3 Term Rep. 693; Shirley v. Sankey (1800), 2 Bos. & P. 130; Ramloll Thackoorseydass v. Soofjunnall Dhondmull (1848), 6 Moo. P. C. C. 300; Pitch v. Jones (1855), 5 E. & B. 238.

4444. — In possession of mayor—Charter of borough.]—For the purposes of an election petition relating to the return of a member for a borough, the mayor of the borough was served with notice to produce at the hearing "all public books, documents, records, & writings whatsoever in his custody relating to the voters of the said borough":—*Held*: under such notice the mayor was bound to produce the charter of the borough.—*YOUGHAL CASE* (1838), Falc. & Fitz. 385.

4445. — In public office—Subpœna served on clerk—Permission of head of office not obtained.]—*AUSTIN v. EVANS*, No. 4438, *ante*.

4446. Parish books—Rate books.]—*R. v. GREENAWAY, R. v. CAREY*, No. 4331, *ante*.

4447. — —.]—Overseers of the poor are bound to produce the rate books of their parish before the justices at petty sessions, on an inquiry into the settlement of a pauper, in obedience to a writ of *subpœna duces tecum*; & if they wilfully omit or refuse to do this, this ct. will grant an attachment against them.

Semble: the attachment will be granted against them, if they do not produce the books, although they swear that they are not in their possession, & that they have made search for them, & think it probable that they may be in custody of a late overseer specifically named, if they do not at the same time swear that they have made search in the parish chest, for this is the proper place for the custody of the books, & the overseers would naturally, in the first instance, expect to find them there.—*R. v. EATON & CROWE* (1846), 6 L. T. O. S. 378; 10 Jur. 222; *sub nom.* *R. v. EATON & CROWE, Re LOVACK'S SETTLEMENT*, 10 J. P. 407.

Company books—In winding up proceedings.]—See COMPANIES, Vol. X., pp. 898, 899, Nos. 6132–6135.

ii. Documents in Possession of Solicitors.

4448. Document tending to prejudice client.]—An attorney is not bound to obey a *subpœna duces tecum* to prove a forgery against his own client.—*R. v. DIXON* (1765), 3 Burr. 1087; 97 E. R. 1047.

Annotations:—Refd. Amey v. Long (1808), 9 East, 473; *R. v. Cox & Rallion* (1884), 14 Q. B. D. 153. *Mentd.* Taylor v. Sheppard (1835), 1 Y. & C. Ex. 271.

4449. —.]—A solr. under a commission of bkpt. is not bound to produce the proceedings under the commission in a collateral action, where the production might tend to the detriment of his clients.—*JAING v. BARCLAY* (1821), 3 Stark, 38, N. P.; *subsequent proceedings* (1823), 1 B. & C. 398.

Annotation:—Refd. Doe d. Egremont v. Dato (1842), 11 L. J. Q. B. 220.

4450. —.]—An attorney is not bound to produce a composition deed in which his client is interested, in a suit between other parties.—

HARRIS v. HILL (1822), 3 Stark. 140; Dow. & Ry. N. P. 17, N. P.

Annotation:—Refd. Volant v. Soyer (1853), 13 C. B. 231.

4451. —.]—In an action against annuity brokers, who have become bkpt., for laying out the money of pltf. on bad security, the solr. under their commission is compelled to produce their books, under a *subpœna duces tecum*; & an entry in their ledger is evidence, though the witness who produces it did not make the entry; & the solr. under their commission is compelled to produce the ledger containing the account between them & the person to whom they advanced the money, to show that they knew him to be in an insolvent state.—*HAWKINS v. HOWARD & GIBBS* (1824), 1 C. & P. 222; Ry. & M. 61, N. P.

4452. Document received in professional capacity.]—A person having a deed in his possession, that in effect amounted to an act of bkpcy. by one of the parties, was ordered to attend the comrs. with it, without prejudice to any objection being taken before them as to disclosure of confidential communications.—*Re —, Ex p. TREACHER* (1817), Buck, 17, L. C.

4453. — Document not part of client's title.]—By an order of the Ct. of Ch., made in a suit depending between the lessee & lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. Upon ejectment brought by the lessee against the tenant in possession:—*Held*: the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title.—*DOE d. COURTAIL v. THOMAS* (1829), 9 B. & C. 288; 4 Man. & Ry. K. B. 218; 7 L. J. O. S. K. B. 214; 109 E. R. 107.

Annotations:—Refd. Doe d. Egremont v. Dato (1842), 11 L. J. Q. B. 220; *Re Chancellor* (1850), 16 L. T. O. S. 323.

Mentd. Doe d. Rogers v. Rogers (1833), 5 B. & Ad. 755; *Worham v. Pemberton, Newenham v. Pemberton* (1847), 1 De G. & Sm. 644.

4454. — Document produced in Ct. of Bankruptcy—& returned under undertaking to produce thereafter on request—Whether solicitor bound to produce document in action by trustee in bankruptcy.]—An attorney who receives a deed from his client, & is compelled to produce it by comrs. of bkpt., & afterwards receives it back from them under an undertaking to produce it again if required, may nevertheless refuse to produce it in an action brought by the assignees of bkpt. under whose commission he was compelled to produce it.—*NIXON v. MAYOH* (1831), 1 Mood. & R. 76, N. P.

Annotation:—Mentd. *Re Reay* (1847), 8 L. T. O. S. 476.

4455. — Draft of conveyance.]—Vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared; the attorney was paid for this business by the vendor & purchaser in moieties by agreement, but the latter employed an attorney on his own part to look over the draft. It remained afterwards with the vendor's attorney:—*Held*: such draft was confidentially deposited with the latter, by the purchaser as well as the vendor, & could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor & his attorney.—*DOE d. STRODE v. SEATON* (1834), 2 Ad. & El. 171; 4 Nev. & M. K. B. 81; 4 L. J. K. B. 13; 111 E. R. 66.

Annotations:—Refd. Weeks v. Argent (1847), 16 M. & W. 817; *Sutcliffe v. James* (1879), 40 L. T. 875. *Mentd.* Doe d. Hopley v. Young (1845), 15 L. J. Q. B. 9; *Johnson v. Thompson* (1850), 15 L. T. O. S. 437.

PART V. SECT. 3, SUB-SECT. 3.—
B. (a) ii.

4452 i Document received in pro-

fessional capacity.]—A person interested in one part of a letter is not entitled to call for the disclosure of confidential communications made to a law agent

in another part of it.—*FIFE (EARL) v. FIFE'S (EARL) TRUSTEES* (1816), 1 Murr. 103.—*SCOT*.

4456. —. —.]—**MARSTON v. DOWNES**, No. 4218, *ante*.

4457. —. —.]—**Will—Held for devisee.**]—A witness is not bound to produce in obedience to a subpoena a will which he holds as attorney for a devisee claiming under it, although it be suggested that it is a will of personality as well as of realty & ought therefore to be deposited in the Ecclesiastical Ct.—**DOE d. CARTER v. JAMES** (1837), 2 Mood. & R. 47, N. P.

Annotation. :—**Consd.** Volant v. Soyer (1853), 13 C. B. 231.

4458. —. —.]—A witness who was a solr. & had been engaged in preparing a marriage settlement, in his examination demurred to such parts of interrogatories as required him to produce certain correspondence in writing, & documents, on the ground of professional privilege:—**Held**: the demurrers would be overruled, as they did not contain any distinct statement that such correspondence was in itself confidential, or that the books or documents contained matters of confidential communication with reference to the subject of that identical interrogatory as between himself & clients.—**WALSH v. TREVANION** (1847), 15 Sim. 577; 16 L. J. Ch. 330; 9 L. T. O. S. 216; 11 Jur. 360; 60 E. R. 743.

4459. —. —.]—**Semble**: the rule of evidence which prohibits an attorney who has received documents from a client in a professional character from producing them in evidence against that client, applies to documents which are the subject-matter of the charge. The rule extends to cases where the attorney has a lien upon the documents.—**R. v. HANKINS** (1849), 2 Car. & Kir. 823; 3 Cox, C. C. 434.

4460. —. —.]—An attorney subpoenaed to produce a document at a trial, may in his discretion refuse to produce it, on the ground that it has been entrusted to him by a client. He is neither bound to produce it, nor to answer a question with respect to its nature; & the judge ought not to examine it to see whether it is a document which ought to be withheld.—**VOLANT v. SOYER** (1853), 13 C. B. 231; 22 L. J. C. P. 83; 20 L. T. O. S. 208; 138 E. R. 1187.

4461. —. —.]—**Document not privileged as regards client.**]—**Re CAMERON'S COALBROOK, ETC. RY. CO.**, No. 4265, *ante*.

4462. —. —.]—**Documents in furtherance of criminal purpose—Solicitor not implicated in fraud.**]—A solr., being examined as a witness in a suit to establish a claim upon a widower in respect of property, alleged to have been fraudulently received by the deceased wife of the widower during coverture, was not compelled to produce letters written to him by the wife at the time of the alleged fraud, he having received those letters in his professional capacity, & not having been implicated in the fraud.—**CHARLTON v. COOMBES** (1863), 4 Giff. 372; 1 New Rep. 547; 32 L. J. Ch. 284; 8 L. T. 81; 27 J. P. 725; 9 Jur. N. S. 534; 11 W. R. 501; 66 E. R. 751.

Annotation. :—**Refd.** R. v. Cox & Ralton (1884), 14 Q. B. D. 153.

4463. —. —.]—**Marriage Settlement.**]—**BURSILL v. TANNER**, No. 4187, *ante*.

—. —.]—**Document subject to lien.**]—*See* Sub-sect. 3, B. (c), *post*.

4464. —. —.]—**Document not received in professional**

capacity.]—If a solr. not being bkpt.'s solr., has in his custody a deed of assignment executed by bkpt., he must produce it if required so to do by the comrs.—**Re OAKDEN**, *Ex p.* LAW (1817), Buck, 110, L. C.

Production & inspection of documents before trial.]—*See* DISCOVERY, Vol. XVIII., pp. 120 *et seq.*

(b) *Documents in which Witness has Limited Right and Property.*

4465. Partnership books.]—**A.-G. v. WILSON**, No. 4429, *ante*.

4466. Copy of partnership deed.]—Each of several members of a firm signed a copy of the partnership deed, & each partner retained a copy. In an action for penalties against one of the partners:—**Held**: a partner of debt. was compellable to produce his copy of the partnership deed upon a *subpoena duces tecum*.—**FORBES v. SAMUEL**, [1913] 3 K. B. 706; 82 L. J. K. B. 1135; 100 L. T. 599; 29 T. L. R. 514.

Annotations. :—**Mentd.** Burnett v. Samuel (1913), 109 L. T. 630; Bird v. Samuel (1914), 30 T. L. R. 323; Tranton v. Astor (1917), 33 T. L. R. 383; Nichol v. Fearby, Nichol v. Robinson, [1923] 1 K. B. 480.

(c) *Documents Subject to Lien.*

4467. General rule—Whether lien ground of objection.]—A right of lien upon an instrument in the possession of a witness, except in the case of an attorney or solr., is not a good objection to the production of the instrument in evidence under a *subpoena duces tecum*.—**HUNTER v. LEAKE** (1829), 7 L. J. O. S. K. B. 221.

4468. —. —.]—A broker, who has possession of a policy, which he effected, & on which he has a lien, is compellable to produce it under a *subpoena duces tecum*, on the part of the assured, on the trial of an action against the underwriters.

A lien is a mere right of possession, & does not relieve the party claiming it from the necessity of producing the instrument which he holds, when regularly required to do so for the purposes of a cause (**PARKE, J.**).—**HUNTER v. LEATHLEY** (1830), 10 B. & C. 858; Dan. & Ll. 226; L. & Welsh, 125; 5 Man. & Ry. K. B. 522; 8 L. J. O. S. K. B. 201; 109 E. R. 667; *affd.*, *sub nom.* LEATHLEY v. HUNTER (1831), 7 Bing. 517, Ex. Ch.

Annotations. :—**Refd.** Gibson v. Overbury (1841), 7 M. & W. 555; Ley v. Barlow (1848), 1 Exch. 800; *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1. **Mentd.** Boyle v. Wiseman (1855), 10 Exch. 647.

4469. —. —.]—A person's having a lien upon a document is no objection to his producing it on a trial at *Nisi Prius*.—**THOMPSON v. MOSELY** (1833), 5 C. & P. 501, N. P.

Annotation. :—**Refd.** Hope v. Liddell (1855), 7 De G. M. & G. 331.

4470. —. —.]—**Lien claimed against party seeking production.**]—A judge at *Nisi Prius* will not compel a witness to produce a document under a *subpoena duces tecum*, if, as against the party asking its production, the witness has a lien on the document which is called for.—**KEMP v. KING** (1842), Car. & M. 396; 2 Mood. & R. 437, N. P.

Annotation. :—**Refd.** Hope v. Liddell (1855), 7 De G. M. & G. 331.

4471. —. —.]—**GRIFFITH v. RICKETTS**, **GRIFFITH v. LUNELL**, No. 4419, *ante*.

4472. —. —.]—**Re CAMERON'S COALBROOK, ETC. RY. CO.**, No. 4265, *ante*.

PART V. SECT. 3, SUB-SECT. 3.— B. (b).

4465 i. Partnership books.]—In a suit to recover the balance due on a partnership transaction, first debt, who was examined as a witness for plff., refused

to produce certain accounts relating to the partnership which he was directed to produce by the judge:—**Held**: the accounts were relevant & material evidence in the suit, & the judge was justified in requiring first debt. to produce

VENKAIYA v. BHUPALAM PEDDA MUL-LASAPPAH (1868), 4 Mad. 142.—**IND.**

n. *Minutes of meetings of society—Made by one of the members.*]—**CARTER v. DENNIS** (1900), 4 Terr. L. R. 357.—**CAN.**

Sect. 3.—Attendance: Sub-sect. 3, B. (c) & (d), C. & D.; sub-sects. 4 & 5, A.]

4473. Solicitor's lien.]—A solr. refused to allow a deed in his possession to be proved on behalf of pltf., because he had a lien on it for costs due from deft.:—*Held*: he must produce the deed at his own expense, & pay all the costs consequent on his refusal.—*BRASSINGTON v. BRASSINGTON* (1823), 1 Sim. & St. 455; 57 E. R. 182.

Annotations:—Refd. Hope v. Liddell (1855), 20 Beav. 438; *Re Hawkes, Ackerman v. Lockhart*, [1898] 2 Ch. 1.

4474. —.]—*HUNTER v. LEAKE*, No. 4467, *ante*.

4475. —.]—*GRIFFITH v. RICKETTS, GRIFFITH v. LUNELL*, No. 4419, *ante*.

4476. — Documents received from client in professional character.]—*R. v. HANKINS*, No. 4459, *ante*.

4477. — Lien not claimed against party seeking production.]—A solr. served with *subpoena duces tecum* to produce for the purposes of evidence a deed in his possession, which his client, the owner of the deed, would be bound so to produce, cannot refuse such production merely on the ground that he has a lien on the deed for the costs of preparing it, when the person by whom the production is called for is not a party against whom the lien is claimed.—*HOPE v. LIDDELL* (1855), 7 De G. M. & G. 331; 3 Eq. Rep. 790; 24 L. J. Ch. 691; 25 L. T. O. S. 231; 1 Jur. N. S. 665; 3 W. R. 581; 41 E. R. 129. L. J.J.

4478. —.]—A solr. being called as a witness by pltf. under a *subpoena duces tecum*, to produce her marriage settlement, to which she was a party, for her inspection:—*Held*: he could not refuse to do so by reason of his lien for the unpaid costs of preparing it.—*FOWLER v. FOWLER* (1881), 50 L. J. Ch. 686; 44 L. T. 799; 29 W. R. 800.

4479. —.]—The London agent of a firm of country solrs. received in the course of his employment certain documents belonging to the lay client. The country solrs. having become bkpt., the client obtained the common order to tax their bill of costs. Upon the application for that order the London agent acted as solr. for the client. The order directed the trustee in bkpy. & the client to produce before the taxing master all documents relating to the matter in question. The client subsequently changed his solr., & the London agent refused to deliver up the documents in his possession on the ground that he had a lien upon them, not only for the proportion of the bill due to him as such agent, but also for all costs due to him from the country solrs. The London agent refused to produce them upon a *subpoena duces tecum*:—*Held*: the London agent was not bound to produce the documents.—*Re JONES & ROBERTS*, [1905] 2 Ch. 219; 92 L. T. 562; 53 W. R. 444; 21 T. L. R. 352; 49 Sol. Jo. 367; *on appeal*, 74 L. J. Ch. 458, C. A.

In winding-up proceedings.]—*See COMPANIES*, Vol. X., pp. 891, 899, 952, Nos. 6062, 6063, 6137, 6138, 6526.

Production & inspection of documents before trial.]—*See DISCOVERY*, Vol. XVIII., pp. 113–116, Nos. 644–674.

(d) Other Documents.

4480. Deeds.]—*WILFORD v. DENNY* (1576), Cary. 52; 21 E. R. 28.

4481. Private papers.]—Under a *subpoena duces tecum*, a witness is not compellable to produce

private papers in his custody.—*MILES v. DAWSON* (1795), 1 Esp. 405; *Peake*, Add. Cas. 54, N. P.

Annotations:—Distd. Amey v. Long (1808), 9 East. 473. *Consd. Doe d. Egremont v. Date* (1842), 11 L. J. Q. B. 220.

4482. Title deeds.—Of mortgagor.—In possession of mortgagee.]—*R. v. UPPER BODDINGTON (INHABITANTS)*, No. 4166, *ante*.

4483. Trade books.]—Deft. being examined as a witness for pltf., under a *subpoena duces tecum*, refused to produce books of trade, although he brought them with him & referred to them. Pltf. then moved that he might be ordered to produce them, on the ground that they contained matters which would throw light on the case; & the notice of motion referred to a particular case, as to which were entries in the books:—*Held*: motion would be refused with costs.—*SELBY v. FRASER* (1857), 5 W. R. 341.

4484. Sealed packet.]—(1) A sealed packet may be a "document," & therefore, liable to production upon a *subpoena duces tecum*.

The fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositors is no answer to a *subpoena duces tecum* requiring the banker to produce the document.

(2) Where there is disobedience to a *subpoena duces tecum*, the ct. has jurisdiction to enforce obedience by attachment, even though the disobedience is not wilful.—*R. v. DAYE*, [1908] 2 K. B. 333; 77 L. J. K. B. 659; 99 L. T. 165; 21 Cox, C. C. 659; *sub nom. R. v. DAYE, Ex p. R.*, 72 J. P. 269.

Annotation:—As to (1) *Apld. Forbes v. Samuel*, [1913] 3 K. B. 706.

4485. Will.]—*Re FLOYD* (1909), 53 Sol. Jo. 790.

C. Objection to Production of Documents.

4486. Mode of objection.—Witness must raise objection.—Not counsel.—Retained by witness to raise objection.]—A witness called on his *subpoena duces tecum*, who objects to the production of documents, has no right to have the question of his liability to produce argued by his counsel retained for that purpose.—*DOE d. ROWCLIFFE v. EGREMONT (EARL)* (1841), 2 Mood. & R. 386, N. P.

4487. — Subpoena to bring document in Probate registry.—Non-contentious business.]—Where a writ of subpoena was issued in a non-contentious matter directing R., a solr., to bring into the Probate Registry a script which was stated to be, but which was not in fact, in his possession or control:—*Held*: his non-compliance with the subpoena was not, under the circumstances, a contempt.—*Re EMMERSON, RAWLINGS v. EMMERSON* (1887), 57 L. J. P. 1, C. A.

Grounds for objecting.—Document privileged.]—*See Sub-sect. 3, B. (a) ii., ante*.

Document subject to lien.]—*See Sub-sect. 3, B. (c), ante*.

Document of which witness has custody only.]—*See Sub-sect. 3, B. (a), ante*.

4488. — Document not in possession or custody of witness.]—*Re EMMERSON, RAWLINGS v. EMMERSON*, No. 4487, *ante*.

4489. — Document not material.]—It is not competent for a person served with a *subpoena duces tecum* to show that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment.—*DOE d. BUTT v. KELLY* (1835), 4 Dowl. 273.

PART V. SECT. 3, SUB-SECT. 3.—B. (d).

o. Telegrams.]—*Held*: the operator was the proper person to subpoena to produce telegrams.—*Re WIGHT & MACKHAM* (1888), 15 O. R. 148.—**CAN.**

4490. Validity of objection—Only of court.]—A witness had been served with a *subpœna duces tecum* to attend an examination before the master & bring with him certain documents which were in his possession. He was examined, but refused to produce the documents, swearing that they were not properly in his custody. On a motion to the ct. for an order for their production, the ct. considered that it was bound to exercise a discretion not so to order, unless some reason was shown for thinking it probable, that they would be evidence between the parties, & in this instance, not so supposing, it refused to compel the documents of a third party to be produced in a state of uncertainty, whether they could be so for any valuable purpose between the parties.—**PHILIPS v. PROTHERO** (1848), 2 De G. & Sm. 271; 11 L. T. O. S. 412; 12 Jur. 667; 64 E. R. 123.

Annotation:—Mentd. Wood v. Homfray (1851), 14 Beav. 7.

4491. ——— Grounds for upholding or rejecting objection—Document not evidence.]—**PHILIPS v. PROTHERO**, No. 4490, *ante*.

4492. ——— Objection overruled—Effect.]—Under a *subpœna duces tecum*, the party may, in ct. object to produce the documents; but if the objection is overruled, production will be compelled.—**FIELD v. BEAUMONT** (1818), 1 Swan. 204; 36 E. R. 358, L. C.

Annotations:—Mentd. Jarvis v. Evans (1838), 2 Jur. 639; Scotson v. Gaury (1811), 6 Jur. 96; Haigh v. Jaggar (1845), 2 Coll. 231.

D. Production of Documents at Proceedings other than Trial.

See **DISCOVERY**, Vol. XVIII., pp. 119, 120, Nos. 691-704.

SUB-SECT. 4.—DOCUMENT FILED IN SUPREME COURT.

See **Administration of Justice Act**, 1925 (c. 28), s. 26.

SUB-SECT. 5. EXPENSES.

A. In General.

4493. Necessity for tender of expenses.]—**BELGRAVE v. HERTFORD (EARL)** (1576), Cary, 62; 21 E. R. 33.

4494. ———.]—**MORE v. WOREHAM** (1580), Cary, 99; 21 E. R. 53.

4495. ———.]—**GARDINER v. SKIPKANY** (1582), Ch. Cas. in Ch. 161; 21 E. R. 94.

4496. ———.]—(1) On 5 Eliz., c. 9, for not appearing on a *subpœna*, a note left of the cause, place, & day, with a shilling, if accepted, is necessary to support the action; but if pltf. was not grieved by the non-appearance of the witness, he cannot recover.

(2) A witness who is served with a *subpœna*, & a shilling, is bound to attend.

(3) In an action on 5 Eliz., c. 9, against a witness for non-attendance, pltf. must show a damage for the want of the witness's testimony.—**GOODWIN v. WEST** (1639), Cro. Car. 540; 79 E. R. 1066.

4497. ———.]—**WAKEFIELD'S CASE**, No. 4350, *ante*.

PART V. SECT. 3, SUB-SECT. 5.—A.

4493 i. Necessity for tender of expenses.]

—Where a party to a suit is notified to attend as a witness for the opposite party a proper sum for his expenses

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should be tendered with the notice.—**STREET v. FAULKNER** (1857), 15 U. C. R. 116.—**CAN.**

4493 ii. ———.]—The ct. will not attach a party who has been summoned to

4498. ———.]—No attachment against a witness unless reasonable expenses were tendered him.—**CHAPMAN v. POINTON** (1711), 2 Stra. 1150; 13 East, 16, n.; 93 E. R. 1093.

Annotations:—Fold. Bowles v. Johnson (1748), 1 Wm. Bl. 36; Brocas v. Lloyd (1856), 23 Beav. 129. **Apld.** Ward v. Nield (1917), 87 L. J. K. B. 54. **Refd.** Miller v. Knox (1838), 4 Bing. N. C. 574.

4499. ———.]—*Subpœna* without tender of expenses will not bring a witness into contempt, though he comes to the assizes & refuses to be sworn.—**BOWLES v. JOHNSON** (1748), 1 Wm. Bl. 36; 96 E. R. 19.

Annotations:—Fold. Brocas v. Lloyd (1856), 23 Beav. 129. **Apld.** Ward v. Nield (1917), 117 L. T. 447. **Refd.** Newton v. Chaplin (1850), 10 C. B. 356.

4500. ———.]—The ct. will not grant an attachment against a witness for not obeying a *subpœna* to attend at a trial, unless the whole expenses of the journey, & of the necessary stay at the place of trial, be tendered at the time of serving the *subpœna*.—**FULLER v. PRENTICE** (1788), 1 Hy. Bl. 126; 126

Annotations:—Fold. Brocas v. Lloyd (1856), 23 Beav. 129. **Apld.** Ward v. Nield (1917), 117 L. T. 447.

4501. ———.]—The whole expenses must be paid or tendered, to a witness living at a distance, in order to ground an attachment against him for not obeying a *subpœna*.—**ASHTON v. HAIGH** (1814), 2 Chit. 201.

Annotation:—Consd. Dixon v. Lee (1831), 3 Dowl. 259.

4502. ——— Rule in criminal proceedings.]—A witness who is subpoenaed by a deft. indicted for a conspiracy, is compellable to give evidence, though such deft. refuses to pay his expenses; & the indictment having been removed by *certiorari*, & coming down to the assizes as a civil record, does not make any difference as to this.—**R. v. COOKE** (1824), 1 C. & P. 321.

4503. ———.]—**R. v. COUSENS** (1843), 2 Russell on Crimes & Misdemeanours, 8th ed. 2102.

4504. ——— Town cause.]—A witness from the country, subpoenaed there by deft., without receiving sufficient for his expenses, & afterwards, when in London, subpoenaed by pltf., & called by him on the trial, is bound to give his evidence both in chief & on cross-examination, & must seek to obtain his expenses in some other way than by objecting to be examined.—**EDMONDS v. PEARSON** (1827), 3 C. & P. 113, N. P.

Annotation:—Distd. Newton v. Harland (1810), 5 J. P. 134.

4505. ———.]—**JACOB v. HUNGATE**, No. 4375, *ante*.

4506. ———.]—A witness resident in London will not be compelled to give evidence for pltf. upon the trial in London of a cause in which he sues in *formâ pauperis*, unless such witness be first paid for his expenses & loss of time.—**MYERS v. MARKS** (1850), 15 L. T. O. S. 329.

4507. ——— Plaintiff suing in formâ pauperis.]—**BLACKBURN v. HARGREAVE** (1828), 2 Lew. C. C. 259.

4508. ———.]—**MYERS v. MARKS**, No. 4506, *ante*.

4509. ———.]—A witness who was duly served with a *subpœna*, but who received no conduct money, accompanied pltf. to the assize town, & lived with them while there. On the morning of the trial she refused to go to ct. to give evidence, unless £9, which was an unreasonable sum, was paid to her:—**Held**: pltf., not having tendered

give evidence on the hearing of a civil bill appeal, unless his reasonable expenses shall have been tendered to him along with the summons.—**CONNOR v. ———** (1842), Ir. Cir. Rep. 610.—**IR.**

Sect. 3.—Attendance: Sub-sect. 5, A., B. & C.]

her a reasonable sum to convey her home, were not entitled to an attachment against her for not obeying the subpoena.—*NEWTON v. HARLAND* (1840), 1 Man. & G. 956; 9 Dowl. 16; 1 Scott, N. R. 502; Woll. 53; 10 L. J. C. P. 11; 5 J. P. 134; 4 Jur. 992; 133 E. R. 619.

4510. ———.]—A witness is not bound to attend the examiner, unless the reasonable expenses of his journey, etc., have been tendered to him, or where an insufficient tender has been made.—*BROCAS v. LLOYD* (1856), 23 Beav. 129; 26 L. J. Ch. 758; 27 L. T. O. S. 131; 2 Jur. N. S. 555; 4 W. R. 510; 53 E. R. 51.

*Annotations:—***Refd.** *Nokes v. Gibbon* (1857), 26 L. J. Ch. 208; *Turner v. Turner* (1859), 5 Jur. N. S. 839; *Re Working Men's Mutual Soc.* (1882), 21 Ch. D. 831.

4511. ———.]—**Order for attendance under Probate Act, 1857 (c. 77).**—*Scmble:* conduct money cannot be claimed in the first instance by a person who is directed to attend for the purpose of being examined pursuant to sect. 26 of the above Act.—*In the Goods of WYATT*, [1898] P. 15; 67 L. J. P. 7; 78 L. T. 80; 46 W. R. 425.

Consd. *In the Goods of Harvey* (1907), 76 L. J. P. 61.

4512. ———.]—Upon a motion to attach a person for not complying with an order made under Probate Act, 1857 (c. 77), s. 26, directing his attendance in ct. for cross-examination as to his knowledge of a certain testamentary paper:—*Held:* the motion must be refused, no conduct money having been tendered.—*In the Estate of HARVEY*, [1907] P. 239; 76 L. J. P. 61; 23 T. L. R. 433; 51 Sol. Jo. 357.

*Annotation:—***Distd.** *Jeffries v. Jeffries* (1907), 51 Sol. Jo. 572.

Sec. generally, EXECUTORS.

4513. ———.]—**Order for attendance before registrar of Divorce Division.**—*TOWNEND v. TOWNEND* (1905), [1907] P. 239, n.; 21 T. L. R. 657; 69 J. P. Jo. 310; *subsequent proceedings*, 93 L. T. 680, C. A.

*Annotations:—***Fold.** *In the Goods of Harvey* (1907), 76 L. J. P. 61. **Distd.** *Jeffries v. Jeffries* (1907), 51 Sol. Jo. 572.

Sec. generally, HUSBAND & WIFE.

Rule in bankruptcy proceedings.—*See* *BANKRUPTCY*, Vol. V., p. 623, Nos. 5616, 5617.

4514. **Time for tender of expenses—Evening before trial.**—(1) The ct. will not grant an attachment against a witness, for not appearing to give evidence; unless a clear case of contempt be made out against him.

(2) Where the witness resides 24 miles from the assize town, & his expenses are not tendered to him till the evening before the trial, the ct. will not grant an attachment.—*HORNE v. SMITH* (1815), 6 Taunt. 9; 128 E. R. 935; *sub nom.* *HOLME v. SMITH*, 1 Marsh. 410.

4515. ———.]—It is not necessary that a witness's expenses shall be tendered to him at the time of serving the writ: for it appears, that, if they be tendered to him a reasonable time before he is required to appear, it is sufficient.—*WHITELAND v. GRANT* (1810), 1 Jur. 1061.

4518 i. *Witness voluntarily giving evidence without subpoena—Right to expenses.*—If a witness attends voluntarily, it is not necessary to serve him with a subpoena in order to be entitled to charge for his attendance.—*FLAGLER v. RICHARDS* (1850), 1 All. 599.—**CAN.**

4518 ii. ———.]—It is not necessary that a witness in an action should be subpoenaed in order to entitle him to be paid for his attendance.—*DONALDSON v. GLEDSTANES* (1889), 8 N. Z. L. R.

263.—**N.Z.**

p. Trial of election petitions—Witness's fees—In discretion of master.—In trials under Controverted Elections Act, 1871, the costs & witness fees are in the discretion of the master, subject to the ct., as in other trials.—*Re PRISCOTT ELECTION CASE*, *MCKENZIE v. HAMILTON* (1872), 32 U. C. R. 303.—**CAN.**

q. Cost of interpretation.—A party examining, by means of an inter-

4516. Reasonableness of amount tendered—Question for jury.—Where a witness summoned to give evidence before comrs. of bkpt. refuses to appear, they may issue their warrant for his apprehension, without having information upon oath of such refusal. In an action by such witness against the comrs. for false imprisonment, the reasonableness of the summons, & of the tender of expenses, is a question of fact, for the jury.—*GROO-COCK v. COOPER* (1828), 8 B. & C. 211; 108 E. R. 1022; *sub nom.* *GROO-COCK v. COOPER*, 2 Man. & Ry. K. B. 78; 1 Man. & Ry. M. C. 302; 6 L. J. O. S. K. B. 265.

4517. ———.]—**Dependent on circumstances.**—(1) What is a reasonable sum to tender a witness on serving a subpoena, depends upon circumstances, & not merely upon the amount of the sum, his condition, the distance he has to travel to give evidence, or the expenses he must actually incur. Therefore, where a witness residing at Camberwell, upon being served with a subpoena to attend a trial at Guildhall, stated that he had previously been subpoenaed by the opposite side, & had received a guinea, & the party serving the subpoena then gave him a shilling, to which he made no objection. In an action for disobeying the subpoena, & an issue on the reasonableness of the sum tendered:—*Held:* the jury were warranted in finding a verdict for plff.

(2) If a witness has received an adequate sum from one party for his expenses on being subpoenaed, & he consents to accept a shilling for his expenses, with his subpoena, when served by the opposite party, he will still be liable to an action by the latter, if he does not attend pursuant to the exigency of the writ.—*BETTELEY v. McLEOD* (1837), 3 Bing. N. C. 405; 5 Dowl. 481; 3 Hodg. 11; 4 Scott, 131; 6 L. J. C. P. 111; 1 Jur. 22; 132 E. R. 466.

— **Expenses to which witness entitled.**—*See* *Sub-sect. 5, D., post.*

4518. **Witness voluntarily giving evidence without subpoena—Right to expenses.**—A witness, though not subpoenaed, shall have his expenses.—*ANON.* (1705), 6 Mod. Rep. 140; 87 E. R. 900.

4519. **Right of party to recover conduct money from witness—Attendance of witness becoming unnecessary—No expense incurred by witness.**—An action is maintainable for money had & received to recover back conduct money paid to a party, under 5 Eliz. c. 9, s. 12, upon a subpoena to attend a trial as witness where, in consequence of the cause being settled, no trial takes place & the party incurs no expense & does not act in consequence of the subpoena.—*MARTIN v. ANDREWS* (1856), 7 E. & B. 1; 26 L. J. Q. B. 39; 28 L. T. O. S. 122; 2 Jur. N. S. 1121; 5 W. R. 67; 119 E. R. 1148.

B. Who Entitled to Expenses.

4520. **Party—Examined as witness.**—A successful party is entitled to the expenses of attending & being examined as a witness in his own cause, unless it appear that his attendance was unnecessary, or that he attended to superintend the conduct of the cause.—*HOWES v. BARRER* (1852),

preter, a witness ignorant of the English language, must bear the expense of the interpreter's services on the cross, as well as the direct examination.—*PLUNKETT v. WILLIAMS* (1872), 6 L. Eq. R. 80.—**IR.**

PART V. SECT. 3, SUB-SECT. 5.—B.

4520 i. *Party—Examined as witness.*—When a party to an action is a necessary & material witness on his own behalf, he is entitled, if the taxing officer is satisfied of such fact, to tax

18 Q. B. 588; 21 L. J. Q. B. 254; 10 L. T. O. S. 201; 16 Jur. 614; 118 E. R. 222.

Annotations.—*Conad. Ansett v. Marshall* (1853), Bail Ct. Cas. 147. *Refd.* The *Bahia* (1865), L. R. 1 A. & E. 15.

4521. ———. ———.]—Pltf. obtained a verdict. Deft. obtained a rule *nisi* for a new trial, which was discharged. Pltf. was a witness in his own cause; & he remained in this country till after the rule *nisi* was discharged. On taxation the master allowed pltf. subsistence money from the time the rule was granted till it was discharged. On a rule to review the taxation:—*Held*: as the master must be taken to have found that pltf. was a necessary witness, that he could not have attended a second trial, if one were ordered, unless he remained, & that his remaining incapacitated him from earning his subsistence, the detention might, under those special circumstances, be considered as part of the costs of the rule, & the allowance was right.

It is not a general rule that parties, if witnesses, are to have an allowance for their attendance.—*DOWDELL v. AUSTRALIAN ROYAL MAIL CO.* (1851), 3 E. & B. 902; 2 C. L. R. 1656; 23 L. J. Q. B. 369; 23 L. T. O. S. 98; 18 Jur. 579; 2 W. R. 551; 118 E. R. 1379.

Annotation.—*Refd.* The *Bahia* (1865), L. R. 1 A. & E. 15.

4522. ———. *About to attend trial—Subpœnaed by other side.*]—A party to the cause, about to attend it on his own account, has no right to conduct money or expenses, when subpœnaed by the other side.—*REED v. FAIRLESS* (1863), 3 F. & F. 958; 8 L. T. 853.

4523. *Alleged contributory—Summoned as witness.*]—*Seem*: where an "alleged contributory," not settled on the list, is summoned as a witness his travelling expenses ought to be tendered to him.

But where an "alleged contributory" who declined to sign a proposed admission of his execution of the co.'s deed was served with a summons to attend as a witness, & did not demand his expenses, but disobeyed the summons & there appeared every probability of his being a contributory:—*Held*: he was not entitled to the costs of a motion to commit him, which it became unnecessary to dispose of on the merits, from his making in *ct.*, the required admission.—*RE NORTHERN & SOUTHERN CONNECTING RY. CO., MERCER'S CASE* (1854), 5 De G. M. & G. 26; 2 Eq. Rep. 481; 23 L. J. Ch. 246; 22 L. T. O. S. 298; 18 Jur. 161; 2 W. R. 251; 43 E. R. 778, L. J.

4524. *Judgment debtor—Attending on examination as to means.*]—A judgment debtor, for whose examination an order has been made under

R. S. C., Ord. 42, r. 32, though entitled to a reasonable sum for conduct money, does not come within Ord. 37, r. 9, & therefore is not entitled under that rule to the "like conduct money & payment for expenses & loss of time as upon attendance at a trial in *ct.*"

The question what, under the circumstances of the case, is a reasonable sum is eminently one for the discretion of the master, & one which he has better means of determining than the *ct.*; & I do not think that the *ct.* ought in this case to interfere with the exercise of his discretion (*LORD ESHER, M.R.*).—*RENDELL v. GRUNDY*, [1895] 1 Q. B. 16; 64 L. J. Q. B. 135; 71 L. T. 564; 43 W. R. 50; 39 Sol. Jo. 26; 11 R. 19, C. A.

—*See, generally, EXECUTION.*

Professional witnesses.]—*See* Sub-sect. 5, D. (b), *post*.

C. Who Liable for

4525. *Party suing out subpœna.*]—*FRANCIS v. SACHEVERELL* (1579), Cary, 97; 21 E. R. 51.

4526. ———. *Though witness not examined.*]—One who is subpœnaed as a witness, & attends at the trial, but there refuses to give evidence unless his expenses are paid, & is, thereupon, not examined, may yet maintain *assumpsit* for his necessary expenses of attendance against the party who subpœnaed him.

There was also evidence of a promise to pay the expenses at the time of serving the subpœna; which it was contended was waived by the subsequent refusal to be examined.—*HALLET v. MEARS* (1810), 13 East, 15; 104 E. R. 271.

Annotations.—*Refd.* *Re Sergentfry*, *Ex p. Roscoe* (1816), 1 Mer. 188; *Robins v. Bridge* (1837), 6 Dowl. 140; *Brocas v. Lloyd* (1856), 23 Beav. 129; *Ward v. Nield*, [1917] 2 K. B. 832.

4527. ———. ———.]—Pltf. examining a deft. as a witness pays his costs.—*HARVEY v. TEBBUTT* (1820), 1 Jac. & W. 197; 37 E. R. 350.

Annotations.—*Mentd.* *Roberts v. Williams* (1841), 11 L. J. Ch. 65; *Perkins v. Bradley* (1842), 1 Hare, 219; *Price v. Berrington* (1849), 7 Hare, 304; *Harmer v. Priestley* (1853), 16 Beav. 569; *Powell v. Roberts* (1869), L. R. 9 Eq. 169.

4528. ———. *Whether express contract necessary.*]—A witness who, in obedience to a subpœna, attends a trial in a civil action, may, without any express contract, maintain an action for his expenses against the party who subpœnaed him, the fact of his attendance being evidence from which the jury may infer a contract.—*PEEL v. DAUBENY* (1850), 5 Exch. 955; 20 L. J. Ex. 44; 16 L. T. O. S. 263; 155 E. R. 416.

4529. ———. ———.]—*ATKINSON v. COMMERCIAL BANK OF SCOTLAND* (1887), 3 T. L. R. 721, D. C.

for himself the same witness fees as if he were not a party.—*BOYLE v. ROTHCHILD* (1908), 16 O. L. R. 424; 11 O. W. R. 618.—*CAN.*

4520 ii. ———. ———.]—If it is advisable & proper that a pltf. should attend for the purpose of giving evidence he will be allowed witnesses' expenses.—*BURT v. GREIG* (1888), 7 N. Z. L. R. 68.—*N.Z.*

4520 iii. ———. ———.]—*LEVIN & CO., LTD. v. CORRY* (1900), 19 N. Z. L. R. 110.—*N.Z.*

r. ———. *Deputy Official Assignee.*]—A Deputy Official Assignee may be allowed expenses as a witness in a case in which he is a party.—*BAYLY v. HUMPHRIES' OFFICIAL ASSIGNER* (1886), 5 N. Z. L. R. 213 (S. C.).—*N.Z.*

Attending for cross-examination—On his affidavit in interlocutory application.]—On an interlocutory application to change venue, deft. filed his own affidavit, & on being

served with an order & appointment attended for such cross-examination, but refused to be sworn or answer until paid his expenses of attendance:—*Held*: he was not entitled to conduct money.—*EMERSON v. IRVING* (1895), 4 B. C. R. 56.—*CAN.*

t ———. *Alimony action—Attendance on foreign commission.*]—Pltf. in an alimony action was refused travelling expenses to attend upon a foreign commission sought by deft. where pltf. was not entitled to *interim* alimony.—*JORDAN v. JORDAN* (1913), 24 O. W. R. 615; 4 O. W. N. 1222.—*CAN.*

a. ———. *Suing in person—Interlocutory proceedings—Whether travelling expenses allowed.*]—The travelling expenses of a party suing in person, incurred for the purpose of conducting in person interlocutory proceedings, are not taxable items in party & party costs awarded against the opposite party in the action.—*ANTHONY v. WALSH* (1889), 22 L. R. 619.—*IR.*

b. *Judgment debtor—Served with order under Administration of Justice Act.*]—A judgment debtor served with an order & appointment under Administration of Justice Act, 1885, s. 52, is entitled to be paid conduct money & expenses as in the case of an ordinary witness.—*GALT v. STACEY* (1888), 5 Man. L. R. 120.—*CAN.*

c. *Where attendance directed by counsel.*]—The expenses of attendance at the trial of a necessary witness, who, owing to the course of the trial, has not been examined, should be allowed where his attendance has been directed by counsel verbally or in writing.—*GREGG v. GARDNER*, [1897] 2 L. R. 122.—*IR.*

d. *Material witnesses not called.*]—The mere fact that a witness has not been called at a trial is not sufficient reason for disallowing his expenses against the opposite side.—*HANER v. MUTENBACH* (1902), 19 S. C. 341.—*S. AF.*

3.—Attendance: Sub-sect. 5, C. & D. (a.)]

4530. Solicitor causing subpoena to be served—Not personally liable.]—The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in a cause, for his expenses of attendance.—*ROBINS v. BRIDGE* (1837), 6 Dowl. 140; 3 M. & W. 114; Murp. & H. 357; 7 L. J. Ex. 49; 2 Jur. 19; 150 E. R. 1079.

*Annotations:—***Apld.** *Lee v. Everest* (1857), 2 H. & N. 285. **Refd.** *Walbancke v. Masterman* (1846), 7 L. T. O. S. 184; *Mulle v. Mann* (1848), 2 Exch. 698; *Pell v. Daubeny* (1850), 5 Exch. 955; *Langridge v. Lynch* (1876), 34 L. T. 695. **Mentd.** *Reynell v. Lewis*, *Wyld v. Hopkins* (1846), 10 Jur. 1097; *Brewer v. Jones* (1855), 10 Exch. 655.

4531. ———.]—A survey & valuation of the parish of E. had been made for the purpose of a poor rate; against which certain inhabitants appealed. Deft. who was an attorney & clerk to the parish officers, thinking it advisable that the valuation should be supported by the evidence of another surveyor, with the authority of the parish officers wrote to the valuer to secure the services of a competent person for that purpose. The valuer communicated with pltf., an architect & surveyor, who, to qualify himself for giving evidence, examined the premises in respect of which the litigation arose, & afterwards gave evidence as to their value. Pltf. entered his account in his ledger against the parish officers & sent in his bill to them, but afterwards sued deft. for the work thus done:—*Held*: the parish officers, & not deft., who was merely their agent, were liable to pltf.—*LEE v. EVEREST* (1857), 2 H. & N. 285; 26 L. J. Ex. 334; 29 L. T. O. S. 263; 22 J. P. 55; 5 W. R. 759; 157 E. R. 118.

*Annotation:—***Refd.** *Sollery v. Flewker* (1857), 27 L. J. Ex. 11.

4532. Witness served by both parties—Expenses recovered from both parties—Position of successful party on taxation.]—Though a witness, subpoenaed by both parties, obtain from each, without the knowledge of the other, full payment for his expenses & loss of time, the party succeeding is entitled to have his payment to the witness allowed him in his taxed costs of suit, & that although he made his payment after the witness had been already paid by the other party.—*BENSON v. SCHNEIDER* (1817), 7 Taunt. 337; 1 Moore, C. P. 76; 129 E. R. 135.

4533. ——— Liability of party calling witness—Witness subpoenaed first by other party.]—A witness who is subpoenaed by both parties in a cause, is entitled to have all his expenses paid by the party who calls him at the trial, although the other party may have been the first who subpoenaed him.—*ALLEN v. YOXALL* (1844), 1 Car. & Kir. 315.

4534. ——— Part expenses recovered from one party—Right to recover balance from other party.]—Pltf. was subpoenaed as a witness by both parties in a cause between B. & E. In consequence of B.'s subpoena he remained in attendance for eleven days. E. obtained the verdict at the trial, & pltf. called upon B. to pay his expenses, which

B. refused to do. The attorney for E. then paid the demand, upon an understanding that pltf. should return to him any part which the master might strike off, upon taxation. At the taxation the attorney swore that he had paid pltf. the whole sum demanded, but, at the instance of B., the master struck off a certain portion, which pltf. accordingly returned, & then brought an action against B. to recover that amount:—*Held*: he was not prevented from recovering in the action, by reason of his repayment of the sum which he had first received from the attorney for E.—*HALE v. BATES* (1858), E. B. & E. 575; 28 L. J. Q. B. 14; 4 Jur. N. S. 1106; 120 E. R. 623.

*Annotations:—***Refd.** *Chamberlain v. Stincham* (1889), 24 Q. B. D. 113; *The Ibis VI.*, [1921] P. 255.

D. Expenses to which Witness entitled.

(a) In General.

4535. Cost of subsistence—Foreign witness.]—A pltf. who brings over a foreign witness hither, in order to judge by his testimony whether there is ground to bring an action, & afterwards sues & examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, & a reasonable sum for his sustenance here during the same time, but not the costs of his passage hither, or of his return.—*SCHIMMEL v. LOUSADA* (1812), 4 Taunt. 695; 128 E. R. 504.

*Annotations:—***Fold.** *Sturdy v. Andrews* (1812), 4 Taunt. 697. **Expld.** *Tremain v. Barrett* (1815), 6 Taunt. 88.

4536. ———.]—The ct. will allow the costs of detaining a foreigner here to give evidence upon a trial, computed from the day of the writ sued out to the day of trial.—*STURDY v. ANDREWS* (1812), 4 Taunt. 697; 128 E. R. 501.

*Annotation:—***Refd.** *Berry v. Pratt* (1823), 1 B. & C. 276.

4537. ——— Witness giving evidence in action other than that for which sent.]—A. abroad furnished goods to B. at the request of C., who drew bills on B., payable to A., which C. refused to accept. A. sent for a witness from abroad for the support of an action against B., pending which action, C. arrived in this country. A. then discontinued his action against B., & commenced another against C., in which he recovered, by means of the witness he had brought from abroad:—*Held*: C. was only liable for the costs of the witness while detained in this country, & not for those of bringing him over or of sending him back.—*TREMAIN v. BARRETT* (1815), 6 Taunt. 88; 1 Marsh. 463; 128 E. R. 966.

*Annotation:—***Consd.** *Louergan v. Royal Exchange Assee.* (1831), 5 Moo. & P. 805.

4538. ———.]—Where a witness is sent for from abroad, *bonâ fide* for the purpose of the cause, & for no other, it is in the discretion of the prothonotary to allow pltf. the costs of bringing him over & of sending him back, though he should have been sent for, & have arrived, before the commence-

PART V. SECT. 3, SUB-SECT. 5.—C.

4532 I. Witness served by both parties—Expenses recovered from both parties—Position of successful party on taxation.]—Where witnesses are subpoenaed & paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other.—*McLEAN v. EVANS* (1863), 3 P. R. 154.—**CAN.**

e. Witness subpoenaed but not called—Whether necessary witness—Master to decide.]—Where witnesses are subpoenaed but not called, the master should decide whether they

were necessary or not, & allow or refuse their expenses accordingly.—*McLEAN v. EVANS* (1863), 3 P. R. 154.—**CAN.**

f. Party attending on notice without payment.]—Pltf. having attended under defts.' notice, without being paid, which she was not bound to do, the ct. refused to direct her expenses to be deducted from defts.' costs.—*HAM v. LASHER* (1865), 24 U. C. R. 357.—**CAN.**

g. Witness produced by successful party—Inquiry—Liability of unsuccessful party.]—If it is proved that expenses are properly payable to a

witness who has been summoned to attend an inquiry the unsuccessful party must pay his taxed costs, if the witness has been produced by the successful party.—*CALVERT v. FORBES* (1895), 3 Terr. L. R. 336.—**CAN.**

h. Party suing out subpoena—Though witness gives evidence for other party.]—A witness, who attends the ct. on a subpoena, is entitled to demand at any time his reasonable expenses of such attendance from the party issuing the subpoena, even though he only gives evidence as a witness for a party to the suit other than the party summoning him.—*Re BULLOCK* (1904), 1 L. R. 28 Bom. 647.—**IND.**

ment of the action.—**TREMAIN v. FAITH** (1815), 1 Marsh. 563; 6 Taunt. 92; 128 E. R. 967.

Annotation :—**Consd.** *Loneragan v. Royal Exchange Assee.* (1831), 5 Moo. & P. 805.

Foreign seaman.—*See* No. 4540, *post*.

4539. — Seaman—Master.—A master of a vessel detained here as a necessary witness was allowed in the taxation of costs the expenses of his living here & his travelling expenses, & disallowed a claim of £7 per month for wages, which if he had sailed he would have been entitled to :—**Held** : the allowance was proper.—**WHITE v. BRAZIER** (1835), 3 Dowl. 499.

4540. — Foreign seaman.—(1) A party in a cause is not bound to examine any of his witnesses before the hearing : & if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing.

(2) In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed.—**THE KARTA** (1865), Brown. & Lush. 367; 13 W. R. 295.

Annotations :—*As to* (1) **Consd.** *The Isis VI.* [1921] P. 255. *As to* (2) **Refd.** *The City of Brussels* (1873), 42 L. J. Adm. 72.

4541. — —.—While it has always been the practice, owing to the nature of their calling, to allow seafaring witnesses to be detained on shore to give evidence, & to allow them reasonable compensation for their detention, it is a question for the taxing master whether a party who seeks to charge his opponent with the cost of detaining an expensive witness has acted reasonably in incurring the expense or whether he ought not to have examined the witness on commission.

A taxing master should bear in mind that a witness duly summoned is bound to attend, & the witness is not entitled to receive, as the measure of his compensation, the exact sum he may prove he has lost by reason of the detention. He is, however, entitled to some compensation, & not merely to the conduct money given him with his subpoena; & the wages he is earning may afford an important indication of what is fair compensation. *THE ISIS VI.* [1921] P. 255; 90 L. J. P. 289; 125 L. T. 378; 37 T. L. R. 557; 65 Sol. Jo. 514; 15 Asp. M. L. C. 237, C. A.; *subsequent proceedings*, [1922] P. 4.

—*See, also.* ADMIRALTY, Vol. I., pp. 227, 228, Nos. 1524–1531.

4542. — Non-seafaring witness.—Pltf. engaged a passage to Australia in defts.' vessel, but being turned out of it, & the ship having sailed without him, he sued defts. for not carrying him according to their contract. Pltf. could have had another passage in the course of a few days, but he remained until the trial of the cause, several months, & gave evidence in his own favour. A verdict was found for him. On motion to review the master's taxation of costs :—**Held** : if pltf. was detained *bonâ fide* for the purpose of giving evidence in the cause, & it was proper to call him as a witness at the trial, he ought to be allowed the expense of his maintenance while so remaining in this country as costs against defts., although he

was not a seafaring man.—**ANSETT v. MARSHALL** (1853), Bail Ct. Cas. 147; 22 L. J. Q. B. 118; 20 L. T. O. S. 240; 17 Jur. 114.

—**Amount allowed.**—*See* No. 4597, *post*.

4543. Compensation for loss of time—Foreign witness.—**TREMAIN v. BARRETT**, No. 4537, *ante*.

4544. — —.—A foreigner & captain of a vessel, on being required to come to this country to give evidence for pltf's. in a particular cause, refused to do so unless he were compensated for his loss of time, which pltf's. agent abroad promised him should be done :—**Held** : he was entitled to have a reasonable sum allowed him by way of compensation for such loss.—**LONERGAN v. ROYAL EXCHANGE ASSURANCE** (1831), 7 Bing. 729; 1 Dowl. 233; 5 Moo. & P. 805; 131 E. R. 282.

4545. — Foreign merchant.—Compensation for loss of time was disallowed to two merchants coming from abroad as witnesses.—**MOORE v. ADAM** (1816), 5 M. & S. 156; 105 E. R. 1009.

Annotations :—**Fold.** *Willis v. Peckham* (1820), 1 Brod. & Bing. 515. **Refd.** *Severn v. Olive* (1821), 3 Brod. & Bing. 72; *Bayley v. Beaumont* (1826), 11 Moore, C. P. 497; *Loneragan v. Royal Exchange Assee.* (1831), 7 Bing. 729.

4546. — Agreement to pay compensation—Not enforceable.—A witness attending a trial under a subpoena, is not entitled to a compensation for his loss of time, although the party requiring his attendance expressly promises to pay him for such loss.—**WILLIS v. PECKHAM** (1820), 1 Brod. & Bing. 515; 4 Moore, C. P. 300; 129 E. R. 821.

Annotations :—**Apld.** *Bayley v. Beaumont* (1826), 11 Moore, C. P. 497. **Fold.** *Collins v. Godfrey* (1831), 9 L. J. O. S. K. B. 158. **Refd.** *Severn v. Olive* (1821), 3 Brod. & Bing. 72.

—**Professional witness.**—*See* Sub-sect. 5, D. (b), *post*.

4547. Cost of messenger—To announce illness of witness.—A gentleman residing in the country was subpoenaed to give evidence at the trial of a cause in London. He proceeded part of the way, & being from illness unable to go on, he sent a special messenger to London to inform the parties that he could not attend. In his account of expenses, he demanded £5 for the messenger going to London. At the trial of an action for the amount of his expenses incurred, the jury gave him £10. A new trial on the ground of excessive damages was refused.—**BRYAN'S CASE** (1823), 1 L. J. O. S. K. B. 157.

4548. Travelling expenses—Foreign witness.—**SCHIMMEL v. LOUSADA**, No. 4535, *ante*.

4549. — —.—**TREMAIN v. BARRETT**, No. 4537, *ante*.

4550. — —.—**TREMAIN v. FAITH**, No. 4538, *ante*.

4551. — Going & returning.—**ASHTON v. LAIGH**, No. 4501, *ante*.

4552. — —.—**NEWTON v. HARLAND**, No. 4509, *ante*.

4553. — Returning from journey begun before trial.—A witness returning from a journey, which was intended before the subpoena, sooner than he otherwise would have done, is entitled to the expenses of that journey, though the trial is at the place of his abode.—**VICE v. ANSON** (1827), 3 C. & P. 19; Mood. & M. 96, N. P.

Annotations :—**Mentd.** *Dickinson v. Valpy* (1829), 5 Man. & Ry. K. B. 126; *Ellis v. Schmoeck* (1829), 3 Moo. & P. 220.

PART V. SECT. 3, SUB-SECT. 5.— D. (a).

4548 i. Travelling expenses—Foreign witness.—The mileage of a witness from England to this province & back, allowed in the costs, on an affidavit stating that he was a material witness, & travelled from England to attend the trial as a witness, though there

was no statement that he intended to return to England.—**LIGHT v. ABEL** (1866), 6 All. 406.—**CAN.**

4548 ii. — —.—**Held** : witness's railway fare & expenses from Ontario to Saskatchewan properly allowed.—**HEWITT v. BOULET** (1909), 10 W. L. R. 21.—**CAN.**

4548 iii. — —.—**LONERAGAN v. ADAM**

PARKER (1827), 1 N. B. R. (Chp.) 151.—**CAN.**

4548 iv. — —.—**HAY v. JACKSON** (1888), 6 N. Z. L. R. 725.—**N.Z.**

k. — —.—*Party as material witness.*—A pltf. who is entitled only to division et. costs of an action can tax as part of such costs his travelling expenses from abroad to attend the

Sect. 3.—Attendance: Sub-sect. 5, D. (a) & (b).]

4554. — Increase through ill-health.]—The wife of a publican, living sixty miles from Lancaster, was subpoenaed to give her evidence at the assizes there, & £2 2s. was given to her for expenses. She did not make any objection to the amount, as being insufficient. On showing cause against a rule for an attachment against her, it appeared that she had an infant in bad health at the breast; & that the inside fare of the coach from Liverpool, the road through which town was the most convenient route to Lancaster from the place where she resided, was £1 1s. 0d.:—**Held**: she might reasonably require an inside place, for which the money was insufficient, & the rule would not be made absolute for an attachment against her.

Semle: the affidavit for an attachment for not appearing as a witness, in pursuance of a subpoena, need not show that the witness was called in ct. on the subpoena, especially if the witness never did attend the assizes.—**DIXON v. LEE** (1834), 1 Cr. M. & R. 645; 3 Dowl. 259; 5 Tyr. 180.

Annotations:—**Refd.** R. v. Stretch (1835), 4 Dowl. 30; Miller v. Knox (1838), 4 Bing. N. C. 574; Goff v. Mills (1844), 2 Dow. & L. 23.

4555. — Journey not undertaken—Expenses less than cost of subsistence.]—Where a country witness remained in London, the sum which his journey would have cost, being less than his expenses in town, will be allowed.

A barrister is *prima facie* entitled to the expenses of a professional man, without proof of his being in practice.—**TURNER v. TURNER** (1859), 5 Jur. N. S. 839; 7 W. R. 573.

Amount allowed.]—See Nos. 4596, 4597,

4556. Prescribed fee for attendance in court—Clerk of High Court subpoenaed to produce court roll.]—A clerk of the Petty Bag Office of the Ct. of Ch., who attends at the trial of a cause under a *subpoena duces tecum* to produce the rolls of the Ct., is entitled to a reasonable fee for each day's attendance, for, although he attends personally in pursuance of the subpoena, he produces the rolls of the Ct. solely under the order of the Master of the Rolls, who may annex a fee to the production of the rolls; & if a party chooses to require the production of the rolls, he is bound to pay a reasonable fee imposed by the Master of the Rolls, & this, whether he is aware of the rules of the office requiring such fee or not.—**BENTALL v. SYDNEY** (1839), 10 Ad. & El. 162; 2 Per. & Dav. 416; 9 L. J. Q. B. 150; 3 Jur. 892; 113 E. R. 62.

In Admiralty proceedings.]—See ADMIRALTY, Vol. I., pp. 226–228, Nos. 1520, 1524–1531.

In arbitration proceedings.]—See ARBITRATION, Vol. II., p. 609, Nos. 2401–2405.

In bankruptcy proceedings.]—See BANKRUPTCY, Vol. V., p. 621, Nos. 5587–5589.

In proceedings at inquests.]—See CORONERS, Vol. VIII., p. 245, Nos. 177, 178.

In county court proceedings.]—See COUNTY COURTS, Vol. VIII., p. 523, Nos. 733, 734.

trial, if he is a necessary & material witness.—**TALBOT v. POOLE** (1893), 15 P. R. 274.—**CAN.**

l. ——Where deft. was party & a material witness in the same cause he was allowed his expenses to & from his home to the ct.—**HAMILTON v. BECK** (1896), 3 Terr. L. R. 405.—**CAN.**

PART V. SECT. 3, SUB-SECT. 5.—D. (b).

m. Professional witnesses generally

—When appointed by court with consent of parties.]—Where, in an administration suit, the master had, with the consent of the creditors, employed an expert, the ct. held that the creditors could not afterwards object to the allowance of the sum paid to such expert.—**Re ROBERTSON, ROBERTSON v. ROBERTSON** (1877), 24 Gr. 555; *affd.* 25 Gr. 276.—**CAN.**

n. ——The fees of expert witnesses employed to make examinations of property, plans, etc., necessary

(b) Professional Witnesses.

4557. Professional witnesses generally—Loss of time.]—The expense of experiments necessarily made for the purpose of affording evidence on a point in dispute new to scientific men, is not allowed on taxation of costs; nor are scientific & professional witnesses allowed any compensation for loss of time, unless they be medical men.—**SEVERN v. OLIVE** (1821), 3 Brod. & Bing. 72; 6 Moore, C. P. 235; 129 E. R. 1209.

Annotations:—**Appl.** Bayley v. Beaumont (1826), 11 Moore, C. P. 497. **Refd.** Loneragan v. Royal Exchange Assoc. (1831), 7 Bing. 729; May v. Selby (1842), 4 Man. & G. 142; Ormerod v. Thompson (1847), 16 M. & W. 860; Curtis v. Platt (1864), 16 C. B. N. S. 465.

4558. ——**Pltf.** will not be allowed his expenses, in the construction of a model, nor a compensation for loss of time to scientific persons, who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony.—**BAYLEY v. BEAUMONT** (1826), 11 Moore, C. P. 497; 4 L. J. O. S. C. P. 191.

Annotation:—**Refd.** Curtis v. Platt (1864), 16 C. B. N. S. 465.

4559. ——**A witness** who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand, from the party calling him, a compensation for his loss of time; & there is a distinction between a witness thus called, & a witness who is called to depose to facts which he saw.—**WEBB v. PAGE** (1843), 1 Car. & Kir. 23, N. P.

4560. ——**Place of residence.]**—Professional witnesses have a right to demand compensation for loss of time at the rate of a guinea a day before they submit to be examined, although they reside in the town in which the examination is conducted.—**CLARK v. GILL** (1854), 1 K. & J. 19; 2 Eq. Rep. 1108; 23 L. J. Ch. 711; 2 W. R. 652; 69 E. R. 351.

Annotations:—**Consd.** Nokes v. Gibbon (1857), 26 L. J. Ch. 288; *Re Working Men's Mutual Soc.* (1882), 21 Ch. D. 831.

4561. ——**Evidence not professional.]**—A professional witness is entitled to his expenses on the scale allowed to persons of his profession, although he is not called to give professional evidence.—**PARKINSON v. ATKINSON** (1862), 31 L. J. C. P. 199.

4562. ——**Expenses of qualifying as witness.]**—An action for the recovery of houses by reason of a breach of covenant to repair them was referred to a special referee. Three surveyors were instructed by pltf. to survey the houses, & report upon their condition. At the hearing before the special referee the surveyors were called as witnesses, & the surveys & reports made by them were necessary for the proper conduct of pltf.'s case. Pltf. obtained judgment in the action with costs. Upon taxation of costs the master refused to allow as against deft. the fees paid to the surveyors by pltf. for their surveys & reports, upon the ground that these fees could under no circumstances be recovered as between party & party:—**Held**: the

for the proof of pltf.'s allegation of damage caused by defts.' illegal acts, & also the costs of notarial protests, form part of the damages which pltf. is entitled to recover from the adverse party.—**DÉCARIE v. VILLE DE MONTREAL-QUEST** (1903), Q. R. 26 S. C. 16.—**CAN.**

o. ——**Foreign witness.]**—**OLSON v. MINOT AUTO CO.**, (1920) 2 W. W. R. 955; 53 D. L. R. 448.—**CAN.**

p. ——**Where an expert witness** had been brought out from

a. *Surveyor—Scale.*]—A surveyor is entitled to his fees & disbursements

Sect. 3.—Attendance: Sub-sect. 5, D. (b), E. & F.] order:—*Held*: he was entitled to one guinea per day for the first three days, but nothing for the last day, & no costs would be given.—*NOKES v. GIBBON* (1857), 26 L. J. Ch. 208; 28 L. T. O. S. 262; 3 Jur. N. S. 282; 5 W. R. 216.

4570. Medical practitioner—Loss of time.]—*SEVERN v. OLIVE*, No. 4557, *ante*.

4571. ———.]—*FRASER v. FRASER*, No. 4567, *ante*.

4572. ———.]—*MILLER v. APPLETON* (1906), 50 Sol. Jo. 192.

———.]—*See, also*, *CORONERS*, Vol. XIII., p. 246. Nos. 184, 185.

4573. Scientific witnesses—Loss of time.]—*SEVERN v. OLIVE*, No. 4557, *ante*.

4574. Solicitor—Loss of time—Witness subpoenaed by other side.]—If pltf. subpoena deft.'s attorney to produce books, the latter is not entitled to receive anything from pltf. for expenses or loss of time in attending as a witness.—*PRITCHARD v. WALKER* (1827), 3 C. & P. 212, N. P. *Annotation:—Mentd.* *Doe d. Baggeley v. Hares* (1833), 2 L. J. K. B. 88.

4575. ———.]—An attorney, who has attended on subpoena as a witness in a civil suit, cannot maintain an action against the party who subpoenaed him, for compensation for loss of time.—*COLLINS v. GODFREY* (1831), 1 B. & Ad. 950; 1 Dowl. 326; 9 L. J. O. S. K. B. 158; 109 E. R. 1010.

Annotations:—Distd. *Bentall v. Sydney* (1839), 10 Ad. & El. 162. *Consd.* *Nokes v. Gibbon* (1857), 26 L. J. Ch. 208; *Re Working Men's Mutual Soc.* (1882), 21 Ch. D. 831; *Chamberlain v. Stoneham* (1889), 24 Q. B. D. 113; *The Isis VI.*, [1921] 1 P. 255. *Reid.* *Brocas v. Lloyd* (1856), 23 Beav. 129; *Hale v. Bates* (1858), 28 L. J. Q. B. 14.

4576. ———.]—*FRASER v. FRASER*, No. 4567, *ante*.

4577. ——— **Bankruptcy proceedings.]**—By Bkpey. Rules, 1886, r. 71, "any witness, other than debtor, required to attend for the purpose of being examined, or of producing any document, shall be entitled to the like conduct money & payment for expenses & loss of time as upon attendance at a trial in ct.," & by the C. C. R., 1889, Ord. 50, r. 16, the costs of witnesses may be allowed, & their allowance for attendance shall not exceed the highest rate of the allowances mentioned in the appendix. A solr. having been summoned as a witness before the registrar of a county ct. in a bkpey. proceeding & having received only his travelling expenses, brought an action against the official receiver by whom he was summoned for the amount allowed by the appendix to a professional witness:—*Held*: he was entitled to recover.—*CHAMBERLAIN v. STONEHAM* (1889), 24 Q. B. D. 113; 59 L. J. Q. B. 95; 61 L. T. 560; 38 W. R. 107; 6 T. L. R. 21, D. C.

from the party who named him expert, although the report has been set aside by the ct. The tariff established by C. S. C., c. 77, s. 108, may be disregarded by the ct., & the sum reduced in the discretion of the judge.—*BRADY v. AITCHISON* (1865), 1 L. C. L. J. 112.—**CAN.**

b. ———.]—Witness fees & expenses allowed for a Dominion land surveyor, a necessary foreign witness, who came from the Yukon to give evidence at the trial of this action, involving absence from home for 51 days.—*BOYLE v. ROTHSCHILD* (1908), 16 O. L. R. 424; 11 O. W. R. 648.—**CAN.**

c. ———.]—The expenses of a surveyor in & about a survey & in the preparation of plans which were of assistance to the ct. at the trial,

allowed in taxation against the unsuccessful party.—*DE VILLIERS v. CAPE DIVISIONAL COUNCIL* (1875), Buch. 122.—**S. AF.**

d. Public officer in charge of documents.]—A public officer in charge of documents for which he is responsible, & attending as a witness in his public capacity, & in relation to matters connected with his office, will be allowed professional witness' fees.—*Re NELSON* (circa 1867), 2 Ch. Ch. 252.—**CAN.**

e. Attorney in cause—Whether entitled.]—An attorney in the cause is not entitled to fees as a witness, it being his duty to be in attendance on the trial of the cause.—*JONES v. BOTSFORD* (1877), 1 P. & B. 581.—**CAN.**

f. ———.]—*Held*: the solic-

4578. Surveyor.]—*NOKES v. GIBBON*, No. 4569, *ante*.

4579. ———.]—*MACKLEY v. CHILLINGWORTH*, No. 4562, *ante*.

4580. ——— **Scale.]**—*BROCKLEBANK v. LANCA-SHIRE & YORKSHIRE RY. CO.* (1887), 3 T. L. R. 575, C. A.

4581. ———.]—Surveyors examined as expert witnesses should be paid according to the work actually done by them & not by a percentage on the amount in dispute.—*DREW v. JOSOLYNE* (1888), 4 T. L. R. 717, D. C.

E. Waiver of Expenses.

4582. What amounts to—Giving examination in chief—Right of witness to object to cross-examination—Expenses not paid by party cross-examining.]—*EDMONDS v. PEARSON*, No. 4504, *ante*.

4583. ——— **No objection to amount tendered—Offer to bear own charges.]**—A master malster, resident at a distance from his malt house, placed his servant in charge of malt in process of manufacture, strictly enjoining him not to leave it at any time whatever. The servant having been subpoenaed as a witness:—*Held*: (1) the injunctions of the master afforded no sufficient excuse for disobeying the subpoena, although it was served upon him so short a time before the trial as to preclude the possibility of his communicating with his master.

(2) The ct. will grant an attachment against a witness for disobeying a subpoena, if it appears clearly from the affidavits that he did not attend the trial, although he may not have been called in ct. on the subpoena.

(3) If a witness, when a subpoena is served upon him, makes no objection on the ground of the amount tendered for his expenses being insufficient, but offers to bear his own charges, he cannot avail himself of the insufficiency of the amount tendered, as an answer to a motion for an attachment.—*GOFF v. MILLS* (1844), 2 Dow. & L. 23; 13 L. J. Q. B. 227; 3 L. T. O. S. 80; *sub nom.* *GOUGH v. MILLER*, 8 Jur. 758.

4584. Right of witness to refuse to attend subsequent examination—Unless former expenses paid.]—A witness who had attended before the examiner, but had refused to be examined unless he were paid the expenses of some former attendances, was ordered, upon motion, to attend & be examined, & to pay the costs of the motion.—*GAUNT v. JOHNSON* (1818), 6 Hare, 551; 67 E. R. 1283.

Annotation:—Reid. *Nokes v. Gibbon* (1857), 26 L. J. Ch. 208.

F. Taxation of Expenses.

See, generally, *PRACTICE*.

4585. Discretion of taxing master—Interference by court.]—The master is in general sole judge

on the record when examined as a witness is only entitled to his professional charges for attendance, & not to witnesses' expenses.—*BARRY v. SPAIGHT* (1903), 37 L. L. T. 214.—**IR.**

g. ———.]—Where an attorney claims for attendance as a witness, he must prove that he is a material & necessary witness, & would not have attended except as a witness. He cannot claim for attendance in ct. in the same case as a witness & as attorney, but must elect between the two.—*ROSENTHAL v. BARNARD* (1893), 7 E. D. C. 120.—**S. AF.**

PART V. SECT. 3, SUB-SECT. 5.—F.

4585 i. Discretion of taxing master—Interference by court.]—As to the sums paid to & expended by witnesses, the

what witnesses shall be allowed on taxation. Therefore, when he had, in an action of libel, disallowed all witnesses to prove innuendoes:—*Held*: the ct. would not interfere to make him review his taxation.—*SKELTON v. SEWARD* (1832), 1 Dowl. 411.

4586. ———. —[.]—In an action upon a policy of insurance, the master, on taxation of plffs.' costs, allowed subsistence money for the captain, whose conduct was impugned by deft., & whose personal attendance at the trial was therefore admitted to be necessary, from the issuing of the writ until the trial, a period of eighteen months, at the rate of 10s. a day; the trial having been delayed by the necessity for each party sending out a commission to examine witnesses at the place where the disaster occurred:—*Held*: in the absence of anything to show that the master had exercised an improper discretion either as to the amount or the period of the allowance, the ct. could not interfere. *POTTER v. RANKIN* (1870), L. R. 5 C. P. 518; 18 W. R. 868.

Annotation:—*Refd.* The 11th VL., [1921] P. 255.

4587. ———. —[.]—(1) A witness having been brought over from Norway was examined before the master. On his examination it was discovered that his evidence, though material in other points, was not sufficient for the required purpose; & the trial was postponed for the purpose of sending out a commission, during which time he remained in London.

In the meantime a compromise was entered into between the parties, so that it became unnecessary to try the cause.

Upon taxation the master refused to allow the witness's costs, on the ground that the bringing him over was premature:—*Held*: the taxing master was wrong, & as the witness's evidence was material, the costs of his journey to & from

Norway & the costs of his examination before the master should have been allowed.

(2) The ct. will not interfere in any case with the discretion of the taxing master, unless some principle is involved.—*SEYMOUR v. SAUNDERS* (1872), 27 L. T. 241; 20 W. R. 832.

4588. ———. —[.]—*RENDELL v. GRUNDY*, No. 4524, *ante*.

—[.]—*See, also*, Nos. 4595–4597, *post*.

4589. Grounds for allowing or disallowing expenses of witnesses—Admissibility of evidence of witness—Rejection of evidence at trial.—[The charges of a witness allowed to be paid, though rejected by the judge of assize.—*SENHOUSE v. BARNES* (1731), Cooke, Pr. Cas. 98; 125 E. R. 981.

4590. ———. —Taxation of costs for not proceeding to trial.]—The master, on the taxation of costs, for not proceeding to trial pursuant to notice, disallowed the expenses of a witness brought up from Newcastle-upon-Tyne to London, to give evidence by comparison of handwriting in a cause where the defence was forgery: *Held*: the master must review his taxation, because whether the evidence were, or were not admissible, the expenses of the witness ought not to have been disallowed.—*MUTCHINSON v. ALCOCK* (1822), 1 Dow. & Ry. K. B. 165.

4591. ———. —Prematurity.—In bringing witness to assizes.]—The ct. will not allow the expenses of plff.'s witnesses brought too early to the assizes to attend on a trial there.—*ANON.* (1811), 2 Chit. 200.

4592. ———. —In bringing witness from abroad.]—*SEYMOUR v. SAUNDERS*, No. 4587, *ante*.

4593. ———. —In serving witness with subpoena.]—Witnesses served with subpoenas to attend the trial of an action are entitled to be paid conduct money unless served prematurely, & it is

master having authority to make all such inquiries as he might deem necessary to satisfy himself, the ct. refused to give any directions as to such inquiries.—*HAM v. LAMER* (1865), 24 U. C. R. 357.—*CAN.*

4585 ii. ———. —[A taxing officer refused to allow plffs. the expenses of seventeen witnesses who were subpoenaed to attend a trial at H., which proved abortive:—*Held*: in refusing plffs. the costs of subpoenaing these seventeen witnesses, the taxing officer did not erroneously exercise his discretion.—*CHRISTOPHER v. NOXON* (1884), 10 P. R. 149.—*CAN.*

4585 iii. ———. —[*POWER v. GREAT SOUTHERN & WESTERN RY. CO.* (1847), Bl. D. & Osb. 236; 12 L. L. R. 59.—*IR.*

4585 iv. ———. —[The registrar is the sole judge of what witnesses shall be allowed on taxation, & where it is entirely a matter of opinion for what purpose a witness was called the ct. will not interfere with the Registrar's decision.—*NUTTER v. PRITCHARD*, 1 J. R. 147.—*N.Z.*

h. —Examination of affidavit of disbursements.]—The master may examine into the truth of an affidavit of disbursements for witnesses' expenses, etc.—*DOE d. BOULTON v. SWITZER* (1849), 1 C. L. Ch. 83.—*CAN.*

k. Grounds for allowing or disallowing expenses of witnesses—Notice of countermand sent too late by other party.]—Where plff.'s attorney sent notice of countermand to his agent in town, but too late for service, & the deft.'s witnesses attended for the trial:—*Held*: their expenses were rightly allowed in the costs of the day.—*SPAFFORD v. BUCHANAN* (1836), 4 O. S. 325.—*CAN.*

l. —Necessity for witness.]—

It must clearly appear that witnesses whose expenses are claimed were necessary to support the issues found for the party claiming.—*HOLDERNESSE v. M'KENDRICK* (1851), 2 All. 213.—*CAN.*

m. ———. —[*CROOKSHANK v. MACFARLANE* (1854), 3 All. 18.—*CAN.*

n. ———. —In attendance but not called.]—In deciding whether a party is entitled to the fees of witnesses who were in attendance but not called the test, especially where there is a jury trial, is whether the witnesses were "necessary" at the time they were subpoenaed & not whether they were "necessary" at the trial.—*ENDERBARY v. CONSOLIDATED MINING & SMELTING CO. OF CANADA, LTD.*, [1918] 3 W. W. L. 579.—*CAN.*

o. ———. —[*VERMETTE v. DESCHAMPS*, [1922] 2 W. W. R. 1183; 67 D. L. R. 780.—*CAN.*

p. ———. —[*WESTON v. STEEDS* (1889), 24 L. R. Ir. 283.—*IR.*

q. —Costs of successful plea.]—Where, on an issue on a plea of property in replevin, the jury find the property in part of the goods to be in plff., & the remainder in deft., each party is entitled to the costs of the evidence arising on that part of the plea which is found for him.—*HEAD v. BOTSFORD* (1860), 4 All. 476.—*CAN.*

r. ———. —[Where, in replevin, the substantial issue was the right to the property, which was found for deft., he is entitled to the costs of the witnesses called to support his plea, though their evidence may not have been exclusively applicable to that issue.—*FEARON v. MURRAY* (1861), 5 All. 173.—*CAN.*

s. —Insufficiency of affidavit.]—The uncontradicted affidavit of a

counsel, that he verily believed that G. travelled a distance of 720 miles for the purpose of attending & giving evidence, etc., is not sufficiently positive to warrant the clerk taxing witness fees thereon.—*LOVITT v. SNOWBALL* (1895), 33 N. B. R. 368.—*CAN.*

t. —Witness testifying on successful issue for each party.]—Where a witness on an issue on which deft. succeeded (plff. recovering the general costs of the action) also gave evidence on an issue on which plff. succeeded, deft. was not allowed to tax his witness fees.—*SASKATOON BREWING CO. v. MAXAMS, LTD.*, [1920] 1 W. W. R. 325; 13 Sask. L. R. 124.—*CAN.*

u. —Not paid—When affidavit of disbursements made.]—*HOUNICK v. ROMNEY TOWNSHIP*, 11 C. L. T. Occ. N. 329.—*CAN.*

v. ———. —[The master is not precluded from allowing costs of payment to witnesses although not actually paid, if he is satisfied they have been incurred, & that the claimant is legally liable for them & will apply them to the purpose for which they are taxed.—*BUTLER v. DAWE* (1867), 5 Nfld. L. R. 212.—*NFLD.*

w. —What expenses allowed—Suits by same plaintiff against different defendants—Same witnesses.]—Where the trials of two causes at the suit of the same plff. against different defts. are put off on payment of costs of the day, & the same persons attend as witnesses on both the cases, plff. is entitled to tax their mileage & attendance in both cases.—*CHAPMAN v. PROVIDENCE WASHINGTON INS. CO. OF PROVIDENCE, CHAPMAN v. DELAWARE MUTUAL SAFETY INS. CO.* (1880), 19 N. B. R. 496.—*CAN.*

d. —Proving admissions made on examination for discovery—Witness

Sect. 3.—Attendance: Sub-sect. 5, F.; sub-sect. 6, A. (a), (b) & (c).]

the practice to allow these payments on taxation.—*CARTER v. APPEL* (1912), 57 Sol. Jo. 97.

4594. — **Witness subpoenaed by both parties—Expenses recovered by witness from both parties.**—*THOMSON v. SCHNEIDER*, No. 4532, *ante*.

What expenses allowed.—*See* Sub-sect. 5, D., *ante*.

4595. — **Amount allowed—Discretion of taxing master—Travelling & hotel expenses.**—*THOMAS v. PARRY*, [1880] W. N. 184.

4596. — — — — —.]—Allowances to witnesses for hotel expenses on attendance at the trial are in the discretion of the taxing master, & are not regulated by the scale of 1853.—*EAST STONEHOUSE LOCAL BOARD v. VICTORIA BREWERY CO.*, [1895] 2 Ch. 514; 64 L. J. Ch. 793; 73 L. T. 54; 43 W. R. 585; 39 Sol. Jo. 622; 13 R. 657.

4597. — — — — — **Cost of subsistence.**—Where a taxing master had directed that fees for consultations should be ascertained by the number of consultations allowed, & that costs of witnesses should be ascertained at a uniform rate of fourteen days' subsistence when the witness was examined twice, & seven days when examined only once:—*Held*: the first direction was right, & the master need not inquire into the length of the consultations & the importance of the occasions on which they were held, but the second direction was erroneous, for the case of each witness properly called should be considered, & a reasonable allowance made having regard to the character of his evidence & the probability of his having to be recalled.—*RAILWAYS COMR. v. O'ROURKE*, [1896] A. C. 594; 65 L. J. P. C. 84; 75 L. T. 81, P. C.

SUB-SECT. 6.—PRIVILEGE.

A. From Arrest on Civil Process.

(a) In General.

See, generally, SHERIFFS & BAILIFFS.

4598. General rule.—A witness subpoenaed is protected from arrest *eundo et redeundo*.—*ANON.* (1870), 1 Mod. Rep. 66; 86 E. R. 735.

4599. — **Witness attending voluntarily—With-**

kept in attendance.—*Pltf.*, not being bound to rely on the admissions of defts. on their examination for discovery, the costs of procuring the attendance of a witness to prove what was then admitted should have been taxed.

Where there is no daily peremptory list of cases at the assizes, & it is necessary to keep the witnesses in attendance from the first day, the fees for such attendance should be taxed.—*ALEXANDER v. GLOUCESTER SCHOOL TRUSTEES* (1885), 11 P. R. 157.—**CAN.**

e. Qualifying fees to witnesses.—In equity qualifying fees to witnesses were allowed but not at common law. Since Legal Procedure Act, 1903, provides in case of difference the rules of equity shall prevail, witnesses are now to be allowed qualifying fees as between party & party.—*BARKER v. WALKER* (1917), 13 Tas. L. R. 109.—**AUS.**

f. — — —.]—Expense incurred for surveys & other special work of that nature, made in order to qualify surveyors to give evidence, are not taxable between party & party.—*MCGANNON v. CLARKE* (1883), 9 P. R. 555.—**CAN.**

g. — — —.]—The successful party in an action cannot have taxed to

him, as party & party costs, the expenses incurred in qualifying witnesses to give evidence at the trial.—*BARRY v. STUART* (1909), 18 Man. L. R. 611.—**CAN.**

h. — — —.]—The principle to be acted upon in dealing with allowances to witnesses for equipping themselves is, that all work should be allowed for which a reasonable man preparing for trial would feel bound to undertake in order to prove his case.—*BOUARDUS v. HILL* (1913), 25 W. L. R. 436.—**CAN.**

k. — — —.]—Expenses incurred by timber cruisers in preparing themselves to give evidence were allowed as part of the witness fees taxable by a successful party.—*BROWN v. GREAT NORTHERN RY. CO.*, [1920] 3 W. W. R. 426.—**CAN.**

l. — — —.]—Expenses of witnesses qualifying themselves to give evidence will be allowed on taxation.—*MILVERTON v. PALMERSTON NORTH BOROUGH* (1888), 7 N. Z. L. R. 174.—**N.Z.**

m. — — —.]—Qualifying expenses to medical witnesses not allowed.—*BUSH v. MORNINGTON TRAMWAY CO.* (1891), 10 N. Z. L. R. 317.—**N.Z.**

n. — — —.]—*DE VILLIERS v. CAPE DIVISIONAL COUNCIL* (1875), Buch. 122.—**S. AF.**

out subpoena.—A witness coming from abroad to give evidence in a cause here, without being served with a subpoena, is privileged from arrest.—*WALPOLE v. ALEXANDER* (1782), 3 Doug. K. B. 45; 99 E. R. 530.

Annotation:—Refd. Ex p. Cobbett (1857), 26 L. J. Q. B. 293.

4600. — — —.]—All persons who have relation to a cause which calls for their attendance in ct., & who attend in the course of that cause, though not compelled by process so to do, such as bail, are privileged from arrest, *eundo et redeundo*, provided their attendance be not for any unfair purpose; such as in the case of bail, for an insolvent person to justify.—*MEEKINS v. SMITH* (1791), 1 Hy. Bl. 636; 126 E. R. 363.

Annotations:—Refd. Rimmer v. Green (1813), 1 M. & S. 638; *Mountague v. Harrison* (1857), 3 C. B. N. S. 292. **Mentd.** *Re Britten, Ex p. Britten* (1840), 1 Mont. D. & De G. 278; *Newton v. Constable* (1841), 2 Q. B. 157; *Rubenstein v.* — (1860), 2 L. T. 732; *Blane v. Geraghty* (1866), 15 W. R. 133; *Re Freston* (1883), 31 W. R. 581.

4601. — — —.]—A person who attends before justices at petty sessions in order to obtain a summons with a view to recover a penalty, & gives evidence before them for the purpose, is not privileged from arrest either in going there with a view to give the evidence & obtain the summons, or on his return after having done so.

The privilege is in favour of those attending in furtherance of the administration of justice; but this is the case of a person going voluntarily with a view of commencing a proceeding as a common informer; & he is in no better position than any other subject (*LORD CAMPBELL, C.J.*).—*Ex p. COBBETT* (1857), 7 E. & B. 955; 26 L. J. Q. B. 293; 29 L. T. O. S. 210; 3 Jur. N. S. 665; W. R. 708; 21 J. P. Jo. 436; 119 E. R. 1502.

Annotation:—Distd. Mountague v. Harrison (1857), 3 C. B. N. S. 292.

4602. — — —.]—A person attending before a police magistrate as a witness on a charge of felony after a remand, is privileged from arrest on civil process, *eundo, morando et redeundo*, though he was not under recognisance or summons to appear.

It can make no difference that the party in this case attended before the magistrates voluntarily, & not upon summons. It seems to me that it is necessary for the administration of justice that this privilege should exist (*WILLIAMS, J.*).—

o. — — —.]—Expenses incurred in qualifying experts to give evidence, disallowed as between party & party.—*KENNEDY v. PORT ELIZABETH HARBOUR BOARD* (1887), 5 E. D. C. 337.—**S. AF.**

p. — — —.]—*WYNBERG MUNICIPALITY v. WAR DEPARTMENT* (1893), 10 S. C. 186.—**S. AF.**

q. — — —.]—The qualifying expenses of an accountant, who had been engaged by *pltf.*, & had prepared a long & intricate summary of accounts, which had had an important bearing on the case, allowed.—*MORAVIAN MISSION v. MONA* (1901), 15 E. D. C. 13.—**S. AF.**

r. — — —.]—*POWER v. PETTIT* (1905), T. S. 653.—**S. AF.**

PART V. SECT. 3, SUB-SECT. 6.—A. (a).

4598 i. General rule.—A witness who attends at petty sessions, in obedience to a summons, to give evidence, is privileged from arrest whilst so attending.—*WILLIAMSON v. LIVERAY* (1852), 19 L. T. O. S. 148.—**IR.**

4598 ii. — — —.]—A person subpoenaed to attend as a witness on the trial of an action is privileged from arrest under a decree for debt.—*HAYES v. BAGWELL* (1870), 18 W. R. 470.—**IR.**

MOUNTAGUE v. HARRISON (1857), 3 C. B. N. S. 292; 27 L. J. C. P. 24; 6 W. R. 43; 140 E. R. 753; *sub nom.* **MONTAGUE v. HARRISON**, 30 L. T. O. S. 135; 22 J. P. 86; 4 Jur. N. S. 20.

Annotations.—**Apld.** *Gilpin v. Cohen* (1869), L. R. 4 Exch. 131. **Refd.** *McGeath v. Geraghty* (1866), 15 W. R. 127.

4603. —[—]—A party, who was in town, having been subpoenaed as a witness in a cause in the Exchequer, & whose examination had begun, was taken upon an attachment for not having put in his answer, in a suit in which he was deft. Motion, that he should be turned over to the Fleet, refused. —*Re THOMAS* (1831), 4 L. J. Ch. 32, L. C.

4604. —[—]—An accused person, who attends under his recognisances at the hearing of the charge against himself, is privileged from arrest on civil process during his return home.

This privilege exists in favour of all other persons who are to take a part in the proceedings of the case, whether civil or criminal, whether as witnesses, parties, or jurymen (**KELLY, C.B.**).—(**GILPIN v. COHEN** (1869), L. R. 4 Exch. 131; 19 L. T. 830; 17 W. R. 885; *sub nom.* **GILPIN v. BENJAMIN & COHEN**, 38 L. J. Ex. 50.

Application of rule—Arbitration proceedings.—*See ARBITRATION*, Vol. II., p. 433, Nos. 832-834.

— **Bankruptcy proceedings.**—*See BANKRUPTCY*, Vol. IV., p. 244, No. 2312; Vol. V., pp. 610, 620, Nos. 5178-5183, 5578, 5579.

4605. — **Witness attending before master—To produce papers.**—Deft. who had been attending a warrant before the master to produce papers, & was arrested on leaving the master's office, discharged from the arrest.—**FRANKLYN v. COLQUHOUN** (1816), 1 Madd. 580; 56 E. R. 213.

Annotation.—**Refd.** *Re Newton* (1837), Donnelly, 178.

4606. — **Person giving evidence before magistrate—As common informer.**—*Ex p.* **COBBETT**, No. 4601, *ante*.

4607. — — — **On charge of felony.**—**MOUNTAGUE v. HARRISON**, No. 4602, *ante*.

(b) Civil Process.

4608. What is civil process—Capias in respect of information under East India Company Act, 1793 (c. 52), s. 62.—An information at suit of A. G. under the above sect. is in nature of a criminal charge & a *capias* under sect. 141 in respect of it is criminal process. No privilege therefore from arrest on such a charge exists to a person *redeundo* on his discharge upon *habeas corpus* from illegal custody as such privilege only exists in civil process.—*Re DOUGLAS* (1842), 3 Q. B. 825; 3 Gal. & Dav. 509; 12 L. J. Q. B. 49; 7 Jur. 39; 114 E. R. 724.

4609. — **Warrant of commitment issued by county court judge.**—(1) A witness subpoenaed to attend a trial *à Nisi Prius* of an issue out of the Ct. of Exch., on returning to his house was arrested at the door by a bailiff under a warrant of commitment issued by the county ct. under 9 & 10 Vict. c. 95, s. 99:—*Held*: the Ct. of Exch. had jurisdiction to entertain an application for prisoner's discharge on the ground of privilege *redeundo*.

(2) *Seemle*: a warrant of commitment issued by the county ct. judge, under the Act is so far a criminal process that a witness in a cause at *Nisi Prius* is not privileged from arrest *redeundo*.—**KIMPTON v. LONDON & NORTH WESTERN RY. CO.**

(1854), 9 Exch. 766; 2 C. L. R. 1026; 23 L. T. O. S. 96; 156 E. R. 328; *sub nom.* **KIMPTON v. LONDON & NORTH WESTERN RY. CO.**, *Ex p.* **KIMPTON**, 23 L. J. Ex. 232; 18 J. P. 617; 2 W. R. 430.

Annotation.—*As to* (2) **Distd.** *Hoborn v. Fowler, Ex p. Hoborn* (1892), 62 L. J. Q. B. 49.

4610. — **Attachment to enforce obedience of order by officer of court.**—Disobedience by a solr. to an order of ct. made against him as an officer of the ct. is a contempt of a criminal nature, & an attachment granted to enforce compliance with the order of ct. is process of a punitive & disciplinary character; & therefore no privilege from arrest exists or can be claimed against the execution of the attachment.

Privilege from arrest for contempt of ct., where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other ct., although the proceedings at a police ct. consist merely of a preliminary inquiry on a charge of felony.

F. was a solr., & an order was made at chambers that he should deliver up certain documents & should pay the sum of £10 & certain costs. This order was made against F. as an officer of the ct. F. delivered up the documents, but he did not pay the sum of £10 or the costs. An order for the attachment of F. for contempt of ct. was thereupon made at chambers. F. then paid the sum of £10, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police ct., where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—*Held*: he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature.—*Re PRESTON* (1883), 11 Q. B. D. 545; 52 L. J. Q. B. 545; 49 L. T. 290; 31 W. R. 804, C. A.

Annotations.—**Consd.** *Harvey v. Harvey* (1884), 26 Ch. D. 644; *Re Gent, Gent-Davis v. Harris* (1888), 40 Ch. D. 190; *Seldon v. Wilde*, [1911] 1 K. B. 701; *Scott v. Scott*, [1913] A. C. 417. **Refd.** *Re Dudley* (1883), 12 Q. B. D. 44; *Re Wray* (1887), 36 Ch. D. 138; *Re Grey*, [1892] 2 Q. B. 440; *Re Evans, Evans v. Noton*, [1893] 1 Ch. 252. **Mentd.** *Re Wickham, Marony v. Taylor* (1887), 35 Ch. D. 272; *Seaward v. Paterson* (1897), 66 L. J. Ch. 267; *Haydon v. Haydon* (1911), 104 L. T. 477.

4611. — **Commitment for non-payment of rates—No distress recoverable.**—Commitment for non-payment of rates where there is no distress recoverable, under Distress for Rates Act, 1849 (c. 11), ss. 2 & 3, & sched. D, is merely a civil process for enforcing payment, so that a witness in a suit returning from the ct. in which such suit has been heard is privileged from arrest under an order for such commitment.—**HOBERN v. FOWLER, Ex p. HOBERN** (1892), 62 L. J. Q. B. 49; 9 T. L. R. 6; 5 R. 33.

4612. — **Bail.**—*Ex p.* **LYNE** (1822), 3 Stark. 132, N. P.

4613. — — —[—]—**HORN v. SWINFORD** (1822), Dow. & Ry. N. P. 20; 1 Dow. & Ry. M. C. 361, N. P.

(c) Extent of Privilege.

4614. Eundo—Necessary deviations allowed.—Bkpt. on motion in bkpey. discharged from an arrest & detainers; as having been arrested on his way, though with a deviation, *bonâ fide* for the

PART V. SECT. 3, SUB-SECT. 6.—A. (b).

4610 i. What is civil process—Attachment to enforce obedience of order by officer of court.—**ANON.** (1830), 3 Ir. L. Rec. 1st ser. 164.—**IR.**

PART V. SECT. 3, SUB-SECT. 6.—A. (c).

s. Eundo.—A deft. in a suit summoned by, & examined as a witness for, pltf., is entitled to protection for arrest during the time reasonably occupied in going to, attending at,

& returning from, the place of trial.—**APPABAMY PATTAR v. GOVIND NAMBIA** (1868), 4 Mad. 115.—**IND.**
t. —[—]—**ROONEY v. COOKE** (1847), 10 L. L. R. 469.—**IR.**
a. —[—]—A witness is privileged

Sect. 3.—Attendance: Sub-sect. 6, A. (c) & (d) & B.; sub-sect. 7, A. (a)]

purpose of examination before the Comrs.—**OGLE'S CASE** (1805), 11 Ves. 556; 32 E. R. 1204, L. C.

Annotation:—**Refd.** *Ockford v. Freston, Chapman v. Freston* (1861), 6 H. & N. 466.

4615. — Interval between service & giving evidence.]—(1) A person, who is served with a *subpoena ad testificandum* in London, & is at the time resident there, is not protected from arrest in the interval between the service of the subpoena & the day appointed for his examination. *Semble*: a witness, who comes to London in order to be examined, is protected from arrest during the whole time that he remains in London *bonâ fide* for the purpose of giving evidence.

(2) A witness is not protected in going, three days before the day appointed by the examiner for his examination, to the solr.'s office to look at the interrogatories, with a view to prepare himself to give his evidence accurately.—**GIBBS v. PHILLIPSON** (1829), 1 Russ. & M. 19; 8 L. J. O. S. Ch. 43; 39 E. R. 8, L. C.

Annotation:—*As to (1) & (2) Refd.* *Spencer v. Newton* (1837), 6 Ad. & El. 623.

4616. Redeundo—Reasonable time allowed.]—**HATCH v. BLISSET** (1714), Gilb. 308; 93 E. R. 338. **Annotations:—****Refd.** *Holliday v. Pitt* (1734), 2 Stra. 985; *Pitt v. Coomes* (1834), 5 B. & Ad. 1078.

4617. — Necessary deviations allowed.]—Order that ptfs. in an action & detainers discharge debt., arrested, when returning home from his examination before the master. Though necessary deviations are allowed, the question always is upon the *bonâ fides*; especially where the examination is not finished.—**SIDGER v. BIRCH** (1803), 9 Ves. 69; 32 E. R. 527, L. C.

Annotations:—**Consd.** *Ex p. Jackson* (1808), 15 Ves. 116. **Apd.** *Franklyn v. Colquhoun* (1816), 1 Madd. 580. **Refd.** *Ockford v. Freston, Chapman v. Freston* (1861), 6 H. & N. 466.

4618. — Journey unduly delayed.]—*Semble*: if a trial be over in the afternoon, & a witness stay in the town till eleven o'clock the next morning, his home being distant only twelve miles, his subpoena is no protection to him from arrest in the town.—**ANON.** (1804), 1 Smith, K. B. 355.

4619. — Witness not bound to return by shortest route.]—(1) A person attending the insolvent debtor's ct. for the purpose of opposing the discharge of debtor, is privileged from arrest, in the same manner as when in attendance upon any other ct.

from arrest by civil process while going to.—**GIBBONS v. TUTTLE** (1906), 9 Nfld. L. R. 186.—**NFLD.**

b. Morando.]—**APPASAMY PATTAR v. GOVINEE NAMBIAR** (1868), 4 Mad. 145.—**IND.**

c. —.]—A witness who has been served with a *subpoena ad testificandum* in the country, is entitled to privilege from arrest as long as he is detained in town by the examiner.—**BURKE v. HIGGINS** (1828), 2 Hog. 110.—**IR.**

d. —.]—A person who resides in the country, but who is in attendance in Dublin as a witness in the Prerogative Ct., is protected from arrest during the whole time that he remains in town, *bonâ fide*, for the purpose of being examined.—**M'DONNELL v. GRAY** (1841), 3 L. R. 509; 1 Leg. Rep. 199; Long. & T. 239.—**IR.**

e. —.]—*Re* **M'CURDY** (1841), 2 Crawford, 99.—**IR.**

f. —.]—*Re* **M'KONE** (1841), Ir. Cir. Rep. 65.—**IR.**

g. —.]—A person who is summoned to attend before a Master in Chancery, is privileged from arrest upon civil process, not merely while attending at the Master's chambers, & going to & returning therefrom, but also during his stay in town in pursuance of the summons.—**ROONEY v. COOKE** (1847), 10 L. R. 469.—**IR.**

h. —.]—**GIBBONS v. TUTTLE** (1906), 9 Nfld. L. R. 186.—**NFLD.**

k. Redeundo.]—A witness attending *bonâ fide* before a sheriff's jury, in proceedings under a writ *de propositate probanda*, is privileged from arrest; & if he be arrested *redeundo*, & give a bail bond, the ct. will order the bail bond to be cancelled.—**BURKE v. SUTHERLAND** (1840), 1 Kerr, 166.—**CAN.**

l. —.]—**APPASAMY PATTAR v. GOVINEE NAMBIAR** (1868), 4 Mad. 145.—**IND.**

m. —.]—*Absence of bonâ fide belief—That attendance is required.]—*Ptf. had obtained a decree, in execution of which debt., who resided out of Ct., had been arrested in C. He claimed to be privileged from arrest on the ground

(2) A person is not bound to go the nearest or most direct way, as the officer may happen to think it; & wherever a party is attending a ct. of justice, the cts. have always considered him as privileged in his way homewards, with a fair & liberal construction (**GIBBS, C.J.**).—**WILLINGHAM v. MATTHEWS** (1815), 2 Marsh. 57; 6 Taunt. 356; 128 E. R. 1072.

Annotations:—*As to (1) Refd.* *Newton v. Constable* (1841), 2 Q. B. 157. *As to (2) Consd.* *Selby v. Hills* (1832), 8 Bing. 166.

4620. — Delay for refreshment.]—A witness from Gravesend having attended ct. pursuant to a summons, being arrested for debt in Pancras Lane, City, while waiting for the conveyance home, was discharged, although he had, on leaving ct., gone to Catharine Street, Strand [& to a tavern in an adjoining street], but without costs as against the officer, he not having been shown the summons to attend.—*Re* **SEWERCROP, Ex p. CLARKE** (1832), 2 Deac. & Ch. 99.

4621. — From prison after committal for contempt.]—A person who is subpoenaed as a witness in a criminal prosecution, but who is committed for a contempt of ct. in striking debt., has the same privilege from arrest in returning home from the prison after his imprisonment has expired, that he would have had in returning home from the ct., if he had not been committed.—**R. v. WIGLEY** (1835), 7 C. & P. 4.

Annotation:—**Refd.** *Gilpin v. Cohen & Benjamin* (1869), 19 L. T. 830.

(d) Remedies of Witness for Wrongful Arrest.

4622. Action—False imprisonment.]—Action of false imprisonment does not lie for a person arrested by legal process, but at a time when privileged *redeundo* from attending the ct.—**CAMERON v. LIGHTFOOT** (1778), 2 Wm. Bl. 1190; 96 E. R. 701.

Annotations:—**Consd.** *Magnay v. Burt* (1843), 5 Q. B. 381. **Refd.** *Tariton v. Fisher* (1781), 2 Doug. K. B. 671; *Nixon v. Burt* (1817), 1 Moore, C. P. 413; *Agar Kurboolie Mahomed v. It.* (1843), 4 Moo. P. C. C. 239. **Mentd.** *Crook v. Dowling* (1782), 3 Doug. K. B. 75; *Hemell v. Lyon* (1817), 1 B. & Ald. 182; *Re Helsby* (1832), 1 L. J. Beg. 5; *Cronmire v. MacColla* (1893), 9 T. L. R. 549.

4623. —.]—A. being indebted to B., B. sued out bailable process, which he delivered to the sheriff to execute, & the sheriff arrested A. whilst he was attending a trial as a witness under a subpoena.—*Held*: an action on the case was not maintainable by A. against B. for procuring A. to be illegally arrested, it not being shown that B. had any knowledge that A. was attending as a

that he had come on subpoena to give evidence in C. & that he was returning to his residence at the time the arrest took place. Debt. had not taken the shortest way home, but had gone out of his way for the purpose of meeting his daughter, & he knew that there was no immediate chance of the case coming on that day.—*Held*: the circumstances showing the absence of a *bonâ fide* belief on his part that his attendance at ct. was required, his claim to privilege would be refused.—**WOOMA CHURN DIOLE v. TEEL** (1875), 14 B. L. R. App. 13.—**IND.**

n. —.]—**ROONEY v. COOKE** (1847), 10 L. R. 469.—**IR.**

o. —.]—**GIBBONS v. TUTTLE** (1906), 9 Nfld. L. R. 186.—**NFLD.**

PART V. SECT. 3, SUB-SECT. 6.—A. (d).

p. Application for discharge—To what court.]—When in such case a party is arrested, he may be discharged either by the Ct. of Chancery, or by the ct. out of which the process issued upon which he is arrested.—

witness when he delivered the writ to the sheriff to be executed.—*Stokes v. White* (1831), 1 Cr. M. & R. 223; 2 Dowl. 703; 4 Tyr. 786; 3 L. J. Ex. 321; 149 E. R. 1062.

Annotations:—*Refd.* *Aga Kurboolie Mahomed v. R.* (1843), 3 Moo. Ind. App. 164. *Mentd.* *Lloyd v. Wood* (1836), 5 Ad. & El. 228; *Eastern Counties Ry. v. Broom* (1851), 15 Jur. 297.

4624. — Against officer arresting witness.]—

(1) Where a party had been summoned to attend the registrar on a matter which had been referred to him by the ct., & after being examined was arrested near the outer door of the registrar's office, he was ordered to be discharged.

(2) The officer has subjected himself to an action for an illegal arrest, as he was informed of the summons & still persevered in arresting the party. He has therefore made himself liable, not only to an action, but to a commitment for contempt; & ought to pay the costs, provided appct. will undertake not to bring an action against him (*Sir John Cross*).—*Ex p. Burt* (1842), 2 Mont. D. & De G. 666.

4625. — — — — —.]—No action lies against a sheriff or his officer for arresting a party attending under a summons from a ct., though it be alleged that the party was thereby privileged, & that debts, knew the fact, & made the arrest maliciously.

If a party be arrested, & the Ct. of Review order him to be discharged on the ground that he was in attendance under order of that ct., but the officer arresting does not discharge him, the remedy, if any, against the officer is in trespass, not case, though malice be alleged.—*Magnay v. Burt* (1843), 5 Q. B. 381; 1 Dav. & Mer. 652; 2 L. T. O. S. 172; 7 Jur. 1116; 114 E. R. 1293, Ex. Ch.

Annotation:—*Refd.* *Ames v. Waterlow* (1869), L. R. 5 C. P. 53.

Application for discharge—Habeas corpus proceedings.]—*See* CROWN PRACTICE, Vol. XVI, p. 252, Nos. 525-530.

4626. — To what court—Trial at Nisi Prius of

ROONEY v. COOKE (1817), 10 L. L. R. 469.—*IR.*

q. — — — — —.]—*Costs of motion for discharge.*—A person subpoenaed to attend as a witness on the trial of an action is privileged from arrest, & will be discharged from custody on motion to the court in which the action is pending, & the attorney causing her to be arrested may be compelled to pay the costs of the motion.—*HAYES v. BAGWELL* (1870), 18 W. R. 470.—*IR.*

r. — — — — —.]—The superior courts of common law have no jurisdiction to release from arrest on civil bill process a witness subpoenaed to attend in the Ct. of Chancery, & arrested while obeying the subpoena.—*HIBERNIAN BANK v. LANGLEY* (1870), 18 W. R. 872.—*IR.*

s. *Waiver of privilege.*—Application to discharge deft. on the ground of being privileged as a witness, dismissed with costs, it appearing that he had waived his privilege at the time the arrest took place.—*GILLESPIE v. FORGARTY* (1840), 1 Kerr, 162.—*CAN.*

PART V. SECT. 3, SUB-SECT. 6.—B.

t. *Extension of rule to statements made outside court.*—To be repeated as evidence.]—The rule that what witnesses & parties state in giving evidence in Ct. is absolutely privileged, extends to statements made outside the ct. for the purpose of being *bond fide* repeated as evidence in ct.—*RONALD v. HARPER*, [1913] V. L. L. 311.—*AUS.*

a. *Action for damages.*—A person cannot be sued for damages by reason of anything said by him while testify-

ing as a witness before a ct. of justice, when he states, in answer to questions put to him, what he honestly believes to be true, & is acting in good faith.—*RENAUD v. GUENETTE* (1903), Q. R. 25 S. C. 310.—*CAN.*

b. — — — — —.]—*BABOO GUNNESH DUTT SINGH v. MUGNEERAM CHOWDHRY* (1872), 11 B. L. R. P. C. 321; 17 W. R. 283.—*IND.*

c. — — — — —.]—*CHIDAMBARA v. THIRUMANI* (1886), 1 L. L. R. 10 Mad. 87.—*IND.*

d. *Prosecution for defamation.*—Where statements alleged to be defamatory were made by persons in the course of their evidence as witnesses in a ct. of justice & were relevant to the issue in the case under inquiry:—*Held*: such persons could not be prosecuted for defamation in respect of those statements.—*WOOLFEN BIRI v. JESARAT (SHEIKH)* (1899), 1 L. L. R. 27 Calc. 262.—*IND.*

e. — — — — —.]—*Answers given to police officer—Conducting investigation under Criminal Procedure Code.*—No action for damages lies against a person for what he states in answer to questions put to him by a police officer conducting an investigation under the provisions of the Criminal Procedure Code. Public policy requires that an action should not be brought against such witness as it does in the case of one giving evidence in an ordinary ct. of justice.—*METHURAM DASS v. JAGGANATH DASS* (1901), 1 L. L. R. 28 Calc. 794; 5 C. W. N. 804.—*IND.*

f. — — — — —.]—*Held*: the statement of the accused was defamatory & was

issue out of Court of Exchequer.]—*KIMPTON v. LONDON & NORTH WESTERN RY. CO.*, No. 4609, *ante*.

—*See, also*, CONTEMPT OF COURT, Vol. XVI, p. 35, No. 348.

B. From Legal Proceedings in respect of Evidence given.

4627. **General rule.**—*HARDING v. BODMAN* (1617), Hut. 11; 123 E. R. 1061.

Annotation:—*Mentd.* *Soames v. Barnardiston* (1676), Freeman. K. B. 431.

4628. **Action for negligently giving false evidence.**—A person, who has been convicted of a crime, & against whom the conviction stands unreversed, cannot maintain an action against a witness for negligently giving false evidence which caused him to be wrongfully so convicted.—*BYNOE v. BANK OF ENGLAND*, [1902] 1 K. B. 467; 71 L. J. K. B. 208; 86 L. T. 110; 50 W. R. 359; 18 T. L. R. 276, C. A.

Annotations:—*Refd.* *Turley v. Daw* (1906), 94 L. T. 216. *Mentd.* *Norman v. Mathews* (1916), 85 L. J. K. B. 857.

Action for libel or slander.]—*See* LIBEL & SLANDER.

SUB-SECT. 7.—PENALTIES FOR NON-ATTENDANCE.

A. Punishment for Contempt.

(a) In General.

4629. **Whether attachment will issue—Remedy by action.**—Attachment refused against a person subpoenaed as a witness, who went away before he was examined.—*PUGH v. ROSSINGTON* (1723), Bunb. 142; 145 E. R. 625.

4630. — — — — —.]—**Action hazardous.**—*TROUBLE-SOME v. EDWARDS* (1729), Bunb. 142, n.; 145 E. R. 625, n.

4631. **Whether attachment or committal proper procedure.]—**Deft. to an administration action, who did not appear to the action, was ordered to

not privileged, as it was a voluntary statement not relevant to the issue in the case in which he deposed & was not elicited by the pleader's questions, & further, the accused was actuated by malicious motives.—*HAIDAR ALI v. ABHU MIA* (1905), 1 L. L. R. 32 Calc. 756; 9 C. W. N. 971.—*IND.*

g. — — — — —.]—It is contrary to public policy that a person bound to state the truth in answer to questions put to him by a ct. should be liable to be prosecuted for defamation in respect of answers so given, though untrue & not given in good faith.—*Re ALRAJA NAIDU* (1906), 1 L. L. R. 30 Mad. 222.—*IND.*

h. — — — — —.]—If a witness whilst giving evidence makes a statement concerning any person which amount to defamation, he may be prosecuted in respect of such statement.—*R. v. GANGA PRASAD* (1907), 1 L. L. R. 29 All. 685.—*IND.*

k. — — — — —.]—Complainant who, on being asked by a magistrate to state his grievance, deliberately makes a defamatory statement without the slightest justification does not enjoy the protection given upon principles of public policy to an ordinary witness. The principles of the Indian Penal Code apply strictly to him.—*DINSHAW EDALJI v. JEHAHNGIR COWASJI* (1922), 1 L. L. R. 47 Bom. 15.—*IND.*

PART V. SECT. 3, SUB-SECT. 7.—A. (a).

1. **Whether attachment will issue.**—The ct. cannot attach a witness disobeying a subpoena issued at *nisi prius*

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attend before the examiner as a witness on the part of pltf. on certain inquiries directed in the action. Deft. having disobeyed that order & also a further order to attend at his own expense, pltf. moved for & obtained an order for leave to issue a writ of attachment, under which deft. was imprisoned. The notice of motion on which the order was made was not served on deft. personally, but was filed under R. S. C., 1883, Ord. 67, r. 4:—*Held*: attachment & not committal was the proper course, & the filing of the notice of motion for attachment was sufficient without personal service.

—*Re* EVANS, EVANS v. NOTON, [1893] 1 Ch. 252; 62 L. J. Ch. 413; 68 L. T. 271; 41 W. R. 230; 9 T. L. R. 108; 37 Sol. Jo. 101; 2 R. 216, C. A. Annotations:—*Consd.* Townsend v. Townsend (1905), 93 L. T. 680. *Refd.* *Re* Bassett, Bassett v. Bassett (1894), 38 Sol. Jo. 564; Favard v. Favard (1896), 75 L. T. 664; D. v. A., [1900] 1 Ch. 484. *Mentd.* Taylor, Plinston v. Plinston, [1911] 2 Ch. 368; *Re* Weatherley (1918), 88 L. J. K. B. 482.

—*J.*—*See, generally*, CONTEMPT OF COURT, Vol. XVI., pp. 47 *et seq.*

4632. Order to pay costs of adjournment—Validity.—*Re* MANSEL, *Ex p.* NORTON (1887), 3 T. L. R. 697, C. A.

Jurisdiction of court.—*See* CONTEMPT OF COURT, Vol. XVI., p. 12, Nos. 46–18.

(b) Conditions Precedent to Order for Attachment or Committal.

4633. Regular service of subpoena.—An attachment for not obeying a subpoena will not lie unless it appear that the party was regularly served, & called in ct. on his subpoena.—*Ex p.* O'CONNELL (1839), 3 Jur. 980.

—**Regularity & sufficiency of service.**—*See ante*, Sub-sect. 1, A. (c); B. (b); sub-sect. 3, A. (d).

Tender of expenses.—*See ante*, Sub-sect. 4, A.

4634. Calling witness on subpoena.—The ct. will not grant an attachment against a witness for disobedience to a subpoena, unless the affidavit state that he was duly called at the trial.—MALCOLM v. RAY (1819), 3 Moore, C. P. 222. Annotation:—*Consd.* Dixon v. Lee (1834), 1 Cr. M. & R. 645.

4635. —*J.*—DIXON v. LEE, No. 4554, *ante*.

4636. —*J.*—(1) On a rule for an attachment for not obeying a subpoena to attend as a witness, it must appear that the party was called in ct. on his subpoena.

(2) It is a sufficient excuse that he was too ill to attend.—*Re* JACOBS (1835), 1 Har. & W. 123; *sub nom.* R. v. STRETCH, 3 Dowl. 368.

Annotation:—*As to* (1) *Refd.* Goff v. Mills (1844), 2 Dow. & L. 23.

4637. —*J.*—*Ex p.* O'CONNELL (1839), 3 Jur. 980.

4638. —*J.*—GOFF v. MILLS, No. 4583, *ante*.

by the clerk of assize.—R. v. KERU (1847), 3 U. C. R. 247.—**CAN.**

m. —*J.*—MALONEY v. MORRISON (1848), 1 All. 240.—**CAN.**

n. —*Jurisdiction of county court.*—R. v. SHANNON (1883), 23 N. B. R. 1.—**CAN.**

o. —*J.*—*Ex p.* LAWLOR (1880), 26 N. B. R. 354.—**CAN.**

PART V. SECT. 3, SUB-SECT. 7.—A. (b).

4633 i. Regular service of subpoena.—SEXTON v. BOSTON & EGAN (1861), 5 L. C. J. 334.—**CAN.**

4633 ii. —*J.*—To bring a person into contempt for disobedience of a subpoena, it must be proved that the

original writ was shown at the time of service, as well as that a copy was delivered to & left with the person.—WOODS v. FADER (1905), 10 O. L. R. 613; 6 O. W. R. 369.—**CAN.**

4633 iii. —*J.*—MAGRATH v. SCANLAN (1831), 2 Ir. L. Rec. N. S. 135.—**IR.**

4633 iv. —*J.*—DOWLING v. LAWLER (1854), 6 Ir. Jur. 187.—**IR.**

4633 v. —*J.*—HEMPSTON v. HUMPHREYS (1867), 1 R. 1 C. L. 271.—**IR.**

p. *Witness in custody at time of service of subpoena—Whether attachment will issue.*—An attachment will not be granted for not obeying a subpoena, when the witness is in custody at the time of service.—R. v. WETHORE (1837), 2 N. B. R. (Ber.) 384.—**CAN.**

q. *Subpoena irregular in form.*—

4639. Witness material.—To render a person liable to an attachment for not attending upon a subpoena, it is incumbent on the party applying to state that he was a material & necessary witness for him:—*Qu.*: whether it be necessary to produce the original writ of subpoena at the time of service of the copy.—TAYLOR v. WILLANS (1830), 4 Moo. & P. 59; 8 L. J. O. S. C. P. 121.

Annotation:—*Foll.* Tinley v. Porter (1837), 5 Dowl. 744.

4640. —*J.*—Where it appears from the notes & information of a judge who tried a cause, that the attendance of a witness who has been subpoenaed would be wholly immaterial to the event, no attachment for contempt in not attending will be granted.—DICAS v. LAWSON (1835), 1 Cr. M. & R. 934; 3 Dowl. 427; 5 Tyr. 235; 4 L. J. Ex. 80; 149 E. R. 1359; *sub nom.* DICAS v. BROUGHAM (LORD), 1 Gale, 14.

4641. —*J.*—In order to obtain an attachment for not obeying a subpoena at *testificandum*, the affidavit must state the party to be a material witness.—TINLEY v. PORTER (1837), 2 M. & W. 822; 5 Dowl. 744; Murp. & H. 213; 6 L. J. Ex. 233; 150 E. R. 990.

4642. —*J.*—To warrant an attachment against a party for not attending pursuant to a subpoena, it must be made out to the satisfaction of the ct. that his non-attendance was the result of a contemptuous disregard of the process of the ct., or that he was a material & necessary witness.

In an action upon an I.O.U., pltf. subpoenaed three witnesses, viz. deft.'s brother, his clerk, & his attorney's clerk, in order to prove his handwriting. The cause was in the list for Nov. 10, when all the witnesses were in attendance, but it was not called on until the following morning, when, deft.'s brother & his clerk not being in attendance, & the other witness declining to state when asked whether or not he could prove deft.'s handwriting, pltf. by the advice of counsel (though under a peremptory undertaking to try) withdrew the record. On Nov. 12, deft. obtained a rule absolute for judgment as in case of a nonsuit. The ct. discharged, but without costs, a rule for an attachment against deft.'s brother for not attending pursuant to his subpoena—he swearing that his absence was the result of a misapprehension as to the probable time at which the cause would be called on, & not of any intentional disregard of the process of the ct.; & the witness who was in attendance swearing that he could have proved deft.'s handwriting, & that pltf.'s attorney had the means of knowing that fact.—CHAPMAN v. DAVIS (1811), 3 Man. & G. 609; 4 Scott, N. R. 319; 11 L. J. C. P. 51; 133 E. R. 1284.

4643. —*J.*—SCHOLES v. HILTON, No. 4339, *ante*.

4644. Damage sustained by non-attendance of

Where the subpoena issued, under C. S. C. c. 79, out of the superior ct. of Lower Canada, had not the statement or notice required by sect. 7:—*Held*: the witness could not be punished, under s. 8, for non-attendance.—*Re* DARLING (1876), 39 U. C. R. 339.—**CAN.**

r. *Means of attending—To be furnished to inform witness.*—When a person subpoenaed as a witness is infirm, & is known to be so by the party who subpoenaed him, the party is bound to furnish him with the necessary means of attending, such as a carriage, etc., otherwise the ct. will not attach him for non-attendance.—SLATTERY v. ARMSTRONG (1795), 1 Ridg. L. & S. 420.—**IR.**

witness.—*BUSSELL v. EDMANDS* (1856), 27 L. T. O. S. 191.

(c) *Grounds for Attachment or Committal.*
i. *In General.*

4645. General rule—Clear case must be made out.—The Ct. will not grant an attachment against a witness for disobedience to a subpoena, unless it be a clear case of contempt.—*HORNE v. SMITH* (1815), 6 Taunt. 9; 128 E. R. 935; *sub nom.* *HOLME v. SMITH*, 1 Marsh. 410.

4646. ———.]—The ct. will not grant an attachment against a witness for disobedience to a subpoena *duces tecum*, unless it appears clearly that the party absented himself, or withheld the documents, in defiance & contempt of the ct.—*R. v. RUSSELL* (LORD JOHN), *R. v. FOX MAULE* (1839), 7 Dowl. 693; 3 Jur. 604.

4647. ———.]—*SCHOLES v. HULTON*, No. 4339, *ante*.

4648. ———.]—The ct. will not make absolute a rule for an attachment against a witness for contempt of ct. in not appearing when called on his subpoena to give his evidence, unless it clearly appears that the witness's absence was voluntary, in contempt of the process of the ct.—*HADDEN v. PARKER* (1849), 14 J. P. Jo. 4.

4649. Failure to attend on subpoena.—On the return of a subpoena, if a witness will not appear and be examined, the party may take out an attachment against him.—*ANON.* (*circa* 1660), *Freem. Ch.* 134; 22 E. R. 1110.

4650. ———.]—*BATT v. ROOKES* (1577), Cary, 61; 21 E. R. 33.

4651. ———.]—*FRANCKLAND v. GRUNSDICH* (1579), *Ch. Cas.* in *Ch.* 126; 21 E. R. 76.

4652. ———.]—*TURNOR v. WARREN* (1579), Cary, 113; 21 E. R. 60.

4653. ———.]—*MIDDLETON v. SPERIGHT* (1579), Cary, 80; 21 E. R. 43.

4654. ———.]—Attachment against a witness if he will not appear.—*DOLMAN v. PRITMAN* (1670), 3 Rep. *Ch.* 64; 21 E. R. 730.

4655. ———.]—Attachment granted against a witness for not attending on a subpoena.—*HAMMOND v. STEWART* (1722), 1 Stra. 510; 93 E. R. 667.

Annotations:—**Consd.** *Miller v. Knox* (1838), 4 Bing. N. C. 574. **Refd.** *Wyat v. Wynkworth* (1728), 1 Barn. K. B. 45.

4656. ———.]—An attachment may be granted against a man who is subpoenaed as a witness in a cause for not attending the trial.—*WYAT v. WINGFORD* (1729), 2 Ld. Raym. 1528; 1 Barn. K. B. 45, 67; Barnes, 33; 2 Stra. 810; 92 E. R. 491.

Annotation:—**Consd.** *Miller v. Knox* (1838), 4 Bing. N. C. 574.

4657. ———.]—*OSMAN v. FITZROY* (1730), 1 Dick. 60; 21 E. R. 190.

4658. ———.]—How far the ct. will grant an attachment against a witness, by reason of his not

attending at the trial, in pursuance of a subpoena.—*TONSON v. IRONSON* (1733), 2 Barn. K. B. 300; 91 E. R. 513.

4659. ———.]—The satisfaction formerly for the non-appearance of a witness was by action only, but now the cts. of law grant an attachment against him.—*VALIANT v. DODOMEDE* (1743), 2 Atk. 592; 26 E. R. 751; *sub nom.* *VALIANT v. DODEMEAD*, 1 Dick. 92, L. C.

Annotations:—**Mentd.** *Lekeux v. Nash* (1745), 2 Stra. 1221; *Onslow v. Corrie* (1817), 2 Madd. 330; *Harley v. King* (1835), 2 Cr. M. & R. 18; *Sawyer v. Birchmore* (1835), 3 My. & K. 372.

4660. ———.]—*ARNOT v. BISCOE* (1747), 1 Dick. 60; 21 E. R. 190.

4661. ———.]—*OWEN v. PINKARD* (1756), 1 Dick. 60; 21 E. R. 190.

4662. ———.]—*RYE v. TENTERDEN* (1765), 1 Dick. 60; 21 E. R. 190.

4663. ———.]—**Cause not called on.**—*Seemle:* a party who is subpoenaed as a witness to attend at the assizes, is guilty of a contempt by neglecting to attend, although the cause be not called on for trial.—*BARROW v. HUMPHREYS* (1820), 3 B. & Ald. 598; 106 E. R. 780.

Annotations:—**Expld.** *Mullett v. Hunt* (1833), 1 Cr. & M. 752. **Distd.** *R. v. Stretch* (1835), 3 Ad. & El. 593. **Consd.** *Goff v. Mills* (1844), 2 Dowl. & L. 23. **Refd.** *Re Jacobs* (1835), 1 Har. & W. 123; *Miller v. Knox* (1838), 4 Bing. N. C. 574. **Mentd.** *Dixon v. Lee* (1834), 1 Cr. M. & R. 645.

4664. ———.]—If a witness, who has been duly served with a subpoena to attend to give evidence before comrs. in the country, neglects to do so, the ct. will order him to attend before the examiner in London to be examined, but does not give costs against him.—*PEPPER v. PEPPER* (1826), 4 L. J. O. S. Ch. 213.

4665. ———.]—**Absence not wilful.**—*CHAPMAN v. DAVIS*, No. 4612, *ante*.

4666. ———.]—Under a decree in a cause certain inquiries were directed. A witness, having been served with a subpoena to attend before the master, declined to attend. An order was made *ex parte*, with costs, that he should appear within four days, or be committed to the Queen's prison.—*BROOK v. BIDDALL* (1851), 2 Eq. Rep. 637; 23 L. J. Ch. 696; 2 W. R. 413.

4667. Failure to produce document—Subpoena to bring in testamentary paper.—The ct. granted an order for an attachment against A. for the disobedience of a subpoena to bring in a will.—*SIMMONS v. DEAN* (1858), 27 L. J. P. & M. 103.

4668. ———.]—**Subpoena to produce sealed packet.**—*R. v. DAYE*, No. 4484, *ante*.

Refusal to be sworn & give evidence.—*See* Sect. 6, sub-sect. 8, *post*.

ii. *Excuses for Non-Attendance.*

4669. Witness pressed for soldier.—*HUMBLE v. ALBE* (1559), Cary, 41; 21 E. R. 22.

4670. Illness.—*MORE v. WOREHAM* (1580), Cary, 99; 21 E. R. 53.

PART V. SECT. 3, SUB-SECT. 7.—
A. (c) i.

4649 i. Failure to attend on subpoena.—A subpoena to attend on Sept. 10, & so from day to day until the cause was tried, was served on Sept. 11, & the witness attended for several days, & knew the cause was not tried:—*Held:* he was guilty of a contempt in subsequently absenting himself, & attachment granted.—*JOHNSON v. WILLISTON* (1851), 2 All. 171.—*CAN.*

4649 ii. ———.]—*MESSINGER v. PARKER* (1885), 18 N. S. R. (6 R. & G.) 237; 6 C. L. T. 444.—*CAN.*

4649 iii. ———.]—*CHUTE v. M'GILLICUDDY* (1833), Hayes & Jo. 172.—*IR.*

s. ———.]—*Personal service not ef-*

fectd.—An attachment will lie against a person for not attending as a witness, though he was not personally served with the subpoena, if it appear that he was aware that the same was left at his house.—*STEWART v. LABRET-TOUCHE* (1831), 4 Ir. L. Rec. 1st Ser. 238.—*IR.*

t. ———.]—*Husband & wife separately served—Husband entering appearance only for himself.*—Where a husband & wife are separately served with a subpoena, & the husband enters an appearance for himself, the ct. will not award an attachment against him for not having entered an appearance for his wife.—*FITZPATRICK v. HACKETT* (1837), 1 Sau. & Sc. 128.—*IR.*

PART V. SECT. 3, SUB-SECT. 7.—
A. (c) ii.

a. *Illness—Delaying attendance—Relief that case would be taken later.*—When a witness came from the country to Dublin, pursuant to a subpoena, & attended ct. during the first day of the sittings, but did not attend on the next day until after the case had been called on, the ct. refused to grant an attachment, it appearing that he had been induced to suppose, from the state of the list, at the close of the first day, that the case would not come on at an early hour on the second day; the witness also deposing that he had been unable to leave his bed until a later hour than usual on the latter day,

4686. Engagement at distant place.]—LEWIS v. THOMAS (1843), 1 L. T. O. S. 292.

4687. Obedience to orders of employer.]—GOFF v. MILLS, No. 4583, *ante*.

— **Non-production of documents.]**—*See* Subsect. 3, B. (a), *ante*.

4688. Non-delivery of subpoena—By wife of witness.]—Upon a motion for an attachment against a witness for not attending pursuant to a subpoena, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to her husband a notice which had been left with her, requiring his attendance in ct. on the following morning, & the witness swearing that he did not receive the notice, & did not wilfully disobey the process of the ct., the rule was discharged, but without costs.—*NETHERWOOD v. WILKINSON* (1855), 17 C. B. 226; 139 E. R. 1056.

4689. Performance of parochial duties—Clergyman subpoenaed to attend on Good Friday.]—I do not think the attachment can go; you do not show conclusively that he could have obeyed the subpoena. The clergyman is summoned to attend on Good Friday, when he has his parochial duties to attend to; & it may be he could not get any other clergyman to do his duty for him. Surely this would be a good excuse for not obeying the subpoena, & if you do not show that this was not so, I cannot say that there may not be good reason for his non-attendance (*ALDERSON, B.*).—*ANON.* (1845), 5 L. T. O. S. 76.

(d) *Procedure.*

Application for attachment or committal—Time for.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 62, Nos. 698, 699.

4690. — Necessity for notice of motion.]—A person served with a subpoena under Court of Probate Act, 1857 (c. 77), s. 6, to bring in a testamentary paper, failed to comply with it. On a motion for an attachment against him, it was held, that, in accordance with R. S. C., 1875, Ord. 44, r. 2, the party proceeded against must receive notice of the application in the first instance.—*BAIGENT v. BAIGENT* (1875), 1 P. D. 421; 1 Char. Pr. Cas. 146.

Annotation:—Mentd. In the Goods of Cartwright (1876), 3 Char. Pr. Cas. 339.

— *See, generally,* CONTEMPT OF COURT, Vol. XVI., p. 62.

4691. — Contents of affidavit in support of application — Jurisdiction of court.]—(1) On motion for an attachment for disobeying a Crown Office subpoena to give evidence at petty sessions, on an application to be made for an order of removal, the affidavits stated that application had been made to the justices "on behalf of the overseers" "to examine & inquire into the legal settlement" of the pauper:—*Held*: the affidavits did not properly state any complaint of chargeability, & therefore did not show jurisdiction in the justices to entertain the application.

(2) It is no answer to such motion for attach-

ment that the subpoena was issued & served before any complaint of chargeability had been made.—*R. v. VICKERY* (1848), 12 Q. B. 478; 3 New Mag. Cas. 23; 3 New Sess. Cas. 193; 17 L. J. M. C. 129; 11 L. T. O. S. 221; 12 J. P. 487; 12 Jur. 581; 116 E. R. 946.

— **Witness called on subpoena.]**—*See* Nos. 4634–4638, *ante*.

Witness material.]—*See* Nos. 4639–4643, *ante*.

— *See, generally,* CONTEMPT OF COURT, Vol. XVI., pp. 69, 70.

Restoring application.]—*See* No. 4695, *post*.

4692. Witness appearing on hearing of motion—Not entitled to conduct money.]—Where resp. was ordered to produce books relating to his income at his place of business for inspection by petitioner's solr., on motion to attach for non-compliance with the order:—*Held*: he was not entitled to conduct money to appear on the hearing of the motion.—*JEFFRIES v. JEFFRIES* (1907), 51 Sol. Jo. 572.

4693. Order for attachment or committal—Validity—Conditional order.]—An order of the chief clerk, summoning deft. after a third insufficient examination to attend at chambers & be examined upon certain interrogatories, & in default of so doing, or in case he should not then perfectly answer the interrogatories, ordering him to stand committed to the Queen's prison until he should have perfectly answered, discharged with costs, on the ground of irregularity in being conditional & made on the third insufficient examination.—*HAYWARD v. HAYWARD, HAYWARD v. PRICE* (1854), Kay, App. XXXI.; 2 Eq. Rep. 436; 23 L. J. Ch. 549; 22 L. T. O. S. 345; 2 W. R. 332; 69 E. R. 329.

Annotations:—Refd. Re Electric Telegraph Co. of Ireland, Ex p. Bunn (1857), 24 Beav. 137; *Croskey v. European & American S.S. Co.* (1866), 14 W. R. 514.

4694. Discharge from custody—When ordered.]—An important witness in a cause being subpoenaed to attend the examiner, tore up the subpoena, & disobeyed that & a subsequent order to attend at his own expense, & was committed. On motion to discharge him, on payment of costs, & an undertaking to appear before the examiner on a day named:—*Held*: the party committing him consenting, B. should be appointed special examiner, at the witness's expense, to take his evidence at ten o'clock the next morning, & on the certificate of B., of the examination had, & payment of all the costs of committal, custody, application for the discharge & examination, prisoner should be discharged.—*WALTER v. RUTTER* (1868), 18 L. T. 788.

4695. Restoring application for attachment or committal—When ordered.]—*R. v. HEWETT* (1902), 66 J. P. 488, D. C.

B. Statutory Penalties.

4696. By whom recompense assessed.]—The further recompense given by 5 Eliz. c. 9, s. 12, against a witness for non-attendance, must be

pltf., having absented himself from the trial, the ct. refused to grant an attachment, the circumstances of the case not showing that he had wilfully absented himself.—*TUITE v. MACGILLICUDDY* (1833), 1 Ir. L. Rec. N. S. 52.—*IR.*

1. Attorney—Engaged in another court—Denial of intention of committing contempt.]—When an attorney had been subpoenaed to give evidence on a trial, & excused his absence on the ground that he was attending a motion in the Rolls et., & denied any intention of contempt, the ct. would not grant

an attachment.—*COLLINS v. GREEN* (1840), 3 L. L. R. 17.—*IR.*

g. Misconception of arrangement with attorney.]—The ct. refused to attach a witness for not attending a trial in obedience to a subpoena, when his non-attendance originated in a misconception of the meaning of an arrangement entered into between pltf.'s attorney & the witness, whereby the latter was to be sent for when the case was likely to be called on.—*MACCORMACK v. M'GRATH* (1843), 6 L. L. R. 524.—*IR.*

PART V. SECT. 3, SUB-SECT. 7.—A. (d).

h. Costs.]—Where defts. had been brought into ct. upon an attachment, although they cleared themselves upon interrogatories of the imputed contempt, the ct. refused to allow costs against the prosecutor, even although he had omitted a fact in his affidavit which might have affected the granting the attachment, & although one of the affidavits upon which the attachment was moved for was not filed early enough for them to answer by a counter affidavit.—*R. v. MCKENZIE & MCINTYRE* (1824), Tay. 70.—*CAN.*

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assessed by the ct. out of which the process issued, not by the jury, or judge, at *Nisi Prius*.—PEARSON v. ILES (1781), 2 Doug. K. B. 556; 99 E. R. 352.

Annotations:—Refd. Mullett v. Hunt (1833), 1 Cr. & M. 752. *Mentd.* Amey v. Jong (1808), 9 East, 473; Miller v. Knox (1838), 4 Bing. N. C. 574.

4697. To what purposes penalty may be applied.]

—By County Cts. Act, 1888 (c. 43), s. 111, as applied by C. C. R., 1903 & 1904, Ord. 25, r. 31 (3a), to a judgment summons, a judgment debtor is liable to a fine for refusing or neglecting, without sufficient cause, to appear at the hearing of a judgment summons, & the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect:—*Held*: the judge has no jurisdiction to apply the fine in reduction of the judgment debt.—R. v. SNAGGE, [1909] 1 K. B. 644; 78 L. J. K. B. 562; 100 L. T. 311; 25 T. L. R. 313; 53 Sol. Jo. 285, C. A.

C. Action for Damages.

4698. General rule.]—COLLIER v. MORRIS, No. 4678, *ante*.

4699. —.]—BETTELEY v. M'LEOD, No. 4517, *ante*.

4700. —.]—The declaration having stated that pltf. was about to institute a suit in the Divorce Ct. against his wife, for the dissolution of their marriage, & that deft. was a surgeon & apothecary, alleged, that in consideration that pltf. would retain & employ deft. to collect & prepare the medical & other evidence necessary to such suit, & to attend & give evidence at the trial for certain fees & reward, deft. promised to use due diligence, etc., in collecting & preparing the evidence for the suit, & to appear as a witness & to give testimony at such trial. Breach, that deft. did not appear at the trial, by reason whereof pltf. was obliged to withdraw the record. Deft. pleaded *non assumpsit*. At the trial there was evidence of the contract as alleged, & of deft. having represented to pltf. that he might safely take his case into the Divorce Ct.:—*Held*: the action lay, & pltf. was entitled to recover substantial damages against deft. for his non-attendance as such witness.—YEATMAN v. DEMPSEY (1860), 7 C. B. N. S. 628; 20 L. J. C. P. 177; 1 L. T. 402; 6 Jur. N. S. 778; 8 W. R. 219; 141 E. R. 962; *affd.* (1861), 9 C. B. N. S. 881, Ex. Ch.

Annotation:—Distd. Crewe v. Field (1896), 12 T. L. R. 405.

4701. —.]—ATKINSON v. COMMERCIAL BANK OF SCOTLAND (1887), 3 T. L. R. 721, D. C.

Conditions precedent to action—Regularity & validity of service.]—See Sub-sect. 1, A. (c); B. (b); sub-sect. 3, A. (d), *ante*.

Tender of expenses.]—See Sub-sect. 5, A., *ante*.

4702. — Calling witness on subpoena.]—In an action against a party for not appearing to give evidence in obedience to a writ of *subpœna ad testificandum*, it is not necessary to show that deft. was called on his subpoena by the officer of the ct., if it be shown by other satisfactory evidence that he was not present at the proper time & place when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence; & in such case it is not necessary that the jury should have been sworn & pltf. nonsuited, it is sufficient if he withdrew the record, being

unable safely to go to trial in the absence of the witness.—LAMONT v. CROOK (1840), 6 M. & W. 615; 8 Dowl. 737; 9 L. J. Ex. 253; 4 Jur. 489; 151 E. R. 558.

Annotation:—Refd. Goff v. Mills (1844), 2 Dow. & L. 23.

4703. — Witness material.]—In an action against deft. for not obeying a subpoena, it is *prima facie* sufficient to allege that deft. was a material witness, & that his absence caused pltf. to be nonsuited, without averring that pltf. had originally a good cause of action. At all events, such allegation is sufficient after verdict.—MASTERMAN v. JUDSON (1832), 8 Bing. 224; 1 Moo. & S. 367; 1 L. J. C. P. 86; 131 E. R. 387.

Annotations:—Refd. Mullett v. Hunt (1833), 1 Cr. & M. 752; Davis v. Lovell (1839), 7 Dowl. 178. *Mentd.* Laney v. Bishop (1833), 4 B. & Ad. 479; Huckman v. Fernie (1838), 1 Horn & H. 149.

4704. — —.]—(1) An action on the case lies against a witness for not attending a trial in pursuance of a subpoena, though pltf. withdrew the record in consequence of his absence, without the jury being sworn.

(2) In such an action it is necessary to allege distinctly in the declaration that there was a good cause of action in the original suit, but an allegation that deft. could have given material evidence for pltf., without which pltf. could not safely proceed to trial, & that by reason of his non-attendance, & because pltf. could not safely proceed to trial without his testimony, he was forced to & did, withdraw the record:—*Held*: sufficient after verdict.

(3) An allegation that the subpoena was made known to & shown to deft. was held to be supported by evidence that the subpoena was made known to, & conduct money taken by him, though the original subpoena was not shown, it not appearing that he requested to see it.

Pltf. in an action for use & occupation had two witnesses to speak to the occupation. One of them could also have rebutted deft.'s expected set-off, but did not appear upon his subpoena. The cause was called on in the absence of counsel on both sides, & the record withdrawn by pltf.'s attorney, who swore that he withdrew the record solely on account of the absence of the witness:—*Held*: the witness was liable to be sued accordingly.—MULLETT v. HUNT (1833), 1 Cr. & M. 752; 3 Tyr. 875; 2 L. J. Ex. 287; 149 E. R. 602.

Annotations:—As to (1) *Apld.* Lamont v. Crook (1840), 6 M. & W. 615. *As to* (2) *Apld.* Davis v. Lovell (1839), 4 M. & W. 678. *As to* (3) *Refd.* Dixon v. Lee (1834), 1 Cr. M. & R. 645. *Generally, Mentd.* Skinner v. Lambert (1842), 5 Scott, N. R. 197.

4705. — Damage sustained by non-attendance of witness.]—GOODWIN v. WEST, No. 4496, *ante*.

4706. — —.]—In case against a witness for not obeying a subpoena, the declaration stated that pltf. had impleaded one F. in an action of trespass, & that certain issues joined in that suit came on to be tried, etc.; that pltf. subpoenaed the now deft. as a witness, etc.; that pltf. had a good cause of action in the suit; & that the appearance & testimony of deft., in obedience to the subpoena were necessary & material to the trial of the said issues; & alleged for breach, that deft., without lawful excuse, neglected to appear & give evidence, by reason whereof pltf. was obliged to withdraw the record, & compelled to pay certain costs to F., etc. Deft. pleaded leave & licence, & several pleas, each being pleaded to the whole cause of action, & each traversing a material allegation in the declaration; & also a traverse, the eighth plea, that pltf. had a good cause of action against F.

At the trial pltf. obtained a verdict on all the

issues except the eighth, which was found for deft.:—*Held*: pltf. was bound to show that he had sustained some damage from the non-attendance of deft. as a witness.

Where there are several issues in the original action, the absence of a good cause of action, generally, does not *per se* show that pltf. has not sustained damage from the absence of the witness; for, the witness's testimony might have entitled him to the costs of some one issue.—*COULING v. COXE* (1848), 6 C. B. 703; 6 Dow. & L. 399; 12 L. T. O. S. 332; 136 E. R. 1424; *sub nom.* *COWLING v. COXE*, 18 L. J. C. P. 100; 13 Jur. 101. *Annotations*:—*Consd.* *Yeatman v. Dempsey* (1860), 7 C. B. N. S. 628; *Crowe v. Field* (1896), 12 T. L. R. 405. *Mentd.* *Rutland v. Bagshaw* (1850), 14 Q. B. 869.

4707. ———.]—*GLENDINNING v. THOMAS*, No. 4676, *ante*.

4708. ———.]—In an action for damages for not appearing & giving evidence on subpoena pltf. must show that he has sustained some loss or damage by reason of deft.'s non-attendance.—*CREWE v. FIELD* (1896), 12 T. L. R. 405.

4709. ——— **Good cause of action in original proceedings.**]—*MASTERMAN v. JUDSON*, No. 4703, *ante*.

4710. ———.]—*MULLETT v. HUNT*, No. 4704, *ante*.

—(1) On Apr. 2 a witness was served with a subpoena requiring his attendance at the assizes on Mar. 31. The cause was not tried until Apr. 6:—*Held*: he was liable to an action for non-attendance.

(2) The declaration stated that an action of ejectment was pending & came on to be tried at T. in the county of S. It then alleged that pltf. served deft. with a *subpoena duces tecum*, & that although the appearance of deft. was necessary & material to the trial of the issue, & although deft. could & might, in obedience to the writ, have appeared at the trial of the issue, & although the production & showing forth of the documents were material evidence for pltf. on the trial, yet deft. did not, nor would appear, although solemnly called upon, by reason whereof pltf. was then forced to become & he was then nonsuited in the action:—*Held*: the allegation that the documents were material evidence for pltf. & that, in consequence of the non-attendance of the witness, pltf. was nonsuited, was, upon general demurrer, a sufficient averment, that pltf. had a good cause of action.—*DAVIS v. LOVELEIGH* (1839), 4 M. & W. 678; 7 Dowl. 178; 1 Horn & H. 451; 8 L. J. Ex. 152; 3 Jur. 225; 150 E. R. 1593.

Annotation:—*Generally*, *Mentd.* *Skinner v. Lambert* (1842), 5 Scott, N. R. 197.

4712. ——— **Several issues.**]—*COULING v. COXE*, No. 4706, *ante*.

4713. ——— **Swearing of jury in original action.**]—No action lies against a witness for non-attendance, unless the cause has been called on & the jury sworn.—*BLAND v. SWAFFORD* (1791), Peake, 85, N. P.

Annotations:—*Dbtd.* *Barrow v. Humphreys* (1820), 3 B. & Ald. 598. *N.F.* *Mullett v. Hunt* (1833), 1 Cr. & M. 752.

4714. ——— **Record withdrawn before jury sworn.**]—*MULLETT v. HUNT*, No. 4704, *ante*.

PART V. SECT. 3, SUB-SECT. 7.—D.

k. Necessity for proof of tender of witness' fees before conviction.]—*Held*: deft. could not be made liable for the penalty imposed by Liquor Licence Act, 1900, s. 161 (2), in the absence of proof that the proper fees were tendered to him before he was required to give evidence.—*R. v. CHRISTOLM* (1903), 35 N. S. R. 505.—*CAN.*

PART V. SECT. 4, SUB-SECT. 1.—A.

4717 i. Evidence of peer.]—The answer of an English peer must be upon oath, unless pltf. consent to take it upon honour.—*WOODWARD v. STANHOPE* (1787), Vern. & Scr. 106.—*IR.*

1. Waiver of oath by acquiescence.]—Although in a civil, as well as a criminal, case, the usual oath should be administered to a peer examined as

4715. ———.]—*LAMONT v. CROOK*, No. 4702, *ante*.

D. In Criminal Proceedings.

4716. Estreatment of recognisances — Non-attendance authorised by solicitor for prosecution.]—An application to rescind an order for estreating recognisances owing to the non-attendance of witnesses upon a trial of an indictment, must be made by affidavit:—*Semble*: where the absence of the witnesses is occasioned by the attorney for the prosecution taking upon himself to authorise the departure from the ct., the ct. will estreat the recognisances, & leave the parties to their remedy against the attorney for his negligence.—*R. v. BAKER* (1840), 4 J. P. 189.

See, generally, CRIMINAL LAW, Vol. XIV., p. 201.

SECT. 4.—OATH AND AFFIRMATION.

See Oaths Acts, 1888 (c. 40), 1909 (c. 39).

SUB-SECT. 1.—EVIDENCE ON OATH.

A. Necessity for Oath.

Evidence by sovereign.]—*See* CONSTITUTIONAL LAW, Vol. XI., pp. 521, 522, Nos. 273, 274.

4717. Evidence of peer.]—Peers of the realm in all criminal cases must in cts. of equity put in their answer upon oath; & where they are witnesses between party & party, they ought to be sworn.—*LINCOLN'S (EART.) CASE* (1627), Cro. Car. 64; Hut. 87; W. Jo. 152; 79 E. R. 659.

Annotation:—*Refd.* Precedence, etc. of the Judges (1723), Foster, Rep. 382.

4718. ———.]—A peer, called as a witness, must be sworn.—*SHAFTSBURY (LORD) v. DIGBY (LORD)* (1676), Freem. K. B. 422; 2 Mod. Rep. 98; 3 Keb. 631; 89 E. R. 314.

4719. ———.]—Where a peer shall depose on oath or honour.—*MEERS v. STOURTON (LORD)* (1711), 1 Dick. 21; 1 P. Wins. 146; 2 Salk. 512; 2 Eq. Cas. Abr. 14; 24 E. R. 332.

Annotation:—*Mentd.* *Langford v. Pitt* (1731), 2 P. Wins. 629.

Evidence of barrister.]—*See* BARRISTERS, Vol. III., pp. 336, 337, 338, Nos. 260–262, 281.

Evidence of jurymen.]—*See* JURIES.

4720. Evidence on trial of peer in House of Lords.]—*PEMBROKE'S (EARL) CASE* (1678), 6 State Tr. 1309, H. L.

Annotation:—*Mentd.* *R. v. Knollys* (1693), 1 Ld. Raym. 10.

4721. Evidence before licensing justices.]—The justices at a licensing meeting have a discretion as to what evidence they will receive & as to the admission of unsworn evidence. Where, therefore, on the hearing of an application for a new licence for a hotel, witnesses had given evidence upon oath in opposition to the granting of the licence, & another person appeared in opposition & proposed to make statements of fact, but refused to be sworn:—*Held*: the justices were acting within their jurisdiction in declining to hear him, although the local public ought, within reasonable limits, to be allowed to express their views at licensing meetings.—*R. v. SHARMAN, Ex p. DENTON*, [1898] 1 Q. B. 578; 67 L. J. Q. B. 460; 78 L. T. 320; 62

a witness, the parties, by acquiescing in the examination of such witness without the previous sanction of an oath, are precluded by such acquiescence from making any objection to the reception of such evidence after verdict, or asking for a new trial, on such grounds.—*BIRCH v. SOMERVILLE* (1852), 18 L. T. O. S. 336.—*IR.*

m. Whether fresh oath necessary

Secl. 4.—Oath and affirmation: Sub-sect. 1, A. & B. (a), (b) & (c).]

J. P. 296; 46 W. R. 367; 14 T. L. R. 269; 42 Sol. Jo. 326, D. C.

Annotations:—Mentd. R. v. Bowman, [1898] 1 Q. B. 663; R. v. Colham, [1898] 1 Q. B. 802; R. v. Manchester JJ., [1899] 1 Q. B. 571; R. v. Nicholson, [1899] 2 Q. B. 455; R. v. Johnson, [1905] 2 K. B. 59; R. v. Woodhouse, [1906] 2 K. B. 501; R. v. Butt, *Ex p.* Brooke (1922), 38 T. L. R. 537.

4722. — *Confirming authority.*—The licensing justices of the district having under Licensing Act, 1874 (c. 49), s. 22, made a provisional grant of a licence with an attached condition fixing the monopoly value at £2,250, the committee of quarter sessions constituting the confirming authority, after hearing evidence, obtained from their valuer a report as to the amount that should be fixed as the monopoly value, & without hearing any evidence upon oath of the statements in that report ordered: that the licence be confirmed & that the conditions . . . be, with the consent of the justices authorised to grant the licence, varied by fixing the monopoly value at £5,000:—*Held*: in fixing the monopoly value to be recommended to the justices of the licensing district for their consent under Licensing Act, 1904 (c. 23), s. 4 (6), the confirming authority are not entitled to act upon evidence not taken upon oath; & a *mandamus* should issue ordering the confirming authority to hear & determine the application for confirmation of the licence according to law.—R. v. JACKSON (1906), 96 L. T. 77; 71 J. P. 25; 23 T. L. R. 128; 51 Sol. Jo. 130, C. A.

—*J.*—*See, generally*, INTOXICATING LIQUORS.

B. Form and Administration of Oath.

(a) In General.

See, now, Oaths Act, 1909 (c. 39).

4723. *Form & manner immaterial—If binding on conscience of witness.*—R. v. LOVE (1651), 5 State Tr. 43, 113.

4724. — *J.*—A witness who declines swearing on the New Testament although he professes Christianity, may be allowed to swear on the Old Testament, if he considers that mode binding on his conscience.—EDMONDS v. ROWE (1824), Ry. & M. 77, N. P.

4725. — *J.*—Comrs. in administering an oath have a discretion of administering it in such a form as will be binding on the conscience of the person taking it.—A-G. v. WILSON (1844), 8 J. P. 806.

after adjournment.—If a witness is sworn & gives evidence it is not necessary to swear him after an adjournment.—R. v. HAMMOND (1878), 1 N. S. W. S. C. R. N. S. 42.—AUS.

n. Evidence before benchers of Law Society—Effect of statute.—Power to examine witnesses under oath which may or may not be employed at the sound discretion of the benchers of Law Society of Upper Canada is conferred by R. S. O. 1887, c. 145, s. 36.—HANTS v. LAW SOCIETY OF UPPER CANADA (1890), 16 O. R. 625; 17 A. R. 41.—CAN.

o. Statutory requirement.—Oaths Act, 1873, s. 6, imperatively requires that no person shall testify as a witness except on oath or affirmation.—R. v. MARU (1888), 1 L. R. 10 All. 207.—IND.

PART V. SECT. 4, SUB-SECT. 1.—B. (a).

4723 i. *Form & manner immaterial—If binding on conscience of witness.*—A Chinese witness may be sworn on the Bible. The form of administering the oath is immaterial; the substance

only is essential. If a witness declare that a special form is binding on his conscience the ct. is obliged to accept it.—R. v. McILREE (1866), 3 W. W. & A'B. 32.—AUS.

p. — *Affidavit.*—*Held*: an affidavit is properly sworn which is attested by the deponent taking the oath with uplifted hand, if the said deponent considers that form binding upon his conscience.—*Re LAKESIDE PROVINCIAL ELECTION, TIDSBERRY v. GARLAND* (1914), 29 W. L. R. 628; 7 W. W. R. 340; 8 W. W. R. 33; 20 D. L. R. 286; 25 Man. L. R. 197.—CAN.

q. — *J.*—*Semle*: perjury may be assigned where the oath has been administered on the Common Prayer Book of the Church of England.—*MADAM v. WEAVER* (1843), 2 Kerr, 176.—CAN.

r. Oath administered in foreign country.—*Semle*: if the county judge in the course of an investigation under R. S. O. 1887, c. 184, s. 477, proceeded to the U.S. to take evidence, any oath administered by him in the U.S. would have no legal significance.

4726. *Effect of omission of words—"So help me God."*—By a private Act, no person appointed to act as tithe valuer shall be capable of acting, etc. until he shall have taken & subscribed an oath in the words following: I, A. B., do swear that I will faithfully, etc., execute, etc. So help me God. The oath had been subscribed with the omission of the words "So help me God":—*Held*: the oath had nevertheless been properly administered according to the statute; for the words omitted were no part of the oath, but only an indication of the manner of administering it.—LANCASTER & CARLISLE RY. CO. v. HEATON (1858), 8 E. & B. 952; 27 L. J. Q. B. 195; 30 L. T. O. S. 333; 4 Jur. N. S. 707; 6 W. R. 293; 120 E. R. 354.

Annotation:—Mentd. Waterloo Bridge Co. v. Cull (1858), 1 E. & E. 213.

4727. *Necessity for one & same form of oath—All evidence relating to same fact.*—*Semle*: all the evidence relating to the same fact must be given under one & the same form of oath.—NOTTINGHAM TOWN CASE, RICHARDS'S CASE (1866), 15 L. T. 89, 94.

4728. *Effect of Oaths Act, 1909 (c. 39), s. 2.*—The form & the administration of the oath contemplated by above sect. is permissive, & not compulsory.—R. v. PALM (1910), 4 Cr. App. Rep. 201, C. C. A.

4729. *Oath taken in usual form without objection—What questions witness may be asked—As to binding effect of oath on conscience of witness.*—

(1) If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary & irrelevant to ask him, if he considers any other form of oath more binding, & such question cannot be asked.

(2) It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, & to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, & having asked him whether he wrote that letter.

(3) If, on cross-examination, a witness admits a letter to be of his handwriting, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.

(4) In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The ct., however, may permit it to be read at an earlier period, if counsel suggest

—*Re GODSON & CITY OF TORONTO* (1888), 16 O. R. 275.—CAN.

s. Oath administered by clerk of county court.—On the occasion when perjury was alleged to have been committed the oath was administered to the prisoner in open ct. by the clerk of the county ct. sitting in the general sessions of the peace for & at the verbal request of the clerk of the peace:—*Held*: the witness was properly sworn.—R. v. COLEMAN (1898), 30 O. R. 93.—CAN.

t. Form of oath most binding on conscience of witness—Duty of judge to inquire.—It is the duty of the presiding Judge to inquire what is the form of oath most binding upon the consciences of the witnesses.—R. v. LEE TUCK & LUNG TUNG (1912), 21 W. L. R. 669; 2 W. W. R. 605; 5 D. L. R. 629; 54 Alta. L. R. 388.—CAN.

a. Christian not sworn in usual way.—Deft. being a Christian, & without being asked whether he objected to being sworn in the usual way, was sworn by holding up his right hand, no Bible being used in administering the oath:—*Held*: under the common

that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of counsel proposing such a course, & subject to the consequences thereof.

(5) If a witness examined in chief on the part of pltf., being asked whether he remembers a quarrel taking place between A. & B., answers, that he has heard of a quarrel between them, but does not know the cause of it, & such witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, counsel for deft. cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel.

(6) When a witness in support of a prosecution has been examined in chief, & has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts.

(7) If, on the trial of an action or indictment, a witness examined on the part of pltf. or prosecutor, upon cross-examination by deft.'s counsel, states that at a time specified he told A. that he was one of the witnesses against deft., & being re-examined by pltf.'s or prosecutor's counsel, states what induced him to mention this to A., pltf.'s or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses.

(8) I think counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense & meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, & also, of the motive, by which the witness was induced to use those expressions; but, I think,

he has no right to go further, & to introduce matter new in itself, & not suited to the purpose of explaining either the expressions or the motives of the witness (ABBOTT, L.C.J.).—THE QUEEN'S CASE (1820), 2 Brod. & Bing. 281; 1 State Tr. N. S. App. 1318; 129 E. R. 976.

Annotations.—As to (1) *Reid*. Maden v. Catanach (1861), 7 H. & N. 360; A.-G. v. Bradlaugh (1884), Cab. & El. 440. As to (2) *Consd.* Macdonnell v. Evans (1852), 11 C. B. 930; Henman v. Lester (1862), 12 C. B. N. S. 776. *Reid*. Penny v. Watts (1848), 2 De G. & Sm. 501; R. v. Christopher (1850), 4 Cox, C. C. 76. As to (3) *Consd.* Strother v. Barr (1828), 5 Bing. 136; R. v. Ford (1851), 5 Cox, C. C. 184. *Reid*. Rawlings v. Chandler (1854), 9 Exch. 687. As to (5) *Reid*. M'Donnell v. Evans (1851), 3 Car. & Kir. 51; Davidson v. Davidson (1856), Dea. & Sw. 167; R. v. Meany (1867), 10 Cox, C. C. 506. As to (6) *Reid*. A.-G. v. Hitchcock (1847), 1 Exch. 91. As to (8) *Reid*. Prince v. Sams (1838), 3 Nev. & P. K. B. 139; Darby v. Ouseley (1856), 25 L. J. Ex. 227. *Generally*, *Mentd.* Vander Donck v. Thellusson (1849), 8 C. B. 812.

4730. What tribunals may administer oath.—*Tribunal under Military Service Act, 1916 (c. 104).*—

—(1) Tribunals under the above Act have power, if they think fit to exercise it, of administering an oath, & of hearing evidence on oath; but, having regard to the nature of the inquiry in which they are engaged, certainly in most cases, & probably in almost all, they will exercise a wise discretion in abstaining from taking evidence on oath.

(2) Tribunals have no inherent power to enforce the attendance of witnesses, but they may in a proper case invoke the assistance of the K. B. Div. of the High Ct. to do so; & the Master of the Crown Office, on being satisfied that the case is a proper one, has power to issue a subpoena at the instance of a tribunal.—R. v. WILTSHIRE APPEAL TRIBUNAL, *Ex p. THATCHER* (1916), 86 L. J. K. B. 121; 115 L. T. 650; 80 J. P. 109; 32 T. L. R. 657; 14 L. G. R. 797, C. A.

Right to take oath in Scottish manner.—*See* Oaths Act, 1888 (c. 46), s. 5.

(b) Witnesses Objecting to be Sworn.

Right to affirm.—*See* Sect. 4, sub-sect. 2, *post*.

Refusal to be sworn—Penalties.—*See* Sect. 6, sub-sect. 8, *post*.

(c) Witnesses not of Christian Religion.

4731. *Chinaman.*—Mode of swearing a Chinese witness.—R. v. ENTREHEMAN (1842), Car. & M. 248.

the oath.—R. v. KUYPER (1915), T. P. D. 308.—S. AF.

PART V. SECT. 4, SUB-SECT. 1.—B. (a).

4731 i. *Chinaman.*—Upon a trial for murder, a Chinese witness, who was not a Christian, was interrogated as to the form of oath most binding, & was sworn by "the King's oath," or "chicken oath," a form deemed of greater solemnity than those ordinarily administered, the "paper" & "saucer" oaths.—R. v. AH WOKEY (1902), 9 B. C. R. 569.—CAN.

4731 ii. —.—An oath administered to a witness, without objection, in the form ordinarily administered to persons of his race or belief, is binding & the witness cannot afterwards be heard to say he was not sworn. It is not necessary to ask the witness whether the oath in the form in which he takes it is recognised by him as binding upon his conscience, there being no such word as "conscience" in the language of the witness, but it is only necessary in such a case to use such equivalent terms as would bring home to the witness the fact that he is binding himself according to his moral sense to speak the truth.—R. v. SHAJOO RAM (1914), 30 W. L. R. 65; 23 Can. Crim. Cas. 334; 19 D. L. R. 313; 8 W. W. R. 613.—CAN.

law rule the oath was defective.—R. v. CURRY (1913), 13 F. L. R. 11.—CAN.

b. —.—*Member of Church of Scotland.*—A member of the Church of Scotland could not have been sworn as a witness in criminal cases without kissing the Book.—R. v. CAMPBELL (1836), 1 Craw. & D. 187, n.—IR.

c. —.—*Scottish Covenanters.*—A Scottish Covenanter could not have been sworn in criminal cases with uplifted hand.—R. v. LOGAN (1837), 1 Craw. & D. 188, n.—IR.

d. —.—.—A. B. calling himself a Scottish Covenanter, refused to be sworn in the ordinary form, but stated his willingness to be sworn with uplifted hand.—*Held*: being neither a seceder nor a separatist, he did not come within the provision of 3 & 4 Will. IV., c. 82, & so could not be sworn in the manner he desired.—R. v. GILLON (1838), Craw. & D. Abr. C. 323.—IR.

e. —.—.—Justices who, on the witness objecting to take an oath to tell the whole truth, had administered an oath "to tell the truth, & that whatever he said should be truth" were wrong in administering any oath except the ordinary one.—McLAUGHLIN v. DOUGLAS & KIDSTON (1863), 4 Ir. 273; 35 Sc. Jur. 322.—SCOT.

f. *Administration of oath*—No

invocation to a Deity.—An oath is improperly administered where there is no invocation to a Deity.—R. v. SHAJOO RAM (1914), 30 W. L. R. 65; 19 D. L. R. 313; 23 Can. Crim. Cas. 334; 8 W. W. R. 613.—CAN.

g. *Oath on book not containing the gospels.*—Where witnesses were sworn upon a book that did not contain the gospels, the court suppressed the depositions, as being a nullity.—DOHERTY v. DOHERTY (1815), 8 L. Eq. R. 379.—IR.

h. *Oath of member of Church of England—Doubt as to divine punishment.*—A member of the Church of England who was willing to take & did take the usual oath, & believed in the obligations of an oath, but who doubted whether God, although He has power to reward & punish, will punish, was held to be admissible as a witness.—R. v. BARCLAY (1873), 2 C. A. 251.—N.Z.

k. *Nature of oath.*—All witnesses should be sworn according to the forms of religion they profess.—R. v. LYNX (1879), K. 110.—S. AF.

PART V. SECT. 4, SUB-SECT. 1.—B. (b).

i. *Accomplice—Called as Crown witness.*—An accomplice called as a Crown witness cannot refuse to take

Sect. 4.—Oath and affirmation: Sub-sect. 1, B. (c) & (d); sub-sect. 2. Sect. 5: Sub-sects. 1 & 2.]

4732. —[—]—THE ORIANADA (1907), 122 L. T. Jo. 531.

4733. Witness professing Gentoo religion.]—The ct. directed a commission to the East Indies, to take the answer of deft. to the cross bill, who was of the Gentoo religion; & empowered two or three of the comrs. to administer such oath in the most solemn manner, as in their discretions shall seem meet; & if they administered any other oath than the Christian, to certify to the ct. what was done by them; that, if there should be any doubt as to the validity, the opinion of the judges might be taken.—*RAMKISSENSEAT v. BARKER* (1739), 1 Atk. 19; 26 E. R. 13, L. C.

Annotation:—Mentd. Wigley v. Whitaker (1838), 1 Beav. 349.

4734. —[—]—*Held*: the deposition of witnesses of the Gentoo religion, sworn according to their ceremonies, ought in the special circumstances of the case to be read as evidence in the cause.—*OMYCHUND v. BARKER* (1745), 1 Atk. 21; 26 E. R. 15; *sub nom. ORMICHUND v. BARKER*, 1 Wils. 84; *sub nom. OMYCHUND v. BARKER*, 2 Eq. Cas. Abr. 397; Willes, 538, L. C.

Annotations:—Conad. Miller v. Salomons (1852), 7 Exch. 475; *A. G. v. Bradlaugh* (1885), 14 Q. B. D. 667. *Refd. Atcheson v. Everitt* (1776), 1 Cowp. 382; *R. v. Gilham* (1795), 1 Esp. 285; *Spain (King) v. Hullett* (1833), 7 Bl. N. S. 359; *Boelen v. Melladew* (1851), 10 C. R. 398; *Parkes v. Parkes* (1852), 2 Rob. Eccl. 518; *Salomons v. Miller* (1853), 8 Exch. 778; *Maden v. Catanach* (1861), 5 L. T. 288. *Mentd. East India Co. v. Campbell* (1749), 1 Ves. Sen. 246; *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19; *Bowman v. Secular Soc.*, [1917] A. C. 406.

4735. Jew—Sworn on Old Testament.]—*ROBELEY v. LANGSTON* (1668), 2 Keb. 311; 84 E. R. 196.

Annotations:—Refd. Omichund v. Barker (1745), Willes, 538; *Miller v. Salomons* (1852), 7 Exch. 475.

4736. — Sworn on Pentateuch.]—A Jew ordered to be sworn to his answer upon the Pentateuch.—*ANON.* (1684), 1 Vern. 263; 23 E. R. 459. *Annotation:—Refd. Omichund v. Barker* (1745), 1 Atk. 21.

4737. — Allowed to be covered.]—Jews allowed to cover when they swear.—*GOMEZ SERRA v. MUNEZ* (1729), 2 Stra. 821; 93 E. R. 872.

4738. — Sworn on New Testament.]—Where a witness is sworn on the New Testament, who admits that he was born a Jew, but the tenets of which religion he had never formally abjured, & was never baptised or admitted into the Christian Church, he is an admissible witness, though the oath has been so taken by him, on his asserting, that he then considered himself as a member of

the established religion & bound by its precepts.—*It. v. GILHAM* (1795), 1 Esp. 284, N. P.

Annotation:—Mentd. Sergeant v. Tilbury (1812), 16 East, 416.

4739. — Sworn on Gospels—Effect.]—On an application for a new trial, it appeared that a witness, who gave himself a false name at the trial, & was sworn on the Gospels, was, at that time, a Jew:—*Held*: the oath, as taken, subjected the witness to the consequences of perjury, if he had sworn falsely.—*SELLS v. HOARE* (1822), 3 Brod. & Bing. 232; 7 Moore, C. P. 36; 129 E. R. 1272.

4740. — — No objection made when sworn.]—*R. v. SIMONS* (1893), 117 C. C. Ct. Cas. 556.

4741. Mohammedan—Sworn on Koran.]—A Mohammedan sworn upon the Koran.—*FACHINA v. SABINE* (1738), 2 Stra. 1104; 93 E. R. 1061.

4742. — —.]—A Mohammedan may be sworn on the Alcoran in a prosecution for a capital offence.—*MORGAN'S CASE* (1764), 1 Leach. 54.

Annotation:—Refd. Maden v. Catanach (1861), 5 L. T. 288.

(d) *Witnesses under Disability.*

Ability to understand nature of oath—Children.]—*Sec Sect. 1, sub-sect. 1, A. (a), ante.*

Deaf & dumb persons.]—*Sec Sect. 1, sub-sect. 1, A. (b), ante.*

Lunatics.]—*Sec Sect. 1, sub-sect. 1, A. (c), ante.*

SUB-SECT. 2.—EVIDENCE ON AFFIRMATION.

4743. Who may affirm—Witness no longer Quaker—Still retaining their opinions as to unlawfulness of oaths.]—A person formerly a Quaker, who has seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refuses to affirm under the forms given in Quakers & Moravians Act, 1833 (c. 49), & 3 & 4 Will. 4, c. 82, is not admissible as a witness in criminal cases upon making the affirmation according to 9 Geo. 4, c. 32.—*It. v. DORAN* (1838), 2 Lew. C. C. 27; 2 Mood. C. C. 37, C. C. R. —[—]—*Sec, now, Quakers & Moravians Act, 1838 (c. 77).*

4744. Grounds of objection to taking oath—Validity—Conscientious objections.]—A witness, who, from conscientious motives only, not being a member, or entertaining the principles of, the Society of Friends, or belonging to the denomination of people called Separatists, cannot object to be sworn when the oath is tendered; & it is not permitted by law that any such privilege shall

4736 i. Jew—Sworn on Pentateuch—Allowed to be covered.]—Jews, who were examined as witnesses, were sworn on the five books of Moses, remaining covered while the oath was being administered, the judge asking them severally, "Do you think the oath, in the form you have taken it, to be most binding on your conscience?" to which the witnesses replied in the affirmative.—*It. v. COOTE* (1842), Arm. M. & O. 337.—*IR.*

4741 i. Mohammedan—Sworn on Koran.]—A Mohammedan witness said he would be sworn on the Koran, a copy of which could not be obtained, & a form of affirmation was administered instead:—*Held*: the witness's evidence was not receivable upon such affirmation but only on the oath upon the Koran.—*It. v. KOGHIE* (1887), 2 Q. L. J. 187.—*AUS.*

m. Indian—[With full sense of obligation to speak truth—Belief in future state & in Supreme Being.]—On

a trial for murder, an Indian witness was offered, & on his examination it appeared that he was not a Christian & had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, & that he & his tribe believed in a future state, & in a Supreme Being who created all things, & in a future state of rewards or punishments according to their conduct in this life. He was then sworn in the ordinary way:—*Held*: his evidence was admissible.—*It. v. PAHMAH-GAY* (1860), 20 U. C. R. 195.—*CAN.*

PART V. SECT. 4, SUB-SECT. 2.

n. Who may affirm—Whether member of General Assembly of Presbyterian Church.]—A member of the General Assembly of the Presbyterian Church, not allowed to give his evidence on affirmation.—*SMITH'S CASE* (1841), Ir. Cir. Rep. 287.—*IR.*

o. Statutory requirement.]—Oaths Act, 1873, s. 6, imperatively requires that no person shall testify as a witness except on oath or affirmation.—*It. v. MARU* (1888), 1 L. R. 10 All. 207.—*IND.*

p. — Separatist.]—An affirmation taken under 3 & 4 Will. 4, c. 82, stated that the affirmant was a member of a religious sect called Separatists. It did not follow in terms the form of affirmation required by the statute, but it purported to be supplemental to another affirmation which did, & to have been made before an officer authorised to administer it.—*Held*: it must be assumed to have been properly made.—*WOLSELY v. WORTHINGTON* (1862), 13 I. Ch. R. 341.—*IR.*

4744 i. Grounds of objection to taking oath—Validity—Conscientious objections.]—A witness must take an oath unless he objects to do so on the ground of conscientious scruples; & he must so state—that is, his objection must be expressed to the ct.—

to a witness so situated & refusing. Upon the objection being persisted in, the witness will be committed to prison; & the ct. has no discretion but to exercise its authority; but the solr. prosecuting the inquiry may waive the oath, & the witness will then be discharged from custody & examined without it.—*Re LAWRENCE* (1852), 20 L. T. O. S. 16.

4745. ———.]—*NASH v. ALI KHAN* (1892), 8 T. L. R. 444, C. A.

4746. ——— **Duty of judge to ascertain.**—It is the duty of a judge, before permitting a witness to affirm under Oaths Act, 1888 (c. 46), s. 1, to inquire into his ground of objection to being sworn, & to ascertain whether he objects because he has no religious belief, or because the taking of an oath is contrary to his religious belief.—*R. v. MOORE* (1892), 61 L. J. M. C. 80; 66 L. T. 125; 56 J. P. 345; 40 W. R. 304; 8 T. L. R. 287; 36 Sol. Jo. 233; 17 Cox, C. C. 458, C. C. R.

Annotation :—*Reid*, *Nash v. Ali Khan* (1892), 8 T. L. R. 444.

4747. **Weight of evidence of witness having no religious belief.**—*Ex p. LENNARD* (1875), 39 J. P. Jo. 88.

4748. **Evidence by affidavit.**—*In the Goods of PRINCE HENRY THE SIXTY-NINTH OF REUSS-KÖSTRITZ*, No. 5489, *post*.

SECT. 5.—ORDERING OUT OF COURT.

SUB-SECT. 1.—IN GENERAL.

4749. **Discretion of court to order.**—(1) Under Evidence Amendment Act, 1853 (c. 83), s. 1, a wife is competent & compellable to give evidence against her husband in an action in which her husband is a party.

(2) The application to have the witnesses ordered out of ct. is made to the discretion of the ct., & the ct. may accede or not to the application, & direct in what manner it may be carried out.

(3) Pltf. has a right to be in ct. to instruct his counsel.—*SELFE v. ISAACSON* (1858), 1 F. & F. 191.

4750. **In what proceedings ordered—Admiralty, matrimonial & probate proceedings—Contested cases.**—*PRACTICE NOTE* (1908), 24 T. L. R. 203.

4751. ———.]—*SAVAGE v. SAVAGE & FRAIN* (1908), 43 L. Jo. 167.

— **In bankruptcy proceedings.**—*See* *BANKRUPTCY*, Vol. V., pp. 618, Nos. 5557, 5558.

— **In winding up proceedings.**—*See* *COMPANIES*, Vol. X., p. 897, No. 6116.

4752. **Time for application for order—At any stage of case.**—*R. v. COOK* (1696), 13 State Tr. 311.

Annotations :—*Mentd.* *R. v. Edmonds* (1821), 4 B. & Ald. 471; *Ramadge v. Ryan* (1832), 9 Bink. 333; *Mansell v. R.* (1857), 8 E. & B. 54; *Mulcahy v. R.* (1867), 15 W. R. 446.

R. v. DEAKIN (1911), 19 W. L. R. 43; 17 B. C. R. 13; 2 D. L. R. 282; 19 Can. Crim. Cas. 62.—*CAN.*

PART V. SECT. 6, SUB-SECT. 1.

q *In what proceedings ordered—In action for passing off—Secret process of manufacture.*—Where pltf., the owner of a secret process for the manufacture of an extract of eucalyptus, alleged by his pleading in an action for passing off that defts. falsely & fraudulently represented, that their extract was the same & made in the same way as pltf.'s, & called his manager to give evidence on his behalf:—*Held*: the ct. had power to direct the cross-examination to be *in camera* & to exclude the parties therefrom.—*SANDNER v. CURNOW*, [1905] V. L. R. 648.—*AUS.*

r. — *Matrimonial proceedings.*—On a petition for divorce on the ground that resp. had been guilty of rape, the offence must be proved by the person on whom the rape was committed, but her evidence may be taken *in camera*.—*AYERS v. AYERS* (1908), 4 Tas. L. R. 65.—*AUS.*

s. *Whether applicable to parties to suit.*—Parties to suits are not debarred from being present in Ct. during the hearing of their suits.—*STONE v. DWYER* (1857), 4 Nfld. L. R. 167.—*NFLD.*

t. *Medical witnesses.*—As a general rule medical witnesses will not be allowed to remain in ct. to hear evidence as to symptoms as to which they are afterwards to be called to give their opinion, but in special circumstances this rule may be relaxed.—

4753. ———.]—Either party at any period of a cause has a right to require that the unexamined witnesses should be out of ct.—*SOUTHEY v. NASH* (1837), 7 C. & P. 632, N. P.

4754. ——— **After plaintiff's case closed.**—The judge in his discretion will, on the application of pltf.'s counsel, order witnesses for deft. out of ct., although the application be not made until pltf.'s case has closed, provided the evidence adduced on the part of pltf. was of such a nature that deft. could not have availed himself of having pltf.'s witnesses also out of ct., if the application had been made at the commencement of the trial. *Qu.*: whether pltf. or deft., who is also a witness, is liable to be ordered out of ct. during the examination of the other witnesses.—*DICKSON v. MALCOLM* (1853), 21 L. T. O. S. 199, N. P.

4755. **Grounds for making order—Allegation of forgery.**—*GUILLIAMS v. HULIE* (1663), 1 Sid. 131; 82 E. R. 1013.

4756. ——— **Legal argument as to evidence.**—(1) The rules of evidence are exactly the same in civil & criminal cases, & in both it is in the discretion of the judge how far he will allow the examination in chief of a witness to be by leading questions or to assume the form of a cross-examination.

(2) It is almost a matter of right for a party to have a witness go out of ct. while a legal argument is going on as to his evidence.

(3) A reporter to a newspaper, who is called as a witness, cannot be asked in cross-examination whether in articles which he has written in that newspaper he has not called the opposite party by nicknames, as that is a part of the contents of the articles.

(4) If a witness called to prove the handwriting of a paper say that he believes it to be the handwriting of deft. from its contents, & from other circumstances, he may be asked what those circumstances are.—*R. v. MURPHY* (1837), 8 C. & P. 297, N. P.

Annotations :—*Generally*, *Mentd.* *R. v. Blake* (1841), 6 Q. B. 126; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

4757. ——— **Reading of evidence on affidavit.**—A witness will not be ordered out of ct. during the reading of evidence on affidavit.—*PENNIMAN v. HILL*, *HILL v. PENNIMAN* (1876), 24 W. R. 245.

4758. ———.]—*MAIDSTONE BOROUGH CASE* (1906), 5 O'M. & H. 200.

SUB-SECT. 2.—WHERE WITNESS A PARTY OR LEGAL ADVISER.

4759. **Witness a party—Whether ordered out of court.**—*DICKSON v. MALCOLM*, No. 4754, *ante*.

H.M. ADVOCATE v. SMITH (1857), 2 Irv. 641; 29 Sc. Jur. 564.—*SCOT.*

a. *Witness present during examination of other witnesses—Whether excluded as witness.*—Evidence Act, 1840, s. 3, which relaxes the common law rule excluding a witness who has heard the evidence given by other witnesses, applies only to proceedings in the cts. specified in the sect., among which the Burgh Police Ct. is not included, & accordingly, in proceedings, in that ct., it is a good objection to a witness that he has been present in ct. during the examination of the other witnesses in the case.—*DOHERTY & GRAHAM v. McLENNAN*, [1912] S. C. (J.) 102.—*SCOT.*

PART V. SECT. 5, SUB-SECT. 2.

4759 i. *Witness a party—Whether ordered out of court.*—The mere fact

Sect. 5.—Ordering out of court: Sub-sects. 2 & 3.
Sect. 6: Sub-sect. 1, A. & B. (a).]

4760. ———.]—ANON. (1851), 18 L. T. O. S. 143.

4761. ———. **Prosecutor on information for libel.**—If on the trial of an information for a libel, where deft. had pleaded a justification under Libel Act, 1843 (c. 96), s. 6, the witnesses be ordered out of ct., the prosecutor must be out of ct. if he is intended to be called as a witness.—*R. v. NEWMAN* (1852), 3 Car. & Kir. 252.

4762. ———.]—Parties to an action cannot be ordered out of ct. as long as they behave themselves with propriety.—*CHARNOCK v. DEWINGS* (1853), 3 Car. & Kir. 378.

4763. ———. **Witness wishing to instruct solicitor.**—All witnesses being ordered out of ct., deft., who proposes to give evidence on his own behalf, has a right to insist upon remaining for the purpose of instructing his attorney; & it is for the judge to leave it to the jury to determine what effect his presence may have had on his testimony.—*CONSTANCE v. BRAIN* (1856), 28 L. T. O. S. 88; 2 Jur. N. S. 1145.

4764. ———. **Witness wishing to instruct counsel.**—*SELFE v. ISAACSON*, No. 4749, *ante*.

4765. ———.]—*OUTRAM v. OUTRAM*, [1877] W. N. 75.

4766. ———.]—*USHER v. HENWOOD* (1882), 26 Sol. Jo. 598.

4767. Witness a legal adviser—Whether ordered out of court.—*R. v. WEBB* (1819), 4 C. & P. 588, n.

4768. ———.]—When the witnesses in a cause are ordered out of ct., the attorney in the cause may remain, & be afterwards called as a witness.—*POMEROY v. BADDELEY* (1826), Ry. & M. 430, N. P.

4769. ———.]—Deft.'s attorney, who has been subpoenaed on the part of pltf. may, at the desire of his counsel, remain in ct. during the trial of the cause, although an order has been made for the witnesses on both sides to withdraw.—*EVERETT v. LOWDIAM* (1831), 5 C. & P. 91, N. P.

SUB-SECT. 3.—EFFECT OF DISOBEDIENCE TO ORDER.

4770. Whether ground for rejection of evidence.—*R. v. WEBB* (1819), 4 C. & P. 588, n.

4771. ———.]—It is an inflexible rule, that a witness who is present in ct. during a trial, when he ought to have been out of ct., under an order made for that purpose, cannot be examined: & the ct. refused to grant rule to show cause why there should not be a new trial, where a person, not originally intended to be examined, who was present in ct., & who had been in ct. during the trial, was called to give evidence, & was not allowed

to be examined on that ground.—*A.-G. v. BULPIT* (1821), 9 Price, 4; 147 E. R. 2.

Annotation:—Consd. Parker v. McWilliam (1830), 6 Bing. 683.

4772. ———. **Or merely matter for comment.**—Where a witness remains in ct. after an order for the witnesses to withdraw, the judge may still allow him to be examined, subject to observation on his conduct in disobeying the order.—*R. v. COLLEY & SWEET* (1829), Mood. & M. 329, N. P.

Annotation:—Refd. Cobbett v. Hudson (1852), 1 E. & B. 11.

4773. ———.]—It is no ground for rejecting a witness's evidence, that he remained in court after an order for all the witnesses to leave the court, it is merely matter of observation on his evidence.—*COOK v. NETHERCOTE* (1835), 6 C. & P. 741.

Annotation:—Refd. Cobbett v. Hudson (1852), 1 E. & B. 11.

4774. ———.]—Where a witness remains in ct., after an order that the witnesses shall leave the ct., his testimony cannot on that ground be excluded; it is only matter for observation on his evidence.

The judge has no right to exclude the witness; he may commit him for the contempt, but he must be examined (*ERSKINE, J.*).—*CHANDLER v. HORNE* (1842), 2 Mood. & R. 423.

Annotation:—Refd. Portescue v. Clayton (1860), 24 J. P. 712.

4775. ———.]—Where a witness remains in ct. after an order for the witnesses on both sides to withdraw, it rests in the discretion of the judge, whether such witness shall be heard; except in the Exchequer, where he is peremptorily excluded.—*PARKER v. McWILLIAM* (1830), 6 Bing. 683; 4 Moo. & P. 480; 8 L. J. O. S. C. P. 276; 130 E. R. 1444.

4776. ———.]—*R. v. BROWN* (1831), 4 C. & P. 588, n.

4777. ———. **Limitation of examination.**—The witnesses had been all ordered out of ct., but one of them came into ct. again, & heard the evidence of another witness. The witness who had so come back into ct. was allowed to be examined as to such facts only as had not been spoken to by any other witness.—*BEAMON v. ELLICE* (1831), 4 C. & P. 585, N. P.

4778. ———.]—All the witnesses were ordered out of ct. A witness for the prosecution remained in ct. The judge would not allow him to be examined.—*R. v. WYLDE* (1834), 6 C. & P. 380; 2 Nev. & M. M. C. 198.

4779. ———.]—(1) In an action against the maker of a promissory note, one of the subscribing witnesses was asked if she did not constantly sleep with her master, the pltf. She said that she did not.—*Held*: a witness might be called for deft. to prove that she did so, & that this was not collateral to the issue; though, if the question had been, whether the witness had walked the streets as

that a party intends to give evidence does not entitle the other party to call for his exclusion, as in the case of an ordinary witness.—*BIRD v. VIETH* (1899), 7 B. C. R. 31.—**CAN.**

b. ———. **Whether excluded as witness—Presence in court during examination of clerk.**—Where in an action for goods sold & delivered, pltf. made out a *prima facie* case through his clerk, who proved a delivery of the goods; & the promise to pay on request implied therefrom was repelled by deft., who stated a special contract varying from that implied.—*Held*: pltf. could not be excluded as a witness by reason of his presence in ct. during the examination of his clerk.—*McFARLANE v. MARTIN* (1853), 3 C. P. 64.—**CAN.**

PART V. SECT. 5, SUB-SECT. 3.

4770 i. Whether ground for rejection of evidence.—Notice had been given on a previous day of the assizes, that parties to the record wishing to give evidence must not remain in ct. during the examination of the other witnesses; & the judge rejected the evidence of a deft. for disobedience of such notice.—*Held*: he had authority so to do.—*WINTER v. MIXER* (1852), 10 U. C. R. 110.—**CAN.**

4770 ii. ———.]—At the trial of an action the witnesses were ordered out of ct. Before the case was closed deft.'s counsel tendered a witness who had remained in ct., but the judge refused to allow him to be examined.—*Held*: there must be a new trial. The practice is to receive such evidence,

but with great care.—*BLACK v. BESSE* (1886), 12 O. R. 522.—**CAN.**

4770 iii. ———.]—A witness should not be prevented from giving evidence by the mere fact that he has remained in the ct. room during the giving of other evidence when the ct. had ordered all witnesses to be excluded.—*OKE v. SPELLER*, [1921] 1 W. W. R. 1117; 14 Sask. L. R. 190; 59 D. L. R. 678.—**CAN.**

c. ———. **Matter for judge's discretion.**—At the trial all the witnesses were ordered to withdraw. Deft., however, remained & was tendered as a witness but refused by the ct.—*Held*: the rejection or admission of the witness's testimony was entirely in the discretion of the judge, & the

a prostitute, that would have been so, & had the witness denied it, other witnesses could not have been called to contradict her.

Is it not material to the issue, whether the principal witness who comes to support *pltf.'s* case is his kept mistress? . . . Here the question is, whether the witness had contracted such a relation with *pltf.*, as might induce her the more readily to conspire with him to support a forgery (COLERIDGE, J.).

(2) If a witness come into *ct.*, & hear some of the evidence after the witnesses have been ordered out of *ct.*, it is entirely in the discretion of the judge whether he shall be examined or not; & this is so in the Exchequer as well as in other *cts.*, the only difference in that *ct.* being confined to revenue cases, in which the rule is strict, that such witnesses cannot be examined.—THOMAS v. DAVID (1836), 7 O. & P. 350, N. P.

Annotations :—*As to* (1) *Consd.* A.-G. v. Hitchcock (1847), 1 Exch. 91; R. v. Gibbons (1861), 26 J. P. 149. *Refd.* Melhuish v. Collier (1850), 19 L. J. Q. B. 493; R. v. Burke (1858), 8 Cox, C. C. 44; R. v. Cargill, [1913] 2 K. B. 271. *As to* (2) *Refd.* Cobbett v. Hudson (1852), 1 E. & B. 11.

4780. —. —.]—SKELTON v. CASTLE (1837), 6 J. P. 154, n.

4781. —. —.]—Where witnesses in a cause are ordered out of *ct.*, & in violation of the order, one of them returns before he is duly called, his testimony on that account ought not to be rejected; but the witness may be punished by fine or imprisonment.—ROBERTS v. GARRATT (1842), 6 J. P. 154.

4782. —. —.]—COBBETT v. HUDSON, No. 4003, *ante*.

Liability of witness to punishment for contempt of court.—*Sec* Nos. 4003, 4751, 4774, 4780, 4781, *ante*.

SECT. 6.—EXAMINATION.

SUB-SECT. 1.—EXAMINATION IN CHIEF.

A. In General.

4783. **Examination must be relevant.**—Where it is sought to elicit from one witness evidence inconsistent with the evidence of a previous witness, the examination, if not for the purpose of throwing discredit upon the previous witness, must have a direct bearing upon the main issue.—NOTTINGHAM TOWN CASE, OLDHAM'S CASE (1866), 15 L. T. 89.

4784. —. —.]—Slander of a school for filth & bad food; which was justified. To rebut the justifications, *pltf.'s* counsel cannot ask how

boys are treated at any other particular school; nor can he ask as to the manner of their education, because it was not called in question by the slander.—BOLDRON v. WIDDOWS (1821), 1 C. & P. 65, N. P.

4785. **Sufficiency of answer—No positive recollection of fact—Belief in affirmative.**—That a man cannot positively recollect a fact but should rather believe the affirmative, is a full & satisfactory answer by a witness.—MILLER'S CASE (1773), 2 Wm. Bl. 881; 3 Wils. 420; 96 E. R. 518.

Annotations :—*Consd.* *Ex p.* Nowlan (1794), 6 Term Rep. 118. *Refd.* Nobes v. Mountain (1822), 3 Brod. & Bing. 233; *Ex p.* Lord (1847), 16 M. & W. 462; *Re* Bradbury (1853), 2 C. L. R. 585; *Re* Courtney (1861), 3 L. T. 899.

B. What Questions may be asked.

(a) Leading Questions.

4786. **General rule.**—I must have none of those things; we must have fair questions put; for, as you see, we will not admit the King's counsel to put any questions to the witnesses nor produce any witnesses against you that are leading or not proper; so nor must you (JEFFERIES, C.J.).—R. v. ROSEWELL (1681), as reported in 10 State Tr. 117.

Annotations :—*Mentd.* R. v. Dowling (1848), 3 Cox, C. C. 509; R. v. Mitchell (1848), 3 Cox, C. C. 1.

4787. **When permissible—Discretion of judge.**—R. v. MURPHY, No. 4756, *ante*.

4788. —. —.]—An interrogatory being objected to as a leading question & the answer obtained by it as objectionable for that reason, the judge caused part of the interrogatory & part of the answer to be suppressed & the remainder which appeared not affected by the context to be read in evidence:—*Held*: the judge was not bound to reject the interrogatory & answer merely because the question was a leading one, but might exercise a discretion as to excluding or admitting the whole or part of the answer obtained by the leading question, & the course taken at the trial was correct.

The point whether a leading question can be put & the answer to it received or not is one on which the judge must exercise a discretion at the trial, & that whether the evidence be written or *vivâ voce* (COLERIDGE, J.).—SMALL v. NAIRNE (1849), 13 Q. B. 840; 13 L. T. O. S. 527; 116 E. R. 1484.

Annotation :—*Mentd.* Wenman v. Mackenzie (1855), 5 E. & B. 447.

4789. —. —.]—Interrogatories were exhibited for the examination of witnesses in a cause.

witness was rightly rejected.—YOUNG v. YOUNG (1854), 1 P. E. L. 98.—CAN. d. —. —.]—A.-G. v. SULLIVAN (1842), 41m. M. & O. 294.—IR.

e. —. —.]—*Party—Excepted in order of exclusion.*—At the beginning of a trial all witnesses were ordered out of *ct.*, except the parties to the action. Judgment having been given dismissing the action as against the *deft.* P. his co-*deft.* M. entered upon his case & called P. as a witness. P. had remained in *ct.* & heard the whole of the evidence adduced by *pltf.*, & his evidence was rejected on this ground:—*Held*: the evidence of P. was improperly rejected.—MAHONEY v. MACDONELL (1885), 9 O. R. 137.—CAN.

PART V. SECT. 6, SUB-SECT. 1.—A.

f. **Previous examination of defendant by plaintiff—On affidavit—Right of plaintiff to examine at trial.**—*Pltf.* has a right to examine *deft.* at the examination & hearing of the cause, although *pltf.* may have already

cross-examined him on his answer, & on an affidavit which he has made in the cause.—THOMPSON v. HIND (circa 1862), 1 Ch. Ch. 217.—CAN.

g. **Right to exclude evidence—Of own witness—After examination.**—Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the *ct.*—VANNATTO v. MITCHELL (1867), 13 Gr. 665.—CAN.

h. **Whether time limit to examination-in-chief—Unnecessary length of examination.**—Where an attempt was being made to protract the examination-in-chief of the defence witnesses to a most unnecessary extent so as to delay, if not to prevent, the final termination of the case:—*Held*: the magistrate was not unreasonable in fixing a time limit for the examination-in-chief of the remaining witnesses.—CHINTAMON SINGH v. R. (1907), 1 L. L. R. 35 Cal. 243.—IND.

k. **Counsel for opposite party—In-**

terposing questions—During examination.—There is no authority to support the practice of the opposite counsel interposing by asking questions during the examination of a witness.—WALSH v. ST. JOHN (1864), 5 Nfld. L. R. 30.—NFLD.

PART V. SECT. 6, SUB-SECT. 1.—B. (a).

4786 i. **General rule.**—The general rule is that in examining one's own witness, not that no leading questions must be asked, but that on material points one must not lead his own witness, but that on points that are merely introductory & form no part of the substance of the inquiry one should lead.—MAVES v. GRAND TRUNK PACIFIC RY. CO. (1913), 25 W. L. R. 503; 11 D. L. R. 70; 6 Alta. L. R. 396.—CAN.

1. **Question to plaintiff creditor—As to whom credit given.**—In an action against the registered owner of a ship for the price of goods supplied for the ship, *pltf.* cannot be asked on his direct

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Exceptions were taken to them on the ground that they were leading & suggested answers beneficial to pltf., & not calculated to elicit the truth, & they were allowed by the master:—*Held*: upon exceptions to the master's certificate, the interrogatories were not leading, & objections might be taken to the evidence at the hearing of the cause.—*GREGORY v. MARYCHURCH* (1850), 12 Beav. 398; 19 L. J. Ch. 289; 50 E. R. 1113; *sub nom.* *GREGORY v. DAVIES*, 14 Jur. 102.

4790. — To direct mind of witness to particular topic—Contents of destroyed document.]—A leading question may be put when it is necessary to contradict a witness on the other side as to the contents of a paper which has been destroyed.—*COURTEEN v. TOUSE* (1807), 1 Camp. 43, N. P.

4791. — — — — —]—A witness called to prove that A. & B. were partners, was asked whether A. had interfered in the business of B.:—*Held*: this was not a leading question.

I wish that objections to questions as leading, might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry (LORD ELLENBOROUGH, C.J.).—*NICHOLLS v. DOWDING & KEMP* (1815), 1 Stark. 81, N. P.

4792. — — — — — Names of alleged partners.]—The counsel for pltf. may suggest to the witness called, to prove the partnership of several members of a firm who are pltf.s., the names of the component members of the firm.—*ACERRO v. PETRONI* (1815), 1 Stark. 100, N. P.

4793. — — — — — Identification of person in court.]—*R. v. WATSON*, No. 4035, *ante*.

4794. — — — — — Contradiction of denial by previous witness that specified statements made.]—*EDMONDS v. WALTER* (1820), 3 Stark. 7, N. P.

4795. — — — — —]—Where a witness in cross-examination denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness, is not at liberty to lead by reading from his brief the words denied: the conversation spoken to by the first witness being evidence in itself.—*HALLETT v. COUSENS* (1839), 2 Mood. & R. 238, N. P.

— — — — — Witness hostile.]—*See* Sect. 8, sub-sect. 1, *post*.

4796. Effect of.]—Evidence obtained in answer to leading questions may invalidate a conviction.—*R. v. WILSON (alias WHITTINGDALE)* (1913), 9 Cr. App. Rep. 124, C. C. A.

In cross-examination.]—*See* Sect. 6, sub-sect. 2, C., *post*.

(b) Other Questions.

4797. To prove that invention not new—Drawing of another machine constructed by witness—Drawing not made by witness—Questions to show accuracy of drawing.]—On *sci. fa.* to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness, who had constructed a machine for the same purposes, a drawing not made by himself, & ask him whether he has such a recollection

of the machine he made, as to be able to say that that is a correct drawing of it.—*R. v. HADDEN* (1826), 2 C. & P. 184, N. P.

4798. Witness failing to give expected evidence.]—Where a witness fails to prove the facts that he was expected to do he may be examined by the counsel who call him, in order to show attempts to intimidate him.—*NOTTINGHAM CASE* (No. 2) (1843), Bar. & Arn. 192.

Hostile witness.]—*See* Sect. 8, sub-sect. 1, *post*.

4799. Witness called to give evidence at variance with that of witness on other side.]—Where a witness for the prosecution has given an account of what was said by deft. at a particular transaction, & a witness is called for the defence to give a different one, it is not allowable for deft.'s counsel to put to him the precise words used by the first witness, & ask if they were uttered; but the witness should be called upon in the first instance to give his version of the matter, & when he has so done, he may be asked whether this or that expression was used.—*R. v. FUSSELL* (1848), 6 State Tr. N. S. 723; 12 J. P. 537; 3 Cox, C. C. 291.

4800. To prove custom.]—A question cannot be asked as to the details of a custom, until a foundation has been laid for that question by proving that some custom exists.—*CURTIS v. PEEK* (1864), 29 J. P. 70; 13 W. R. 230, Ex. Ch.

— — — — —]—*See* CUSTOM & USAGES, Vol. XVII., pp. 19 *et seq.*

4801. In action against directors for damages for misrepresentation in prospectus.]—It is always an important question in such cases [actions against directors for misrepresentation in prospectus] what has induced pltf. to take the shares, so that the inquiry could not be excluded, although, probably, the proper form would be, whether on the faith of the prospectuses & reports he was induced to apply for shares (COLERIDGE, J.).—*MOORE v. BURKE* (1865), 4 F. & F. 258; 15 L. T. 118, N. P.

— — — — —]—*See* COMPANIES, Vol. IX., pp. 122 *et seq.*

4802. In action to restrain breach of covenant to buy beer—Questions to show complaints from customers.]—Deft. executed under seal an agreement with B. Ltd. to take a yearly tenancy of the M. hotel & covenanted that he would purchase of B. Ltd. or their successors all ale beer etc. sold. B. Ltd. sold all their property, including the M. hotel & the goodwill of their business to pltf.s. Defts. refused to purchase beer, ale, etc., from pltf.s., & bought from others. On an injunction to restrain defts. from committing a breach of the covenant:—*Held*: in examining deft. with respect to the covenant alleged to have been broken the general question "Have you received complaints from customers?" would be allowed.—*MANCHESTER BREWERY CO. v. COOMBS*, [1901] 2 Ch. 608; 70 L. J. Ch. 814; 82 L. T. 347; 10 T. L. R. 299.

Annotations:—*Mentd.* *Torkington v. Magee*, [1902] 2 K. B. 427; *Rickett v. Green* (1909), 79 L. J. K. B. 193; *Gilbey v. Cossey* (1912), 106 L. T. 607; *Wedd v. Porter*, [1916] 2 K. B. 91; *Blanc v. Francis*, [1917] 1 K. B. 252; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Cole v. Kelly*, [1920] 2 K. B. 106; *Gray v. Spyker*, [1922] 2 Ch. 22.

examination to whom he gave credit.—*TROOP v. EVERETT* (1893), 32 N. B. R. 147; *affd.* Cont. 131.—*CAN.*

m. Question as to time of occurrence.]—It is not leading a witness to ask him whether something took place before or after a certain event.—*OLIPHANT v. ALEXANDER* (1914), 27 W. L. R. 56; 15 D. L. R. 618.—*CAN.*

PART V. SECT. 6, SUB-SECT. 1.—B. (b).

n. To prove custom.]—*LOVITT v. SNOWBALL* (1895), 33 N. B. R. 263.—*CAN.*

o. Meaning of words.]—Evidence as to the meaning of such unintelligible terms as "gum shoe" may be elicited

by the question: "What did you understand by the expression, used?" without laying the foundation applicable to such evidence with respect to well-known words used in a special sense.—*KNOTT v. TELEGRAM PRINTING CO., LTD.*, [1917] 1 W. W. R. 974 *affd.* 55 S. C. L. 631.—*CAN.*

Questions tending to incriminate.]—*See* Sect. 2, sub-sect. 4, B. (a), *ante*.

Questions exposing witness to penalty.]—*See* Sect. 2, sub-sect. 4, B. (b), *ante*.

Questions exposing witness to forfeiture.]—*See* Sect. 2, sub-sect. 4, B. (c), *ante*.

Questions tending to degrade.]—*See* Sect. 2, sub-sect. 4, B. (d), *ante*.

SUB-SECT. 2.—CROSS-EXAMINATION.

A. In General.

4803. Right to cross-examine—No questions asked witness in examination-in-chief.]—Where a witness has been called by one party, the other may cross-examine him, though no question has been asked him in chief.—*PHILLIPS v. EAMER* (1795), 1 Esp. 355.

*Annotation:—***Reid.** *Clifford v. Hunter* (1827), 1 C. & P. 16.

4804. ———.]—A witness having been called into the box & sworn in the course of a prosecution for a misdemeanour, produced a document, but was not examined:—*Held: deft.* was entitled to cross-examine.—*R. v. BROOKE* (1819), 2 Stark. 472, N. P.

4805. ——— Examination stopped before any material question asked.]—If a witness is called, & has only answered an immaterial question when his examination is stopped by the judge, the opposite party has no right to cross-examine him.—*CREEVEY v. CARR* (1835), 7 C. & P. 64, N. P.

4806. ——— Witness examined by both parties.]—If a witness called by *pltf.* has been examined, cross-examined, & quitted, & *deft.* has afterwards occasion to call the same witness back to prove his case, counsel for *deft.* is not bound to examine as in chief, but may put leading questions, as in cross-examination.—*DICKINSON v. SHEE* (1801), 4 Esp. 67, N. P.

*Annotations:—***Mentd.** *Thomas v. Evans* (1808), 10 East, 101; *Re Farley, Ex p. Danks* (1852), 1 W. R. 57.

4807. ———.]—(1) *Pltf.* having examined a witness, if a *deft.* afterwards calls him as his witness in chief, *pltf.* may cross-examine him at large.

(2) A *deft.* may cross-examine another *deft.*'s witness.

(3) All evidence taken, whether on examination-in-chief or on cross-examination, is open to all parties.—*LORD v. COLVIN* (1855), 3 Drew. 222; 3 Eq. Rep. 514; 24 L. J. Ch. 517; 25 L. T. O. S. 42; 1 Jur. N. S. 208; 3 W. R. 342; 61 E. R. 888.

*Annotations:—***As to** (2) **Apld.** *Allen v. Allen*, [1894] P. 248. **As to** (3) **Reid.** *Wood v. Scarth* (1855), 3 Eq. Rep. 485; *Fellden v. Slater* (1869), L. R. 7 Eq. 523.

4808. ——— After plaintiff nonsuited.]—After *pltf.* in the course of a cause has submitted to be nonsuited, counsel for *deft.* cannot put any further question to a witness.—*JONES v. HALL* (1819), 2 Stark. 505, N. P.

4809. ——— Witness called by mistake.]—If *pltf.*'s counsel call "Captain S." & Captain Hugh S. answer, & is sworn, & *pltf.*'s counsel, after asking him a few questions, ascertain that it was Captain Francis S. whom they meant to examine, this does not give the other side a right to cross-examine Captain Hugh S. as he was only examined by

mistake.—*CLIFFORD v. HUNTER* (1827), 3 C. & P. 16.

4810. ———.]—Where a person called only to produce a document is sworn as a witness by mistake, & a question is put to him, which he does not answer, the opposite party is not entitled to cross-examine him.—*RUSH v. SMITH* (1834), 1 Cr. M. & R. 94; 2 Dowl. 687; 4 Tyr. 675; 3 L. J. Ex. 355; 149 E. R. 1008.

Swearing of witness merely producing documents, *see* Nos. 4415–4418, *ante*.

4811. ———.]—A witness called under a mistake of counsel as to his being able to speak to a transaction, is not liable to cross-examination, though sworn, if the mistake be discovered before any question is put.—*WOOD v. MACKINSON* (1840), 2 Mood. & R. 273, N. P.

4812. ——— Affidavit of witness not read.]—On the hearing of a cause *pltf.* is not at liberty to cross-examine a *deft.* whose affidavit has not been read.—*FELDEN v. GOSCHEN* (1869), 18 W. R. 85.

4813. ——— Witness called by court.]—(1) At the trial of an action, the judge has power to call & examine a witness who has not been called by either of the parties & when he does so neither party has a right to cross-examine the witness without the leave of the judge.

(2) If the evidence of the witness given in answer to questions put to him by the judge is adverse to either of the parties, leave should be given to that party to cross-examine the witness upon his answers, but a general cross-examination ought not to be permitted.—*COULSON v. DISBOROUGH*, [1894] 2 Q. B. 316; 70 L. T. 617; 58 J. P. 784; 42 W. R. 449; 10 T. L. R. 429; 38 Sol. Jo. 416; 9 R. 390, C. A.

*Annotations:—***As to** (1) **Consd.** *Re Enoch & Zaretsky, Bock*, [1910] 1 K. B. 327. **Reid.** *Shea v. Wilson, Barnsley* (1916), 9 B. W. C. 633. **As to** (2) **Reid.** *Re Enoch & Zaretsky, Bock*, [1910] 1 K. B. 327.

4814. ———.]—**MAIDSTONE BOROUGH CASE** (1906), 5 O'M. & H. 200.

4815. ———.]—When a party is compelled to call the attesting witnesses to a will or codicil he may cross-examine them as they are not the witnesses of either party, but of the *ct.*—*JONES v. JONES* (1908), 24 T. L. R. 839; *sub nom. Re BROCK, JONES v. JONES*, 52 Sol. Jo. 600.

Hostile witness.]—*See* Sect. 8, sub-sect. 1, *post*.

4816. Duty to cross-examine—Intention to impute perjury on particular point.]—(1) If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or the story is of an incredible & romancing character.

(2) If a *solr.* reasonably believes that his services may be required by a possible client who does not afterwards retain him, all communications passing between the *solr.* & the client, leading up to the retainer & relevant to it, & having that,

entitled to a full cross-examination of witnesses called by the *ct.* on matters relevant to the inquiry. The *ct.* cannot restrict the cross-examination of such witnesses by either party to the subjects on which it had examined them.—*CHINTAMON SINGH v. R.* (1907), 1 L. R. 35 Cal. 243.—**IND.**

PART V. SECT. 6, SUB-SECT. 2.—A.

4803.1. Right to cross-examine—No questions asked witness in examination-in-chief.]—Where a witness has been put in a box & sworn, without being examined, the other side has a right to cross-examine him, even if he is not recalled.—*MCLEAN v. NICHOLSON*, 4

J. R. N. S. 98.—**N.Z.**

4805.1. ——— Examination stopped before any material question asked.]—*Re SWEET'S APPEAL* (1882), 15 N. S. R. (3 R. & G.) 397.—**CAN.**

4813.1. ——— Witness called by court.]—Prosecutor & accused are both equally

B. Who may cross-examine.

4828. Person "at liberty to attend trial of issue."—Where, on the trial of an issue out of the Ct. of Ch., a person who is not a party on the record is, by order of that ct., "to be at liberty to attend the trial of such issue"; the counsel of such person has no right to address the jury, or to call witnesses; but he may cross-examine the witnesses called by both parties, & suggest points of law.—*WRIGHT v. WRIGHT* (1830), 7 Bing. 459, n.; 4 C. & P. 389; 5 Moo. & P. 319, n.; 131 E. R. 177.

4829. Co-defendant—Plaintiff's witnesses.—Where there are two co-defts. to a suit, one of whom has similar interests to pltf.'s, he is nevertheless entitled to cross-examine pltf.'s witnesses.—*BREMER v. FREEMAN & BREMER* (1854), 2 Ecc. & Ad. 65; 164 E. R. 309.

4830. — Other defendant & his witnesses.—*LORD v. COLVIN*, No. 4807, *ante*.

4831. — — — — ——*Re DUNHILL, Ex p. DUNHILL* (1891), 29 L. Jo. 368.

4832. — On answer of other defendant.—Pltf. under a notice of motion for a decree, gave notice that he should read, as against one of defts., the answer of a co-deft.:—*Held*: deft. against whom the decree was sought was entitled to cross-examine on the answer of his co-deft.—*DAWKINS v. MORTAN* (1861), 1 John. & H. 339; 4 L. T. 704; 70 E. R. 777; *subsequent proceedings* (1862), 6 L. T. 214.

— *In criminal proceedings.*—*See CRIMINAL LAW*, Vol. XIV., p. 285, Nos. 2976-2981.

4833. Party—Compelled by court to call witness.—*MAIDSTONE BOROUGH CASE* (1906), 5 O'M. & H. 200.

4834. — — — — ——*JONES v. JONES*, No. 4815, *ante*.

— *To impeach credit of own witness.*—*See* Sect. 8, sub-sect. 1, B., *post*.

In matrimonial cases.—*See HUSBAND & WIFE. In salvage actions.*—*See ADMIRALTY*, Vol. I., p. 196, Nos. 1108, 1109.

C. Leading Questions.

4835. General rule.—(1) Leading questions may always be put in cross-examination whether

the witness be a willing or an adverse one for the party calling him.

(2) I apprehend you may put a leading question to an unwilling witness on the examination in chief at the discretion of the judge (*ALDERSON, B.*).—*PARKIN v. MOON* (1836), 7 C. & P. 408, N. P.

4836. Words not to be put into witness's mouth.—*R. v. HARDY* (1794), 24 State Tr. 199, 755.

Annotations:—*Mentd.* R. v. Stone (1796), 25 State Tr. 1155; R. v. Edwards (1812), 4 Taunt. 309; R. v. Watson (1817), 2 Stark. 116; Bedford v. Birley (1822), 3 Stark. 110, n.; R. v. Barber & Dorey (1844), 8 J. P. 644; R. v. Blake (1844), 6 Q. B. 126; R. v. O'Connell (1844), 5 State Tr. N. S. 1; R. v. Richards (1844), 3 L. T. O. S. 142; Conway & Lynch v. R. (1845), 5 L. T. O. S. 458; A. G. v. Briant (1846), 15 M. & W. 169; R. v. Garbett (1847), 2 Cox, C. C. 448; R. v. Grant, Ranken & Hamilton (1848), 7 State Tr. N. S. 507; R. v. Smith O'Brien (1848), 7 State Tr. N. S. 1; R. v. Duffy (1849), 7 State Tr. N. S. 795; R. v. Petcherini (1855), 7 Cox, C. C. 79; Mulcahy v. R. (1867), 15 W. R. 446; R. v. McCafferty (1867), 15 W. R. 1022; R. v. Meany (1867), 15 W. R. 1082; Marks v. Beyfus (1890), 25 Q. B. D. 494.

4837. Question must not make false assumptions.—*HANDIEY v. WARD* (1818), Starkie on Evidence, 4th ed., p. 197.

4838. — — — — ——*HILL v. COOMBE* (1818), Starkie on Evidence, 4th ed., p. 197.

In examination in chief.—*See* Sect. 6, sub-sect. 1, B. (a), *ante*.

D.

4839. Necessity for relevancy.—A witness cannot demur, because the questions asked him are not pertinent in the matter in issue.—*ASHTON v. ASHTON* (1683), 1 Vern. 165; 1 Eq. Cas. Abr. 41; 23 E. R. 390.

Annotation:—*Refd.* Nightingale v. Dodd (1729), 1 Barn. K. B. 257.

4840. — — — — ——(1) Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause.

(2) In seduction cases pltf.'s counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination.—*BATE v. HILL* (1823), 1 C. & P. 100, N. P.

4841. — Questions apparently irrelevant—Undertaking by counsel to show that questions

MAN (1877), 3 V. L. R. 242.—*AUS.*

4839 ii. — — — — ——[A question cannot be put to a witness on cross-examination, for the mere purpose of contradicting, unless such question be relevant to the issue.]—*GILBERT v. GOODERHAM* (1856), 6 C. P. 39.—*CAN.*

4839 iii. — — — — ——[In an action for overflowing pltf.'s land by means of a mill-dam, & destroying his growing trees, pltf. cannot be asked for what purpose he purchased the land, or how much he paid for it, such evidence being irrelevant to the question of damages.]—*LOWELL v. MCADAM* (1873), 1 Pug. 337.—*CAN.*

4839 iv. — — — — ——[The erroneous exercise of discretion in refusing to allow questions on cross-examination, which are irrelevant to the issue, would be no ground for a new trial.]—*HICKEY v. FITZGERALD* (1877), 41 U. C. R. 303.—*CAN.*

4839 v. — — — — ——[In an action by A. against B. for the amount credited to an agent, A.'s counsel on the cross-examination of B. questioned him without objection with a view of showing that the amount of the agent's indebtedness was disputed, & when B.'s counsel objected the judge sustained the objection & ruled out the evidence as irrelevant:]—*Held*: the evidence was improperly rejected.—*TURNER v. McMANN* (1882), 22 N. B. R. 391.—*CAN.*

PART V. SECT. 6, SUB-SECT. 2.—B.

4828 i. Person at liberty to attend trial.—[Intervenor who has appeared to a citation served on him to see proceedings, but who has not pleaded, is not entitled at the hearing of the cause to cross-examine the witnesses.]—*KELLY v. DUNBAR* (1864), 13 L. T. 104.—*IR.*

4829 i. Co-defendant—Plaintiff's witnesses.—[Defts. appeared by the same attorney, & their defence was, in substance precisely the same, but they were represented at the trial by separate counsel. On examination of one of pltf.'s witnesses, both counsel claimed the right to cross-examine the witness:]—*Held*: only one counsel could cross-examine the witness.—*WALKER v. McMILLAN* (1882), 6 S. C. R. 241.—*CAN.*

4829 ii. — — — — ——[In trespass, when there are several defts., who, having separate defences, plead by separate attorneys, & appear at the trial by separate attorneys & counsel, the latter may cross-examine pltf.'s witnesses.]—*DIXON v. DANE & LUMSDEN* (1841), Arm. M. & O. 152.—*IR.*

q. Plaintiff called by other party—Right of plaintiff's counsel to cross-examine plaintiff.—[Where a party to the suit is called by the opposite party, he is not thereby made a witness for all purposes, but can be cross-examined by his own counsel, or the counsel of

his co-pltf. or deft., only as to those matters upon which he has been examined by the party calling him.]—*LAMB v. WARD* (1859), 18 U. C. R. 304.—*CAN.*

r. Co-plaintiffs—Right to cross-examine—Each other's witnesses.—[Two shipowners brought separate actions against the same defender in respect of salvage services rendered to defender's vessel. The claims of the two pursuers were mutually hostile. The actions having been conjoined:]—*Held*: counsel for the one pursuer should have the right to cross-examine the witnesses for the other.—*BOYLE v. OBSER, LINDSEY STEAM FISHING CO., LTD. v. ACT. BONHEUR*, [1912] S. C. 1235.—*SCOT.*

s. All parties to suit.—[A witness called by the ct. is liable to be cross-examined by any of the parties to a suit.]—*TARINI CHARAN CHOWDHRY v. SARODA SUNDARI DAS* (1869), 3 B. L. R. A. C. 145; 11 W. R. 468.—*IND.*

PART V. SECT. 6, SUB-SECT. 2.—D.

4839 i. Necessity for relevancy.—[Where, in cross-examination, evidence is allowed to be given which might have been successfully objected to, no explanation of it is admissible in the examination, if it was wholly immaterial in any view; but if it could have been material, explanation will be allowed.]—*IRELAND v. CHAP-*

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[3.]

not irrelevant.]—The judge will allow deft.'s counsel to cross-examine as to facts which appear to be irrelevant, as relating to a third person, if deft.'s counsel undertake that it shall be shown by other evidence that these facts are relevant to the issue.—*HATGH v. BELCHER* (1836), 7 C. & P. 389, N. P.

4842. — Allowance of great latitude.]—*R. v. SMALLMAN* (1914), 10 Cr. App. Rep. 1, C. C. A.

4843. — What questions are relevant.]—*SELLS v. HOARE* (1823), 1 C. & P. 28; 2 L. J. O. S. C. P. 56, N. P.

Annotations:—Mentd. Willoughby v. Backhouse (1824), 4 Dow. & Ry. K. B. 539; Glynn v. Thomas (1856), 11 Exch. 870.

4844. — —.]—On the trial of an issue "whether," during a certain period, "there arose from the works of defenders certain noisome, offensive, noxious or unwholesome smoke & other vapours to the nuisance of pursuer, whereby the produce of his garden was deteriorated," evidence was adduced for the pursuer to show that the smoke & other vapours from defenders' works had injured the produce of other grounds in the neighbourhood; & also for defenders to show that their works did not injure the produce of any other grounds; & one of defenders witnesses having on his examination in chief, described several gardens in the neighbourhood of the works as in utmost health, was asked in cross-examination by pursuer's counsel, if he knew Glasgow-field, grounds in the neighbourhood; & having answered that he "knew Glasgow-field, & never knew of any damage done there," he was then asked "whether he had known of any sum having been paid by defenders to the proprietors of Glasgow-field for alleged damage there occasioned by their works":—*Held*: the question was incompetent, as leading to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness.—*TENNANT v. HAMILTON* (1839), 7 Cl. & Fin. 122; MacL. & Rob. 821; 7 E. R. 1012, H. L.

Annotation:—Consd. Metropolitan Asylum District Managers v. Hill (1882), 47 L. T. 29.

4845. — —.]—A deft. was tried for publishing a letter, purporting to be the resolutions of a body of persons calling themselves the General Convention, & in one part of it stated that an outrage had been committed on the people of B. by a force, "acting under the authority of men, who, when out of office, sanctioned & took part in the meetings of the people." A witness for the Crown stated in his cross-examination, that he had formerly belonged to the Convention, but had since resigned, & had become a town councillor of B. It was proposed to ask him further in cross-examination, as to what he said at a meeting at which the Convention was agreed on, but which took place nearly a year before the publication of the alleged libel:—*Held*: this could not be done.—*R. v. COLLINS* (1839), 9 C. & P. 456; 3 State Tr. N. S. 1149.

4846. — —.]—In trespass for false imprisonment on a criminal charge, deft. cannot

cross-examine as to the bad character of pltf., nor as to previous charges made against him.—*DOWNING v. BUTCHER* (1841), 2 Mood. & R. 374, N. P.

4847. — —.]—Pltf. in his examination in chief, stated that some years prior to the uttering of the slander, he had had a dispute with deft, about a bet on a racehorse, deft. claiming the amount, which he refused to pay. Upon cross-examination he was asked if deft. had not offered to refer the dispute, & he, pltf., had not refused to do so. This question was objected to as being irrelevant. The judge, however, permitted it to be put, & pltf. denied it. Dft. afterwards called several witnesses to prove that such offer was made by deft., & refused by pltf. This evidence was also objected to:—*Held*: under the circumstances, the question & the evidence were admissible.—*BLACKMAN v. BRYANT* (1872), 27 L. T. 491.

4848. — —.]—*LEVER & Co. v. GOODWIN BROTHERS*, [1887] W. N. 107, C. A.

Annotations:—Follid. Boake, Roberts v. Wayland (1909), 26 R. P. C. 251. *Mentd.* Saxlehner v. Apollinaris Co., [1897] 1 Ch. 893; Price's Patent Candle Co. v. Ogston & Tennant (1909), 26 R. P. C. 797; Edge v. Niccolls (1910), 80 L. J. Ch. 154.

4849. — —.]—During the course of the trial of an action to restrain infringement & passing off defts.' counsel proposed to put to one of pltf.'s witnesses some of pltf.'s circulars & advertisements & to cross-examine him upon them with regard to alleged user by pltf. of the word "Patent" long after the Patent had expired:—*Held*: such cross-examination was inadmissible, because no wrongful user of the word "Patent" had been pleaded.—*BOAKE (A.), ROBERTS & Co., LTD. v. WAYLAND (W. A.) & Co.* (1909), 26 R. P. C. 251.

4850. — Separate trials of claim & counter-claim.]—Deft. in an action for a legacy pleaded a set-off by counterclaim, & raised issues not involved in the claim & defence. He was not allowed in cross-examination of a pltf. to ask questions relevant only to the issues raised upon the counterclaim, but was allowed to recall that pltf. as his own witness.—*Re WOODFINE, THOMPSON v. WOODFINE* (1878), 47 L. J. Ch. 832; 38 L. T. 753; 26 W. R. 678.

4851. Whether cross-examination confined to evidence in chief.]—An adverse party may cross-examine a witness to the same point for which he is produced, but not to any new matter.—*ELY (DEAN & CHAPTER) v. STEWART* (1740), 2 Atk. 44; Barn. Ch. 170; 26 E. R. 423, L. C.

Annotation:—Mentd. Robinson v. Dulcep Singh (1879), 11 Ch. D. 798.

4852. — —.]—If a party in a cause be under the necessity of calling his real adversary in the cause, who is not a party on record, although for the purpose of formal proof only, he makes him a witness for all purposes, & he may be cross-examined as to the whole of the case.—*MORGAN v. BRYDGES* (1818), 2 Stark. 314, N. P.

Annotation:—Consd. Summers v. Moseley (1834), 4 Tyr. 158.

4853. — —.]—Pltf. having examined witnesses on particular points, deft. is at liberty to cross-examine those witnesses upon any other point he thinks fit.—*BERWICK-UPON-TWEED CORPN. v. MURRAY* (1850), 10 L. J. Ch. 281; 14 Jur. 659.

4851 i. Whether cross-examination confined to evidence-in-chief.]—Deft. has not a right on the cross-examination of pltf.'s witness, & before the defence is opened, to prove a justification of which he has given notice, & the affirmative of which lies on him; no question leading to it having been

asked on the examination-in-chief.—*ATKINSON v. SMITH* (1859), 4 All. 309.—*CAN.*

4851 ii. — —.]—In an action the mayor of a town gave evidence for defts., of the care with which the officials looked after the streets:—

Held: he might be asked, on cross-examination, if he knew on what street a person had fallen & was injured, & for which an action was brought, such question arising out of the direct examination.—*CAMERON v. MONCTON TOWN* (1889), 29 N. B. R. 372.—*CAN.*

E. Improper Questions.

4854. As to previous legal proceedings by plaintiff.]—(1) On the trial of an action for a nuisance, a witness for pltf. may be asked whether he has not heard pltf. say that he had preferred eight indictments against the proprietors of the works, which in the present action were charged to be a nuisance; (2) a witness may be asked what he heard pltf. say when pltf. was examined as a witness on the trial of one of those indictments.—*DAVID v. GRENFELL* (1834), 6 C. & P. 624, N. P.

4855. —]—When the same person has been pltf. in any previous action to try the same right, it is "unusual" to ask that question of a witness with the evident view of influencing the jury in their verdict.—*DOE d. SPENCER (EARL) v. BURCHAM* (1843), 1 L. T. O. S. 529.

4856. Requiring witness to draw inference from acts.]—A sergeant in the police, after stating in cross-examination that he attended a debating society where political subjects were discussed, by the direction of the comrs. of police, for the purpose of noticing & reporting; & that he went in private clothes, was asked if he went as a spy:—*Held*: the question could not be put, as it required the witness to draw an inference from facts; but he might be asked under what directions, & for what purpose he went, & what he did when there.—*R. v. BERNARD* (1858), 1 F. & F. 240; 8 State Tr. N. S. 887.

Annotations:—Mentd. *R. v. Kohn* (1864), 4 F. & F. 68; *R. v. Lomas* (1913), 110 L. T. 239.

4857. As to contents of pamphlet—Religious views of witness.]—It is no ground for a new trial that, pltf. having been asked while under cross-examination whether he was the author of a certain pamphlet which contained expressions of opinion on religious subjects altogether at variance with those generally received amongst Christians, & having declined to answer on the ground that his answer in the affirmative might subject him to a criminal prosecution, counsel for deft. was permitted for a considerable time, obviously with a view to prejudice pltf. with the jury, to read various passages of a similar tendency from other printed documents, each time repeating the inquiry whether pltf. was the author or whether the passage read expressed his notions on the subject, the jury being entitled to have before them all the facts & circumstances from which they might be enabled to judge of the degree of credit due to the party as a witness.—*BRADLAUGH v. EDWARDS* (1861), 11 C. B. N. S. 377; 142 E. R. 843.

Annotation:—Expld. *Maden v. Catanach* (1861), 10 W. R. 112.

PART V. SECT. 6, SUB-SECT. 2.—E.

t. As to infringement of secret process.]—Where pltf., the owner of a secret process for the manufacture of an extract of eucalyptus, alleged by his pleading in an action for passing off that defts. falsely & fraudulently represented, *inter alia*, that their extract was the same & made in the same way as pltf.'s, & called his manager to give evidence on his behalf:—*Held*: defts.' counsel was entitled to cross-examine the manager as to pltf.'s secret process.—*SANDNER v. CURNOW*, [1905] V. L. R. 648.—**AUS.**

a. Usury.—Making notes payable at distant place.]—On the trial of an action on a promissory note brought by pltf., to which defts. pleaded usury, consisting in pltf. making the note payable at a distance from the place of discount, & thereby securing a larger rate of interest in the shape of commission than they were legally entitled to, the pltf.'s agent was asked

in cross-examination, whether during the time he was in P., the place of discount, he had directed or caused any other note to be made payable at any other place than P.:—*Held*: the question was admissible.—*BANK of MONTREAL v. SCOTT* (1867), 17 C. P. 358.—**CAN.**

b. As to liabilities of firm.]—A surety on a bond, who is a member of a mercantile partnership is not compellable, upon cross-examination on his affidavit of justification, to disclose the liabilities of the partnership.—*DOUGLAS v. BLACKLEY* (1892), 14 P. R. 504.—**CAN.**

c. As to insurance of plaintiff.]—Deft., in an action to recover damages for injury to pltf.'s vehicle, is not entitled to have pltf. answer any question relating to insurance on his vehicle.—*MILLARD v. TORONTO RY. CO.* (1914), 31 O. L. R. 526; 6 O. W. N. 519.—**CAN.**

d. As to insurance of defendant.]—

4858. As to employer's motive.]—*R. v. ATTENBURY* (1907), 148 C. C. Ct. Cas. 202.

4859. As to insurance of plaintiff—Action for damages for personal injuries.]—*WRIGHT v. HEARSON*, [1916] W. N. 216, D. C.

Tending to incriminate.]—*See* Sect. 2, sub-sect. 4, B. (a), *ante*.

Exposing witness to penalty.]—*See* Sect. 2, sub-sect. 4, B. (b), *ante*.

Exposing witness to forfeiture.]—*See* Sect. 2, sub-sect. 4, B. (c), *ante*.

Tending to degrade.]—*See* Sect. 2, sub-sect. 4, B. (d), *ante*.

Impeaching credit of witness.]—*See* Sect. 8, *post*.

F. In Particular Proceedings.

Admiralty proceedings.]—*See* ADMIRALTY, Vol. I., p. 196, Nos. 1108, 1109.

Bankruptcy proceedings.]—*See* BANKRUPTCY, Vol. V., p. 620, Nos. 5573–5575.

Criminal proceedings—Generally.]—*See* CORONERS, Vol. XIII., p. 259, Nos. 398, 399; CRIMINAL LAW, Vol. XIV., pp. 267, 275, 287, Nos. 2731, 2733, 2853, 2854, 2859, 3011.

Proceedings before justices.]—*See* CRIMINAL LAW, Vol. XIV., p. 191, No. 1708.

As to character.]—*See* CRIMINAL LAW, Vol. XIV., pp. 362–366, 445–450.

Action for defamation.—Mitigation of damages.]—*See* LIBEL & SLANDER.

Election petitions.]—*See* ELECTIONS, Vol. XX., p. 166.

Action to restrain infringement—Of patent.]—*See* PATENTS.

Of trade mark.]—*See* TRADE MARKS.

4860. Writ of inquiry—On judgment by default.]—In an action for work & labour deft. on a judgment by default is at liberty to cross-examine pltf.'s witnesses who are called to prove the work done, as to whether the work was done on deft.'s retainer or not.—*WILLIAMS v. COOPER* (1834), 3 Dowl. 204.

Matrimonial causes.]—*See* HUSBAND & WIFE.

SUB-SECT. 3.—RE-EXAMINATION.

4861. Object of re-examination—Explanation of evidence already given.]—*THE QUEEN'S CASE*, No. 4729, *ante*.

4862. —]—When a statement made by a party to a suit in giving evidence on a former trial has been got out in cross-examination, only so much of the remainder of the evidence is allowed

it is improper for pltf.'s counsel, at the trial before a jury of an action by an employee of a co. for damages for a personal injury suffered by him in the course of his employment, to ask a witness for defts. if the co. is indemnified against loss in the event of an adverse verdict.—*HYNDMAN v. STEPHENS* (1909), 19 Man. L. R. 187.—**CAN.**

PART V. SECT. 6, SUB-SECT. 3.

4861 i. Object of re-examination—Explanation of evidence already given.]—Where a witness called to prove that the consideration of a note was usurious declined to state what amount he gave on discounting the note, because his answer might render him liable to a penalty, but on cross-examination said he gave what he thought it was worth:—*Held*: he was bound on re-examination to state what he gave.—*PETERS v. IRISH* (1859), 4 All. 326.—**CAN.**

Sect. 6.—Examination: Sub-sects. 3, 4, 5 & 6, [A. & B.]

to be given on re-examination as tends to qualify or explain the statement made on cross-examination.—*PRINCE v. SAMO* (1838), 7 Ad. & El. 627; 3 Nev. & P. K. B. 139; 1 Will. Woll. & H. 132; 7 L. J. Q. B. 123; 2 Jur. 323; 112 E. R. 606.

Annotation:—*Refd. Sturge v. Buchanan* (1839), 10 Ad. & El. 598.

4863. ———. ———.]—Where a person is examined at the instance of the official liquidator of a co. under Cos. Act, 1862 (c. 89), s. 115, his counsel & solr. are entitled to be present at the examination, & his counsel or solr. may re-examine him, such re-examination to be limited to eliciting from him such evidence as can be reasonably offered for the purpose of explaining the evidence which he may have already given in his examination on behalf of the liquidator.—*Re CAMBRIAN MINING CO.* (1881), 20 Ch. D. 376; 51 L. J. Ch. 221; 30 W. R. 283.

— **Hostility of witness.**—]—See Sect. 8, sub-sect. 1, *post*.

4864. Extent of re-examination—Limited to questions arising out of cross-examination.—]—Where the cross-examination of an accomplice is directed merely to his discredit, it is not competent to the prosecutor's counsel to ask questions not arising out of the cross-examination, in order to criminate the prisoner.—*R. v. FLETCHER* (1829), 1 Lew. C. C. 111.

4865. ———. ———.]—If counsel for the prosecution call a witness, whose name is on the back of the indictment, but do not examine him, & such witness be examined by prisoner's counsel, any question put by prosecutor's counsel after this must be considered as a re-examination, & therefore prosecutor's counsel cannot ask anything that does not arise out of the previous examination by prisoner's counsel.—*R. v. BEEZLEY* (1830), 4 C. & P. 220, N. P.

4866. ———. **What are matters arising out of cross-examination—Provocation.**—]—*R. v. ST. GEORGE*, No. 4822, *ante*.

4867. ———. **Custom.**—]—Upon an issue whether a cargo, loaded on deck, is improperly loaded, A., a witness called on the part of pltf., to prove that the practice of stowing part of the cargo upon deck is dangerous, states, in answer to a question put to him on cross-examination, that it is usual for ships in the particular trade to carry deck-cargoes. A. may be asked, upon re-examination, whether it is not usual for the shipowner to pay for deck-cargo washed or thrown overboard.—*GOULD v. OLIVER* (1840), 2 Man. & G. 208; 2 Scott, N. R. 241; 133 E. R. 723.

Annotations:—*Mentd. Lewin v. Edwards* (1842), 9 M. & W. 720; *Milward v. Hibbert* (1842), 3 Q. B. 120; *Hall v. Jamson* (1855), 24 L. T. O. S. 289; *Miller v. Titherington* (1861), 30 L. J. Ex. 217; *Carr v. Royal Exchange Assce.*

4864 i. Extent of re-examination—Limited to questions arising out of cross-examination.—]—On cross-examination of deft., pltf.'s counsel put in his hands a deed from W. to deft. & others, & asked him whether he knew of the deed having been made, & whether he as a member of an Orange lodge had accepted it.—*Held*: deft.'s counsel had no right on re-examination to ask deft. what took place between W. & him with regard to the purchase of the land described in the deed.—*DOE d. WETMORE v. BELL* (1890), 30 N. B. R. 83.—**CAN.**

4864 ii. ———. ———.]—In an action against a street railway co. to recover damages for personal injuries, the vice-president of the co., called on pltf.'s behalf, was asked on direct examina-

tion the amount of bonds issued by the co. On cross-examination the witness was questioned as to the disposition of the proceeds of debentures, & on re-examination pltf.'s counsel interrogated him at length as to the selling price of the shares on the Montreal exchange.—*Held*: on the cross-examination of the witness by defts.' counsel the door was not opened for re-examination as to the selling price of the stock.—*HESSE v. St. JOHN RY. CO.* (1899), 20 C. L. T. 113; 30 S. C. R. 218.—**CAN.**

4864 iii. ———. ———.]—The right to re-examine follows upon the exercise of the right to cross-examine, & even if inadmissible matter be introduced in cross-examination, the right to re-examine remains, & the rule holds

Corpn. (1864), 2 P. C. 535; *Al. v. Auld* (1866), 20 N. B. R. 221; *derichsen v. Farquharson*, [1898] 1 Q. B. 150.

7000. ———. ———.]—A witness for pltf. stated, on cross-examination, that by the rules of the Jockey Club the owner of a horse might bet against his own horse & then withdraw him:—*Held*: the witness might be asked, on re-examination, whether he did not consider such conduct dishonourable.—*GREVILLE v. CHAPMAN* (1844), 5 Q. B. 731; 1 Dav. & Mer. 553; 13 L. J. Q. B. 172; 2 L. T. O. S. 419; 8 Jur. 189; 114 E. R. 1425.

Annotation:—*Mentd. Helsham v. Blackwood* (1851), 17 L. T. O. S. 166.

4869. ———. **Cross-examination as to conversation—Whether whole conversation admissible in re-examination.**—]—*THE QUEEN'S CASE*, No. 4729, *ante*.

4870. ———. ———.]—In an action against the Governor of Gibraltar, for assault & false imprisonment, it was proved that a party of soldiers, under the command of his military secretary, surrounded pltf.'s house, & that while a search was making in the adjoining house for a Spaniard who was suspected to be concealed there, pltf., in attempting to leave his house, was prevented from so doing by a sentinel placed at the door, who compelled him to return. It was also proved that the deft. had repeatedly expressed a desire to apprehend the Spaniard; that his secretary being unattached, could not employ the troops on such a service except by his directions, & that deft. had never called his secretary to account for what had occurred. It further appeared, on the evidence of pltf.'s brother, that pltf. had told him, that deft. expressed to pltf. his regret at having been obliged to direct the search. No evidence was given on the part of deft. Pltf.'s brother, who was examined on interrogatories, having been asked upon cross-examination as to some particulars of a conversation which pltf. had told him, he, pltf., had held with deft., & being asked, on re-examination, to detail the whole conversation, stated that pltf. had informed him that deft. had expressed his regret at being obliged to direct the search:—*Held*: this evidence was admissible.—*GLYNN v. HOUSTON* (1841), 2 Man. & G. 337; 4 State Tr. N. S. App. 1368; 2 Scott, N. R. 548; 5 Jur. 195; 133 E. R. 775.

Annotation:—*Mentd. Scott v. Seymour* (1862), 10 W. R. 739.

4871. ———. ———.]—In cross-examining the master of J., prisoner's counsel asked whether he did not put the age on the tombstone from the best information he could get; & he said he put it there in consequence of what J. told him. Counsel for the prosecution asked what it was that J. told him:—*Held*: this question could not be put.—*R. v. BARBER* (1844), 1 Car. & Kir. 434; 8 J. P. 644; *sub nom. R. v. RICHARDS, BARBER*,

good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matter, it must be expunged at the instance of the party cross-examining while it remains as part of the testimony, the right to re-examine upon it also remains.—*R. v. NOEL* (1903), 23 C. L. T. 293; 6 O. L. R. 385; 2 O. W. R. 776; 7 Can. Crim. Cas. 309.—**CAN.**

4864 iv. ———. ———.]—*R. v. MATHEWS* (1884), 1 L. R. 10 Calc. 1022.—**IND.**

4864 v. ———. ———.]—*NOEL v. FITZGERALD* (1824), 1 Hog. 135.—**IR.**
e. Evidence improperly admitted—Whether objection waived—By re-examination.—]—When evidence is improperly admitted on cross-examination, if the other party re-examine

FLETCHER & DOREY, 3 L. T. O. S. 142 ; 1 Cox, C. C. 62.

Annotation.—*Mentd.* R. v. Rowlands (1851), 5 Cox, C. C. 436.

4872. ————.]—A witness having been asked on cross-examination whether he did not hear a particular fact from A. & having answered "Yes":—*Held*: question entitled counsel for deft., on re-examination of that witness, to go into the whole conversation with A.—*MORRIS v. WILSON* (1848), 11 L. T. O. S. 515, N. P.

SUB-SECT. 4.—POWER OF JUDGE TO CALL AND EXAMINE WITNESS.

4873. In civil proceedings—Plaintiff declining to call witness.]—Where an order for an issue from Chancery directs all witnesses to be examined, but pltf. declines to call some, conceiving his case made out, it seems the judge will himself call the others.—*GROOM v. CHAMBERS* (1835), 2 Mont. & A. 742.

4874. ————.]—*COULSON v. DISBOROUGH*, No. 4813, *ante*.

4875. ———— *Necessity for consent of parties.*]—Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties.—*Re ENOCH & ZARETZKY*, Bock & Co., [1910] 1 K. B. 327 ; 79 L. J. K. B. 363 ; 101 L. T. 801, C. A.

Annotations.—*Refd.* *Shea v. Wilson*, Barnsley (1916), 9 B. W. C. C. 633 ; *R. v. Sullivan*, [1923] 1 K. B. 47.

——— *Right of cross-examination.*]—*See* Nos. 4803–4815, *ante*.

In criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., pp. 267, 275, 276, Nos. 2731–2734, 2851–2855, 2867–2869.

On election petitions.]—*See* ELECTIONS, Vol. XX., p. 165.

SUB-SECT. 5.—RECALLING WITNESSES.

See Nos. 5022–5026, 5033, 5034, 5037, *post*.

Further evidence generally.]—*See* Sect. 7, *p*

SUB-SECT. 6.—AS TO DOCUMENTS.

A. In General.

See Criminal Procedure Act, 1865 (c. 18), ss. 3–5.

4876. Notice to produce document—Necessity for.]—In an action for libel for calling deft. a traitor, etc., counsel for the defence proposed to ask pltf. whether his name was not inscribed in a book stated to be a book containing a list of persons forming an association to convert this country to Catholicism :—*Held*: such question could not be asked without a notice having been given to produce the book.—*DARBY v. OUSELEY* (1856), 1 H. & N. 1 ; 25 L. J. Ex. 227 ; 2 Jur. N. S. 497 ; 156 E. R. 1093 ; *sub nom.* *DARBY v. OUSELEY*, 27 L. T. O. S. 70 ; 4 W. R. 463.

Annotation.—*Refd.* *Hennman v. Lester* (1862), 12 C. B. N. S. 776.

upon it, he thereby waives the objection to it.—*SMITH v. GEROW* (1874), 2 Pug. 425.—*CAN.*

I. When not permissible.]—A party having before judgment examined another party to the cause adverse in interest is not entitled to a re-examination of the same party except under the most special circumstances.—*THORNHURN v. BROWN* (1879), 8 F. R. 114.—*CAN.*

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4877. ————.]—Cross-examination as to the contents of documents which there has been no notice to produce is permissible as when one of the parties to the suit is being cross-examined, the rules of evidence, as to notice to produce & otherwise, are somewhat altered, & you may get anything you can from them.—*NEVILL v. LOADMAN* (1860), 2 F. & F. 313, N. P.

4878. ———— *Refusal to obey—Effect.*]—Deft. cannot, in the course of pltf.'s evidence, cross-examine pltf.'s witnesses as to the contents of written documents, although notice has been given to pltf. to produce them, & he refuses to produce them in that stage of the cause.—*SIDEWAYS v. DYSON* (1817), 2 Stark. 49, N. P.

4879. What must be produced—Original document itself.]—To explain or contradict a statement made by a party as to an alteration in a will under which he was claiming :—*Held*: the probate of the will was not sufficient evidence, but the original document itself should be put into the hands of the witness.—*BROWN v. HUGHES* (1858), 1 F. & F. 299, N. P.

What questions may be asked.]—*See* Nos. 4883–

Right of witness to see document.]—*See* Subsect. 6, B., *post*.

To what documents reference may be made—

Cross-examination to discredit witness.]—*See* Sect. 8, sub-sect. 2, B., *post*.

4880. Time for reading document.]—*THE QUEEN'S CASE*, No. 4729, *ante*.

See C. L. P. Act, 1854 (c. 125), s. 22 ; Criminal Procedure Act, 1865 (c. 18), s. 5.

4881. ————.]—A witness for deft. was examined on a commission granted under Evidence on Commission Act, 1831 (c. 22), s. 4 ; on his cross-examination a paper signed by him was produced to him, & a portion of his cross-examination & re-examination related to it was founded on it. The paper was annexed to the deposition :—*Held*: this paper was not to be read as a part of the cross-examination of the witness, but, if pltf.'s counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle deft.'s counsel to observe on it in a special reply.—*STEPHENS v. FOSTER* (1833), 6 C. & P. 289, N. P.

4882. ————.]—If deft.'s counsel, in cross-examining a witness, put a letter into his hand, & after asking him if he wrote it, desire him to read it, & then put questions upon it, deft.'s counsel is not bound to have the letter read till after he has addressed the jury.—*HOLLAND v. REEVES* (1835), 7 C. & P. 30, N. P.

Effect of cross-examination on document.]—*See* Sub-sect. 6, C., *post*.

Cross-examination on documents referred to by witness to refresh memory.]—*See* Nos. 5013–5016, *post*.

B. What Questions may be asked.

4883. As to contents of document.]—*R. v. MURPHY*, No. 4756, *ante*.

PART V. SECT. 6, SUB-SECT. 4.

4874 i. In civil proceedings.]—*KIRK v. KIRK* (1889), 15 V. L. R. 118.—*AUS*

4874 ii. ————.]—Leading questions may be asked by the trial judge of a witness for the purpose of clearing up any point his former testimony had left doubtful, & indeed as to any relevant matter as to which information not brought out by counsel was desired ; though in

considering the weight to be given to the testimony, the form of the questions was an element to be taken into account.—*CONNOR v. BRANT TOWNSHIP* (1914), 31 O. L. R. 274 ; 5 O. W. N. 433 ; 6 O. W. N. 206.—*CAN.*

PART V. SECT. 6, SUB-SECT. 6.—B.

4883 i. As to contents of documents.]—A party to an action may be cross-

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4884. — Document not put in.]—A party may be cross-examined as to the contents of an affidavit which is not put in. An attesting witness's description of himself as deponent is sufficient affidavit of his description, etc., under Bill of Sales Act.—*SLADDEN v. SERGEANT* (1858), 1 F. & F. 322.

4885. —]—A party may be cross-examined as to whether he has received a letter of a certain date, & in certain terms, etc.—*IRELAND v. STIFF* (1858), 1 F. & F. 340.

4886. — Document not admissible.]—Counsel ought not to suggest to the jury, by cross-examination or otherwise, the contents of documents which he is not entitled to put in evidence.—*R. v. SEHAM YOUSRY* (1914), 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27; 24 Cox, C. C. 523; 11 Cr. App. Rep. 13; 78 J. P. Jo. 521, C. C. A.

Annotation:—Mentd. R. v. Gibbins & Proctor (1918), 82 J. P. 287.

4887. As to handwriting in which document written.—Previous contradictory statement by witness.]—(1) Evidence of statements by witnesses on other occasions, relevant to the matter at issue, & inconsistent with the evidence given by them at the trial, is always admissible, in order to impeach the value of their testimony; but it is only such statements as are relevant that are admissible. In order to lay a foundation for the admission of such contradictory statements, & to enable the witness to explain them, & for that purpose only, he must be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admit the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, & evidence may be given on the other side that the witness did say what is imputed, provided the statement be relevant to the matter in issue.

(2) If the witness had made a previous contradictory statement, in writing, on a matter relevant

examined as to anything which has been said or read in his hearing, even if it should be the contents of an affidavit or other instrument.—*CANNING v. BROWN* (1867), 6 N. S. W. S. C. R. 169.—*AUS.*

4888 ii. —]—Asking a witness if he wrote a letter containing certain statements, which were read to him, is improper, & a ground for a new trial if the letter is material.—*POWELL v. WARR* (1880), 20 N. B. R. 15.—*CAN.*

4888 iii. —]—It is a general salutary, & intelligible rule that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation & clear up the particular point of ambiguity or dispute.—*BAL GANGADHAR TILAK v. SHRINIVAS PANDIT* (1915), 1 L. R. 39 Bom. 441.—*IND.*

4888 iv. —]—A witness may be asked if he copied a note, but he will not be allowed to speak as to the contents of the copy.—*MILLER v. MOFFAT* (1820), 2 Murr. 322.—*SCOT.*

4884 i. — Document not put in.]—As a general rule a witness cannot be examined as to the contents of a paper not in evidence.—*LAWTON v. TARRATT* (1858), 4 All. 1.—*CAN.*

4884 ii. —]—It is discretionary with the judge at *Nisi Prius*, whether he will allow a witness to be cross-

examined as to the contents of a written statement made by him without the writing being produced.—*LAWTON v. CHANCE* (1859), 4 All. 411.—*CAN.*

4884 iii. —]—Where, on the cross-examination of *pltf.*, *def't.*'s counsel examined him as to the time he entered into a partnership, & his interest in it:—*Held:* *pltf.* was entitled to go into the contents of the whole agreement, although it appeared there were written articles.—*TOZER v. HUTCHISON* (1869), 1 Han. 540.—*CAN.*

4884 iv. —]—Where a sailing chart was put in evidence, & witness asked on cross-examination in what respect it differed from another on board *def't.*'s vessel:—*Held:* this evidence was improperly admitted.—*JACKSON v. McLELLAN* (1873), 2 L'ug. 83.—*CAN.*

4884 v. —]—*DOE d. WETMORE v. BELL* (1890), 30 N. B. R. 83.—*CAN.*

4884 vi. —]—A party cannot upon a cross-examination give parol evidence of a written instrument which is in his own possession.—*HUNTER v. KEHOE* (1794), Rldg. L. & S. 355.—*IR.*

4884 vii. —]—A witness who hold farms under leases was asked in cross-examination, whether he held more than one farm, & whether, by

to the issue, he may be asked, on cross-examination whether the paper containing it is of his handwriting; & if he admit it, that will entitle the other side to read it; & if it contradicts the evidence of the witness, he may be called back to explain it.—*CROWLEY v. PAGE* (1837), 7 C. & P. 789.

Annotation:—As to (1) Consd. Russell v. Russell & Mayer (1923), 129 L. T. 151.

4888. — Circumstances causing belief.]—R. v. MURPHY, No. 4756, *ante*.

4889. —]—On the cross-examination of a witness as to his knowledge of handwriting, a paper not in evidence may be put into his hand, & he may be asked whether it is in *def't.*'s handwriting, in order to comment upon the difference, if any, between his answer & the answers of the other witnesses to the same question; but not for the purpose of asking him whether, having looked at such paper, he still persists in saying that the acceptance in question is not in *def't.*'s handwriting.—*STURMY v. EVANS* (1850), 16 L. T. O. S. 65, N. P.

4890. Founded on statements made by servants.]—AMALGAMATED PROPERTIES OF RHODESIA (1913), LTD. *v. GLOBE & PHOENIX GOLD MINING CO., LTD.* (1915), 140 L. T. Jo. 8.

4891. Whether extracts from text-books may be read.—On cross-examination as to custom.]—HARRISON v. UNIVERSAL MARINE INSURANCE CO. (1862), 3 F. & F.

C. Production and Inspection of Document.

Documentary evidence, generally, *see* Part IV., *ante*.

See Criminal Procedure Act, 1865 (c. 18), s. 5.

4892. Production of document.—Necessity for—Affidavit.]—A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit is produced.—*SAINTHILL v. BOUND* (1801), 4 Esp. 74.

Annotation:—Consd. R. v. Christopher (1850), 2 Car. & Kir. 994.

4893. — — — —]—On trial of an information by the A.-G. for penalties, *def't.*, who had been held to bail, had subpoenaed the officer from the Queen's Remembrancer's Office to produce the affidavit on which he had been held to bail, with

his leases, he was bound to residence:—*Held:* in cross-examination the contents of a lease cannot be proved by parol; the practice of the estate may be proved, but not the conditions of particular leases.—*DANIEL v. QUEENSBERRY'S (DUKE) EXECUTORS* (1826), 4 Murr. 10.—*SCOT.*

4884 viii. — — — —]—It is incompetent to ask a witness what was the import of correspondence, which might itself have been recovered & produced.—*GIBSON v. ANDERSON* (1846), 9 Duml. (Ct. of Sess.) 1.—*SCOT.*

g. — Meaning of writing.]—Incompetent to ask a witness the meaning of a writing, but competent to ask if the writing gives a fair representation of facts with which he is acquainted.—*HAMILTON v. HOPE* (1827), 4 Murr. 222.—*SCOT.*

h. — — — —]—*BAYNE v. MACGREGOR* (1863), 1 Macph. (Ct. of Sess.) 615; 35 Sc. Jur. 368.—*SCOT.*

k. Whether extracts from text books — Have influenced expert evidence.]—It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, & then to read such books to the jury; but they may be asked whether such books have influenced their opinion.—*BROWN v. SHEPARD* (1856), 13 U. C. R. 178.—*CAN.*

a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, & for the purpose of cross-examining him deft.'s counsel wished to put in the affidavit:—*Held*: the officer was bound to produce it, & deft. had a right to make use of it in this way: but if the affidavit was made by another deponent besides the witness, & related to other persons besides deft. the latter would be only entitled to use so much of the affidavit as was sworn by the witness, & as related to deft. himself.—*A.-G. v. BOND* (1839), 9 C. & P. 189.

4894. ———— **Production of office copy.]**—On an application for a new trial, one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office copy of her affidavit, which was ordered by a judge's order in the usual form, to be admitted as a true copy:—*Held*: this might be done, & it was not necessary to have the original affidavit to cross-examine upon.—*DAVIES v. DAVIES* (1840), 9 C. & P. 252.

4895. ———— **]**—Where a witness, who previously to his examination has made an affidavit as to the subject-matter thereof, & on the examination, contradicts the affidavit in one particular, but has not had the affidavit produced to him, it is not an objection to a commission to examine witnesses as to his credit in this ct. though it would if he had been publicly examined. Neither is it an objection that the affidavit was taken by the solr. to pltf. of his own authority, though it is highly improper.—*HARVEY v. MOUNT* (1844), 7 Beav. 517; 13 L. J. Ch. 440; 3 L. T. O. S. 340; 8 Jur. 903; 49 E. R. 1186.

Annotation:—*Consd. Penny v. Watts* (1848), 2 De G. & Sm. 501.

4896. ———— **]**—Where a witness in cross-examination is asked a question as to a fact, to which he has spoken in his affidavit, he is not entitled to refuse answering the question until the paragraph in such affidavit is shown to him.—*GWYNNE v. WATNEY* (1858), 31 L. T. O. S. 231.

4897. ———— **]**—*SLADDEN v. SERGEANT*; No. 4884, *ante*.

4898. ———— **Production of examination in bankruptcy referred to in affidavit.]**—Where a document is referred to in an affidavit, such as an examination taken in bkpcy., to enable a proper cross-examination to be had, such document will be ordered to be produced.—*BELL v. JOHNSON* (1861), 1 John. & H. 682; 4 L. T. 636; 9 W. R. 549; 70 E. R. 918.

Evidence by affidavit, generally, *See* Part VII. *post*.

4899. ———— **Document written by witness.]**—(1) A party to the action, being called as a witness on his own behalf, may be asked in cross-examination the contents of a letter which he has written, without producing the letter.

(2) If a question arises as to the contents of a written instrument, & you can get a witness to come & swear that he heard pltf. say that it contained such & such expressions, that is good evidence of the contents of the document without producing it, & if pltf. is himself in the box, you may ask him as to the contents of the document & his answer will be as good evidence as previous statement. He may, perhaps, refer to the deed for better information, & perhaps the judge might say that the document ought to be

produced (*POLLOCK, C.B.*).—*FARROW v. BLOMFIELD* (1859), 1 F. & F. 653.

4900. ———— **]**—*THE QUEEN'S CASE*, No. 4729, *ante*.

4901. ———— **]**—In an action by the assignees of bkpt., where a witness for pltf. states that he investigated bkpt.'s accounts, & that the result of that investigation was stated on paper, he may be cross-examined as to the conclusion at which he arrived, without producing the paper.—*CLOUGH v. TAYLOR* (1843), 1 L. T. O. S. 551.

4902. ———— **]**—A witness cannot, upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced nor its absence accounted for. Therefore, where a witness was asked, upon cross-examination, a letter in his own handwriting being shown to him, "Did you not write that letter in answer to a letter charging you with forgery?" :—*Held*: the question was inadmissible for any purpose, inasmuch as it was an attempt to get at the contents of a written document which for anything that appeared might have been produced.—*MACDONNELL v. EVANS* (1852), 11 C. B. 930; 21 L. J. C. P. 141; 18 L. T. O. S. 241; 16 J. P. 88; 16 Jur. 103; 138 E. R. 742.

Annotation:—*Distd. Henman v. Lester* (1862), 12 C. B. N. S. 776.

4903. ———— **Document not written by witness.]**—*R. v. GRIMWADE* (1844), 1 Car. & Kir. 592; 3 L. T. O. S. 343; 8 J. P. 698; 1 Cox, C. C. 67.

4904. ———— **Record of public judicial proceedings.]**—In an action charging deft. with having made a fraudulent representation as to the price which certain seedsmen in London would give for certain seed, whereby pltf. was induced to sell it for a lower price than he otherwise would have done, deft., who appeared as a witness, having, in his examination-in-chief, denied the alleged misrepresentation, was asked on cross-examination whether there had not been proceedings against him in a county ct. at the suit of A. in respect of a similar claim, which he has resisted, & upon which he had given evidence, & the jury had notwithstanding found their verdict for the then pltf. It was objected by deft.'s counsel that the questions relating to the contents of public judicial proceedings, which must be in writing, could not be asked, but that the record must be produced. The objection having been overruled, & the questions allowed to be put:—*Held*: the ruling was correct.—*HENMAN v. LESTER* (1862), 12 C. B. N. S. 776; 31 L. J. C. P. 366; 9 Jur. N. S. 601; 142 E. R. 1347.

Annotation:—*Reid. Beaufort v. Crawshaw* (1866), L. R. 1 C. P. 699.

4905. ———— **]**—When a witness is asked as to what he said on a previous occasion, he is bound to answer the question; he cannot insist on seeing what he previously said before he answers it; he must answer (*LORD ESHER, M.L.*).—*NORTH AUSTRALIAN TERRITORY CO., LTD. v. GOLDSBOROUGH, MORT & CO., LTD.*, [1893] 2 Ch. 381; 62 L. J. Ch. 603; 69 L. T. 4; 41 W. R. 501; 2 R. 397, C. A.

Annotations:—*Mentd. Re Standard Gold Mining Co.*, [1895] 5; *Re Strachan*, [1895] 1 Ch. 439; *Goldstone v. Deacon*, [1899] 1 Ch. 47; *Re Merchants Fire Office* (1899), 68 L. J. Ch. 211.

4906. Right of inspection.—By other side.—Document used to prove handwriting.]—Where a witness on cross-examination proves the handwriting of the opposite party to a paper, the counsel for such party has no right to see the paper to enable him to found an examination as

Sect. 6.—Examination: Sub-sect. 6, C.; sub-sect. 7, A.]

to whether it was really the writing of his client or not.—*RUSSELL v. RIDER* (1834), 6 C. & P. 416, N. P.

Annotation:—Mentd. Bannister v. Hyde (1860), 1 L. T. 438.
4907. ———.—*]*—The mere fact of counsel, whilst cross-examining a witness, putting a document into the witness's hand, & asking him whether it is in his handwriting, does not entitle the opposite counsel to see such document; but the opposite counsel has a right to see the document, before the cross-examining counsel proceed to found any question on the document itself. Where A. was called by deft. to prove conversations between pltf. & the agents of deft.; & after deft.'s case had closed, it was proposed to call B. on the part of pltf., to contradict A.:—*Held*: notwithstanding the course of cross-examination pursued by deft.'s counsel, had been such as to give notice of deft.'s case, B. might be called to contradict A. as to what took place between pltf. & the agents of deft., on any occasion on which A. had admitted in his evidence that B. was present.—*COPE v. THAMES-HAVEN DOCK CO.* (1848), 2 Car. & Kir. 757; *affd.* 12 Jur. 923.

4908. ———.—*]*—If a document be given to a witness during cross-examination for the purpose of identifying the handwriting, counsel for the party whose witness is in the box has a right to inspect the document sufficiently to enable him to re-examine about the writing, & also to identify the document in case it should afterwards be put in evidence. He has, however, no right to read the document through, nor to comment upon its contents, until it be put in by the other side, although he may remark upon its absence if it be not put in.

In an action by exors. against a son of their testator to recover money received by him from his father, the debtor side of testator's account book, containing entries of the receipt of interest from the son:—*Held*: to be admissible in support of pltf.'s contention that the money had been lent & not given, although the right of pltf's. without consent to put in the other side, which contained no entries opposed to the advantage of the writer, was doubtful.—*PECK v. PECK* (1870), 21 L. T. 670; 18 W. R. 295.

4909. ———.—*]*—*CROWLEY v. PAGE*, No. 4887, ante.

4910. ———.—*Failure of cross-examination.]*—If counsel who cross-examines put a paper into the witness's hand, & puts questions on it, & anything comes of those questions, counsel for the opposite party have a right to see the paper & re-examine on it; but if the cross-examination founded on the paper entirely fails, & nothing comes of it, the opposite counsel have no right to see the paper.—*It. v. DUNCOMBE* (1838), 8 C. & P. 369, N. P.

PART V. SECT. 6, SUB-SECT. 6.—C.

4909 i. *Right of inspection—By other side.]*—If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, his adversary will have no right to see the document, but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite counsel.—*JARAT KUMARI DASRI v. BISSESSUR DUTT* (1911), 1 L. R. 39

Calc. 245.—IND.

4914 i. *Whether document evidence—For other party.]*—Papers proved on cross-examination are to be treated as the evidence of the party producing them.—*CRANE v. CLARKE* (1828), N. B. Dig. 350.—**CAN.**

4914 ii. ———.—*]*—The mere fact of pltf., during the *voir dire* examination of deft., producing documents for the purpose of having them proved, will not entitle deft. to their production for the general purposes of the suit.—*HOWCUTT v. REES* (1851), 2 Gr. 553.—**CAN.**

4914 iii. ———.—*]*—If the cross-

4911. Whether document evidence—For party cross-examining.]—If, during the cross-examination of one of pltf.'s witnesses, deft.'s counsel, under a notice to produce, calls for a book which pltf.'s counsel produces, deft.'s counsel, if he looks over the book, so as to see the contents of several pages of it, will be bound to put it in as his evidence.—*CALVERT v. FLOWER* (1836), 7 C. & P. 386, N. P.

4912. ———.—*]*—A witness for pltf. having stated that he had never heard of a certain agreement in writing, the agreement was put into his hands, & he was then asked by deft. whether he had seen an agreement respecting the above matter; he replied, "Never, before I came into ct.":—*Held*: deft., if he wished the agreement read, must put it in his own evidence.—*KEYS v. HARWOOD* (1846), 2 C. B. 905; 15 L. J. C. P. 207; 7 L. T. O. S. 161; 135 E. R. 1201.

4913. ———.—*For other party—Document used to prove handwriting.]*—(1) If a document is on cross-examination put into the hands of a witness, that he may prove it, the other party cannot claim it, in order to put it in as his evidence.

(2) *Qu.*: such witness is asked to prove the handwriting only, whether the counsel on the other side is entitled to see it.—*COLLIER v. NOKES* (1849), 2 Car. & Kir. 1012; 15 L. T. O. S. 189, N. P.

4914. ———.—*]*—Deft.'s counsel, on cross-examination of pltf., read a letter from him, which in effect answered his case, & then submitted that there was no evidence for the jury:—*Held*: the ct. *in banc*, in considering whether there was evidence, could not look at the letter as part of pltf.'s case.—*RAWLINGS v. CHANDLER* (1854), 9 Exch. 687.

4915. ———.—*For both parties.]*—A book having been allowed to be referred to by pltf.'s counsel on cross-examination, being the accounts of the solrs. employed to prepare the will, entries therein allowed to be referred to by both parties, for the purpose of proving from whom the instructions to prepare the will really emanated.—*MARTIN v. JOHNSTON* (1858), 1 F. & F. 122.

4916. Whether whole document must be read—Joint affidavit.]—*A.-G. v. BOND*, No. 4893, ante.

4917. ———.—*Cross-examination as to part of document.]*—*TINDALL v. BASKETT, BASKETT v. TINDALL* (1861), 2 F. & F. 611, N. P.

4918. ———.—*]*—On cross-examination some letters written by a witness who was not a party in the cause were put into her hand & she was asked to explain the meaning of certain passages therein contained & whether what she wrote in such passages was true:—*Held*: the other party was entitled to have the whole of such letters read.—*SMITH v. PRICKETT & MORRELL* (1861), 7 Jur. N. S. 610.

4919. ———.—*]*—On an indictment for obtaining money by a false pretence, that a parcel contained all letters written by prosecutrix to prisoner, & which he had promised, in considera-

examining counsel seek to contradict a witness by the aid of a written document, as, for example, from his informations in a criminal case, that document must be given in evidence.—*FRENCH v. FRENCH* (1850), 2 Ir. Jur. 21.—**IR.**

4914 iv. ———.—*]*—Defender may prove documents on cross-examination, but, if he uses them in evidence, pursuer has a reply.—*LINDSAY v. GILCHRIST & BLACK* (1822), 3 Murr. 96.—**SCOT.**

4914 v. ———.—*]*—If a pursuer observes on letters proved in cross-examination, they become his evidence.—*MACKENZIE v. ROY* (1830), 5 Murr. 257.—**SCOT.**

tion of the money, to give up to her:—*Held*: counsel for the prosecution were not bound to have the letters read, although the counsel for prisoner might cross-examine as to the contents of any of them, & have any read for that purpose.—*K. v. COLUCCI* (1861), 3 F. & F. 104.

SUB-SECT. 7.—REFRESHING MEMORY OF WITNESS BY REFERENCE TO DOCUMENTS.

A. At What Time Document must be made.

4920. Whether contemporaneously with facts referred to.—Where a witness swears to a matter, he is not to read a paper for evidence, though he may look upon it to refresh his memory. But if he swears to words, he may read it, if he swears he presently committed it to writing, & that those are the very words (Holt, C.J.).—**SANDWELL v. SANDWELL** (1697), Comb. 415; Holt, K. B. 295; 90 E. R. 581, N. P.

Annotation :—**Refd.** *Hill v. Barry* (1842), 7 Jur. 10.

4921. ———.] —R. v. LAYER (1722), 16 State Tr. 93; 8 Mod. Rep. 82; 88 E. R. 64.

Annotations:—**Mentd.** R. v. Orrery (1722), 8 Mod Rep. 96 ;
R. v. Lambe (1791), 2 Leach, 552 ; R. v. O'Connell (1844),
5 State Tr. N. S. 1 ; R. v. Duffy (1849), 7 State Tr. N. S.
795 ; Mulcahy v. R. (1867), 15 W. R. 446.

4922. ———. [—]—To prove an act of bkpcy. committed some years back, an old witness shall be allowed to recur to his deposition made at the time, to refresh his memory, & thereby ascertain the date of such act of bkpcy.—**VAUGHAN v. MARTIN** (1796), 1 Esp. 439, N. P.

Annotation:—**Apld.** Smith v. Morgan (1839), 2 Mood. & R.

4923. —.]—To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written, contemporaneously with the transaction it refers to.—**STEINKELLER v. NEWTON** (1838), 9 C. & P. 313, N. P.; *subsequent proceedings* (1840), 6 Man. & G. 30, n.; (1841), 2 Mood. & R. 372.

Annotation :—**Mentd.** **Robinson v. Davies** (1879), 28 W. R. 255.

4924. —.]—*Semble* : where a witness had been examined before comrs. of bkpt. shortly after the act of bkpy., he may refer to the deposition he then made, for the purpose of refreshing his memory as to the date.—*SMITH v. MORGAN* (1839), 2 Mood. & R. 257, N. P.

Annotation :—**Mentd.** Metters v. Brown (1863), 1 H. & C. 686.

4925. —.]---It is essential that a witness producing a memorandum by which to refresh his memory as to a fact, should be enabled to swear positively to the truth of such fact, although he has no present independent recollection of it; but it is not essential that the memorandum

should have been contemporary with the fact.—
HILL v. BARRY (1842), 7 Jur. 10.

4928. —.]—The log of a ship is inadmissible, because, a vessel, during a period of war, when cases of joint capture are constantly arising, might make any statement whatever in the log, which statement might afterwards be converted into evidence on behalf of the very persons who make the statement. That is contrary to the first principles of justice. Where an entry in a log has been made by any particular individual at the time of the transaction, that individual, when he comes to be examined, has a right to refer to the entry, in the log, for the purpose of refreshing his memory, that log having been made by himself at the time, & he swearing, not to the truth of the log, but, to the best of his belief, certain facts to be true, & refreshing his memory merely from the entry *at the time*. But the ct. will not admit the contents of the log itself (DR. LUSHINGTON).—THE SOCIÉDADE FELIZ (1842), 1 Wm. Rob. 303; 1 Notes of Cases, 286; 4 L. T. 528; 6 Jur. 134; 7 Jur. 956; 160 E. R. 585.

4927. — Document made shortly afterwards.]

—On the trial of an issue directed by the Ct. of Ch. to try whether a deed of assignment was fraudulent or not, a witness was called to prove that another deed, which bore date more than three years before the trial, was not executed on the day on which it bore date, but was executed by one party on the day after, & by the other three days after. The witness stated, that he could not recollect how this was, but stated that he had been examined on this subject before comrs. of bkpt. within a fortnight of the time when the matters occurred, & when the facts were fresh in his memory. He stated that his examination before the comrs. was not in his own handwriting, but he had signed it:—*Held*: the witness would be allowed to look at his examination, to refresh his memory.—*Wood v. COOPER* (1845), 1 Car. & Kir. 615.

4928. ———.]—GREAT WESTERN RY. CO.
p. GURTON (1858), 1 F. & F. 359, N. P.

4929. —.]—A witness cannot refresh his memory from depositions in bkpy. made some time after the facts deposed.—*WHITFIELD v. ALAND* (1849), 2 Car. & Kir. 1015; 15 L. T. O. S. 189. N. P.

4930. —. —.]—As the receipts were contemporaneous documents, he [plff.] may refresh his memory by looking at them (BYLES, J.).—HISCOX v. BATCHELOR (1867), 15 L. T. 513, N. P.

Annotation :--**Mentd.** *Green v. Wright* (1876), 1 C. P. D. 591.

4931. —.]—R. v. DUNCAN (1890), Wood
Renton's Law & Practice in Lunacy, p. 908.

PART V. SECT. 6, SUB-SECT. 7.—A.

4920 I. Whether contemporaneously with facts referred to.]—A horoscope is not a document to be relied upon as a probative document in itself, but it is a record made by the witness at the time to which he is entitled to refer for the purpose of refreshing his memory & is therefore admissible.—
BANWARI LAL v. MAHESH (1918),
I. L. R. 41 All. 63.—IND.

4920 ii. —.])—A witness is not entitled to look at notes unless made by him at the time the transaction occurred.—*ROBERTSON v. FERGUSON* (1820), 2 Murr. 303.—**SCOT.**

4920 iii. —. —.]—A witness may refresh his memory by looking at notes made by him at the time a fact occurred.—*OSWALD v. LAWRIE* (1828), 5 Murr. 6.—**SCOT.**

4920 iv. — J — A witness not allowed to look at a note made by him on the morning of the trial.—*GRAHAM v. LOCH* (1829), 5 Murr. 74.—**SCOT.**

4927 I. — *Document made shortly afterwards.*—A constable called as a witness in a betting prosecution admitted that he was relying, with regard to the names of the races, on his recollection of what he wrote in a memorandum made several days after the races, & not on his recollection of the names of the races from what he read or heard on the day on which they were held. Deft.'s counsel called for the document which was not produced & a request for an adjournment to enable production was refused:—*Held*: the evidence of the constable relating to the names of the races was inadmissible. — *AMES v. NICHOLSON*.

[1921] S. A. S. R. 224.—AUS.

4927 ii. ———.]—A witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind.—FRASER v. FRASER (1864), 14 C. P. 70.—CAN.

4927 iii. ———,]—Deft. as a witness produced an entry in one of his books of account made at a time when the transaction to which it related was still fresh in his memory:—*Held*: as the ct. below would have been justified in allowing the witness to refresh his memory by reference to the entry & as no objection was then taken to the production of the entry, it was now too late to raise the objection.—HARRIS R. MAYER (1911), App. D. 260. —S. F.

Sect. 6.—Examination: Sub-sect. 7, B., C. & D.]**B. By Whom Document may be made.**

4932. General rule.]—A witness on the trial of a cause may refresh his memory from a document, though not written by himself.—*HENRY v. LEE* (1814), 2 Chit. 124; *previous proceedings, sub nom. HENRY v. LEIGH* (1813), 3 Camp. 499, N. P.

Annotations:—Expld. & Distd. Burton v. Plummer (1834), 4 Nev. & M. K. B. 315. *Refd. Hill v. Barry* (1842), 7 Jur. 10.

4933. —.]—The general rule is, that no paper can be put into the hand of a witness to refresh his memory, which is not of his own handwriting. Therefore, if he is asked whether he has not been imprisoned in France, the counsel asking this cannot put into his hand an authenticated copy of the sentence of the French Ct.—*MEAGOE v. SIMMONS* (1827), 3 C. & P. 75, N. P.

Annotation:—Mentd. A.-G. v. Hitchcock (1847), 11 Jur. 478.

4934. —.]—The clerk in a solr.'s office when speaking to facts within his own knowledge may refer to the "office journal" in order to fix the dates of those facts; but cannot speak to facts, not within his knowledge, from entries in the journal, not in his own handwriting.—*BUTLIN v. BARRY* (1837), 1 Curt. 614.

Annotations:—Mentd. Wright d. Tatham v. Doe (1837), 7 Ad. & El. 313; *Durling & Parker v. Loveland* (1839), 2 Curt. 225; *Durnell v. Corfield* (1844), 1 Rob. Eccl. 51; *Hastilow v. Stobie* (1865), L. R. 1 P. & D. 64.

4935. Document not made by witness personally —Examined by witness.]—A witness for the purpose of refreshing his memory may refer to entries in a book, which he did not write with his own hand but which he regularly examined, from time to time, soon after they were written, & while the facts stated in them were fresh in his recollection.—*BURROUGH v. MARTIN* (1809), 2 Camp. 12, N. P.

Annotations:—Expld. & Distd. Burton v. Plummer (1834), 4 Nev. & M. K. B. 315. *Refd. Hill v. Barry* (1842), 7 Jur. 10.

4936. — Checked by witness.]—*BURTON v. PLUMMER*, No. 4995, *post*.

4937. —.]—The prisoner was a time-keeper & T. was pay clerk in the employment of a colliery co. It was the duty of the prisoner every fortnight to give a list of the days worked by the workmen to a clerk who entered the days & the wages due in respect of them in a time book. At pay time it was the duty of the prisoner to read out from the time book the number of days worked by each workman to T. who paid the wages accordingly; & T. saw the entries in the time book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences:—*Held*: T. might refresh his memory by referring to the entries in the time book in order to prove the sums paid by him to workmen.—*R. v. LANGTON* (1876) 2 Q. B. D. 296; 46 L. J. M. C. 136; 35 L. T. 527; 41 J. P. 134; 13 Cox, C. C. 345, C. C. R.

Annotation:—Mentd. R. v. May (1900), 64 J. P. 570.

4938. — Dictated by witness.]—Where a person was in communication with the police, & duly reported to them the proceedings of a criminal conspiracy:—*Held*: such person when examined as a witness might refresh his memory from such reports, though they were taken down from his lips by an inspector of police, & then read over to &

signed by the witness.—*R. v. MULLINS* (1848), 12 J. P. 776; 3 Cox, C. C. 526.

Annotations:—Mentd. R. v. Bickley (1909), 73 J. P. 239; *R. v. Wilson, Lewis & Havard* (1911), 6 Cr. App. Rep. 126; *R. v. Watson* (1913), 109 L. T. 335; *R. v. Baskerville*, [1916] 2 K. B. 658.

4939. —.]—*Semle*: a witness may refresh his memory from notes taken in writing by a policeman from the lips of the witness, which have been read over to & signed by the witness.—*R. v. CUFFEY* (1848), 12 J. P. 807.

4940. —.]—A solr., for the purpose of refreshing his memory, may be allowed to look at his own account of his interview with the prisoners, dictated by him to a shorthand writer, & by the latter written in longhand shortly after the interviews took place, & read over by the solr. shortly afterwards, although the shorthand writer is alive & is not called as a witness.—*R. v. DEXTER, LAIDLIE & COATES* (1899), 19 Cox, C. C. 360.

Annotations:—Mentd. R. v. Turner (1909), 3 Cr. App. Rep. 103; *R. v. Waller* (1909), 26 T. L. R. 142.

4941. — Assented to by witness.]—A ship's log, written by the mate, who is abroad, may be used to refresh the memory of the captain, who read it about a week after it was written.—*ANDERSON v. WHALLEY* (1852), 3 Car. & Kir. 54; 19 L. T. O. S. 365.

4942. — Notes of counsel.]—A witness may refresh his memory from the notes of counsel taken on his brief at a former trial; but the witness must afterwards speak from a refreshed memory & not merely from the notes (*ALDERSON, B.*)—*LAWES v. REED* (1835), 2 Lew. C. C. 152.

Annotations:—Expld. R. v. Cuffey (1848), 12 J. P. 807. *Dbdd. R. v. Mullins* (1848), 12 J. P. 776.

C. Independent Recollection of Facts to which Witness testifies.

4943. Whether necessary.]—*HILL v. BARRY*, No. 4925, *ante*.

4944. —.]—A witness, who states that he had at one time received a number of letters from one of the parties in a cause, containing statements with reference to a particular fact, but which letters he had since destroyed, cannot be examined as to the general contents of such letters, for the purpose of ascertaining the impression thereby produced in his mind with reference to the fact in question. The editor of a newspaper swore that A. was the writer of a certain article which had appeared in that paper many years before, & that the manuscript had been lost. A. stated that he had been in the habit of writing such articles for the newspaper in question, but that he had no recollection of having sent the particular article now referred to. He swore, however, that all the statements made in the articles he did send were true:—*Held*: the newspaper might be put into A.'s hand, in order to refresh his memory, & he might be asked, whether, looking at the article, he had any doubt that the fact was as therein stated.—*TOPHAM v. MCGREGOR* (1844), 1 Car. & Kir. 320.

Annotations:—Consd. Talbot de Malahide v. Cusack (1865), 12 L. T. 678.

4945. —.]—*BRISTOWE v. PINNA* (1846), 6 L. T. O. S. 315.

4946. —.]—A witness said that he made a certain entry, & that seeing such entry he knew that A. must have been at M. on a certain day, but that independent of such entry he had no recollection of it:—*Held*: such evidence was

PART V. SECT. 6, SUB-SECT. 7.—B.

4932 1. General rule.]—*MATTHEWS v. MARSH* (1903), 23 C. L. T. Occ. N. 164; 5 O. L. R. 540; 2 O. W. R. 247.—*CAN.*

PART V. SECT. 6, SUB-SECT. 7.—C.

1. No independent recollection of facts—Recognition of witnesses' initials.]—The recognition by a witness of his

initials affixed to an entry made in the ordinary course of commercial transactions, without any recollection of the transaction, may be given in

—R. v. BROOKS (1848), 12 J. P.

663.

4947. —[—]—A witness may refresh his memory from a document, & narrate the transaction therein mentioned, though he has no recollection of it independently of the document.—R. v. WATTS (1850), 14 J. P. 402.

4948. No independent recollection of facts—Necessity for production at trial of document referred to.]—TANNER v. TAYLOR (1756), cited 3 Term Rep. at p. 754; 100 E. R. 841.

*Annotations:—***Apld.** Doe d. Church & Phillips v. Perkins (1790), 3 Term Rep. 749. **Consd.** R. v. St. Martin's, Leicester (1834), 2 Ad. & El. 210. **Refd.** Hill v. Barry (1842), 7 Jur. 10.

4949. —[—]—A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any farther than as finding it entered in a book or paper, the original book or paper must be produced.—DOE d. CHURCH & PHILLIPS v. PERKINS (1790), 3 Term Rep. 749; 100 E. R. 838.

*Annotations:—***Expld.** Burton v. Plummer (1831), 4 Nev. & M. K. B. 315. **Consd.** Beech v. Jones (1848), 5 C. B. 696. **Refd.** R. v. St. Martin's, Leicester (1834), 2 Ad. & El. 210; Hill v. Barry (1842), 7 Jur. 10. **Mentd.** Richardson v. Mellish (1825), 3 Bing. 334; Jackson v. Galloway (1845), 14 L. J. C. P. 141; Bowers v. Nixon (1848), 12 Q. B. 546.

4950. —[—]—A witness called to prove the receipt of a sum of money, was shown an acknowledgment of the receipt of such money signed by himself; & on seeing it said that he had no doubt he had received it, although he had no recollection of the fact:—**Held:** this was sufficient parol evidence of the payment of the money, & the written acknowledgment having been used to refresh the memory of the witness, & not as evidence of the payment, did not require any stamp.—MAUGHAM v. HUBBARD (1828), 8 B. & C. 14; 2 Man. & Ry. K. B. 5; 6 L. J. O. S. K. B. 229; 108 E. R. 948.

*Annotation:—***Refd.** Hill v. Barry (1842), 7 Jur. 10.

4951. —[—]—To prove a settlement by renting a tenement under 59 Geo. 3, c. 50, the following evidence of the taking was given. A witness produced a book containing this entry, unstamped, in his handwriting: "Agreed with T., the pauper, "to have the house in P., now occupied by W., at £11 per annum, to be paid quarterly, quarter's notice to be given on either side; to leave in same repair as he found it." The witness stated that he let the house as agent to the owner, & that the terms were reduced to writing to prevent mistake, & signed by the pauper's wife to bind her husband, who was not present; but there was no other signature. The pauper occupied, & appeared to have paid rent quarterly for some time, at the rate above-mentioned:—**Held:** the sessions not having found that the wife was authorised by the pauper, the above entry was not an agreement for a lease, nor a lease, & the witness might look at it to refresh his memory, without its being produced in evidence.—R. v. ST. MARTIN'S, LEICESTER (INHABITANTS) (1834), 2 Ad. & El. 210; 4 Nev. & M. K. B. 202; 2 Nev. & M. M. C. 472; 4 L. J. M. C. 25; 111 E. R. 81.

*Annotation:—***Refd.** Hill v. Barry (1842), 7 Jur. 10.

evidence of the transaction.—MACDONALD v. BANK OF VANCOUVER (1915), 32 W. L. R. 339; 9 W. W. R. 8; 25 D. L. R. 567; 22 B. C. R. 310.—CAN.

PART V. SECT. 6, SUB-SECT. 7.—D.

4955 i. Account books.—B., who was largely indebted, & several suits

pending against him, transferred all his property to pltf. for £7,000 & took as payment pltf.'s promissory notes payable in five years, without security:—**Held:** entries in B.'s books, relative to the property, though made by his clerks, might be referred to by him on cross-examination, & by his clerks on examination in chief by deft., in

4952. —[—]—If a witness, at the time of giving his evidence, has no recollection of a fact except from an entry in a book, his evidence of that fact cannot be received unless the book is produced.—HOWARD v. CANFIELD (1836), 5 Dowl. 417; Will. Woll. & Dav. 78; 1 Jur. 71.

4953. —[—]—The cashier of a banking house, upon his examination as a witness, stated that he had ascertained from the clearing-book, kept by him & in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book & of his own handwriting, & not from any recollection of the fact deposited to; & the book was not produced:—**Held:** under these circumstances, the statement could not be received as evidence of the fact deposited to, though it might serve as a ground for further inquiry.—DUPUY v. TRUMAN (1843), 2 Y. & C. Ch. Cas. 341; 63 E. R. 150.

4954. —[—]—In an action by the acceptor against the drawer of an accommodation bill, on his implied contract of indemnity, pltf., in order to prove that a former bill, in renewal of which the bill in respect of which the action was brought was given, had been made payable at a particular place, called a banker's clerk, who without producing the bank book, stated that he had ascertained the fact from an entry therein in his own handwriting, but that, independently of that entry, he had no recollection whatever of the fact:—**Held:** this was not evidence of such fact.—BEECH v. JONES (1848), 5 C. B. 696; 136 E. R. 1052.

D. To What Documents Reference may be made.

4955. Account-books.—A witness stated that he believed, from a reference to his books of account, & from inspection of a cheque & other documents which were produced to him at the time of his examination, that A. on a certain day paid £500 to B.:—**Held:** this was not sufficient evidence of payment.—CATOR v. CROYDON CANAL CO. (1841), 4 Y. & C. Ex. 405; 13 L. J. Ch. 89; 160 E. R. 1064; on appeal (1843), 4 Y. & C. Ex. 593, L. C.

—[—]—*See, also*, No. 4994, *post*.

4956. Census paper.—The census paper may be used to refresh the memory of the person who made it.—DOE d. MACKENZIE v. BAYLIS (1851), 17 L. T. O. S. 172, N. P.

4957. Cheques.—CATOR v. CROYDON CANAL CO., No. 4955, *ante*.

4958. Declaration.—A friendly witness may not be asked in examination-in-chief as to his previous declaration, for the purpose of refreshing his memory, where he is being examined for the purpose of striking off the vote of another person on a scrutiny.—BERWICK ELECTION PETITION, McLAREN v. HOME (1880), as reported in 44 L. T. 289.

*Annotations:—***Mentd.** Stepney Poln. (1886), 2 T. L. R. 559; York County East Riding, Buckrose Division Case (1886), 4 O.M. & H. 110; Cooper v. Ogden, Oldham Municipal Election (1908), 24 T. L. R. 242.

4959. Depositions.—In bankruptcy.—VAUGHAN v. MARTIN, No. 4922, *ante*.

order to show the value of his property & the state of his business at the time of the transfer.—LAWTON v. TARRATT (1858), 4 All. 1.—CAN.

4955 ii. —[—]—A witness may be allowed to look at notes taken by himself from his day-book.—FORGIE v. HENDERSON (1818), 1 Murr. 413.—SCOT.

Sect. 6.—Examination: Sub-sect. 7, D. & E.]

—[SMITH *v.* MORGAN, No. 4924, |

4961. — — — —[WOOD *v.* COOPER, No. 4927, |

4962. — — — —[WHITFIELD *v.* ALAND, No. 4929, *ante*.

4963. — — — —**Made before coroner.**—There is no distinction between depositions before a coroner & before a magistrate with reference to the modes of cross-examination upon them. A witness cannot, therefore, be asked on cross-examination as to what he said before the coroner; but the deposition may be put into the witness's hands to read over to himself & refresh his memory.—*R. v. BARNET* (1850), 4 Cox, C. C. 269.

4964. — — — —[Where a witness for the prosecution gives a different answer on examination-in-chief, to that which was expected, his deposition before the coroner or justices, as the case may be, may be put in his hands for the purpose of refreshing his memory, & the question then put to him. If the witness persists in giving the same answer after his memory has been so refreshed, the question may be repeated to him, from the depositions in a leading form.—*R. v. WILLIAMS* (1853), 6 Cox, C. C. 343.

4965. — — — —**Made before magistrate—Cross-examination.**—Where an accomplice who could not read had made a statement before the committing magistrate, & at the trial gave evidence falling very short of what he said before the magistrate, the judge allowed his deposition to be shown to him, but would not allow the deposition to be read to him by the officer of the ct., that the counsel for the prosecution should examine upon it.—*R. v. BEARDMORE* (1838), 8 C. & P. 260.

4966. — — — —[A witness cannot be asked on cross-examination to refresh his memory from the deposition which he made before the magistrates; nor can it be put into his hands, so as to call his attention to what he then stated.—*R. v. PULLEN* (1818), 13 J. P. 90.

4967. — — — —[The depositions of a witness before a magistrate cannot be put into his hands at the trial to refresh his memory on cross-examination.—*R. v. STOKES* (1850), 4 Cox, C. C. 451.

4968. — — — —[The counsel for prisoner, on cross-examining a witness for the prosecution, is not entitled to put the deposition of the witness into his hand for the purpose of refreshing his memory without giving it in evidence.—*R. v. FORD, HIGGINSON & MADDOCK* (1851), 2 Den. 245; 3 Car. & Kir. 113; T. & M. 573; 4 New Sess. Cas. 596; 20 L. J. M. C. 171; 17 L. T. O. S. 135; 15 Jur. 406; 5 Cox, C. C. 181; 15 J. P. Jo. 290, C. C. R.

4969. — — — —[A witness cannot refresh his memory from his deposition made before the magistrate.—*R. v. JOEL* (1850), 14 J. P. 227.

4970. — — — —[A witness for the prosecution may have his deposition put into his hand in order that he may refresh his memory from it.—*R. v. LAWLER* (1850), 14 J. P. 561.

4971. — — — —[*R. v. SWANN*, No. 4095, *ante*.

4972. — — — —[*R. v. WILLIAMS*, No. 4964, *ante*.

4973. — — — —[The deposition made by a witness was allowed by the judge to be put into the witness's hands to refresh his memory, & he was then asked what he said about a fact which he had answered before in the negative, & answered

the question affirmatively.—*R. v. QUIN* (1863), 5 F. & F. 818.

4974. **Memorandum book.**—Witness may speak to the contents of a licence to trade with an enemy from memory, though he had made an entry of it in his memorandum book for the private information of himself & the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him: for such book, if in ct. would not have been evidence *per se*; but could only have been used by the witness to refresh his memory.—*KENSINGTON v. INGLIS* (1807), 8 East, 273; 103 E. R. 346.

Annotations.—*Mentd.* Hubbard *v.* Jackson (1811), 4 Taunt. 169; Do Tastet *v.* Taylor (1812), 4 Taunt. 233; Flindt *v.* Waters (1812), 15 East, 260; Willikon *v.* Patteson (1817), 7 Taunt. 439; Weir *v.* Aberdeen (1819), 2 B. & Ald. 320; Bacon *v.* Simpson (1837), 3 M. & W. 78; Schmitz *v.* Van der Veen (1915), 84 L. J. K. B. 861; Rodriguez *v.* Speyer, [1919] A. C. 59.

4975. **Memorandum—Indorsed on printed paper containing terms of letting.**—At a letting of lands, the terms of letting were read from a printed paper, & a party present agreed to take certain premises from Lady-Day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let & to take subject to the printed terms, the name of the farm & the rent, & that the letting was for one year certain from Lady-Day, & so from year to year, till notice to quit. Some of the terms were special, having relation to husbandry. The new tenant entered at Lady Day, & paid rent:—*Held*: assuming the first transaction not to have been a demise, there was a valid demise by parol under Stat. Frauds, s. 2, when the tenant entered, & a demise rendered valid by that sect. might contain the same special stipulations as a regular lease, & on the trial of an action by the landlord against the tenant for breach for them, the paper above-mentioned might be referred to, to refresh the memory of a witness as to such stipulations.—*BOLTON (LORD) v. TOMLIN* (1836), 5 Ad. & El. 856; 2 Har. & W. 369; 1 Nev. & P. K. B. 247; 6 L. J. K. B. 45; 111 E. R. 1391.

Annotations.—*Mentd.* Giles *v.* Spencer (1857), 3 C. B. N. S. 241; Cornish *v.* Stubbs (1870), 22 L. T. 21; Coatsworth *v.* Johnson (1886), 54 L. T. 520.

4976. **Minutes—Of evidence to be given—Prepared by solicitor.**—*ANON.* (1753), Amb. 252; 3 Keny. 27; cited in 3 Term Rep. at p. 752; 96 E. R. 1295, L. C.

Annotations.—*Folld.* Shaw *v.* Lindsey (1808), 15 Ves. 380. *Refd.* Doe d. Church & Phillips *v.* Perkins (1790), 3 Term Rep. 749; Hood *v.* Plumm (1831), 4 Sim. 101.

4977. — — — —**Of proceedings of House of Commons.**—Where a party agrees to admit the copy of the minutes of the proceedings of a select committee of the House of Commons "as & in the place of the original, saving all just exceptions" it is open to him to take the same objection to the copy as he might to the original, & that not being a record of a ct. cannot be read *per se*, but can only be used to refresh the memory of the clerk of the committee, or the party taking the minutes.—*WESTMINSTER IMPROVEMENT COMRS. v. FULLER* (1849), 13 L. T. O. S. 264, N. P.

4978. **Newspaper—Article written by witness.**—*TOPHAM v. MCGREGOR*, No. 4944, *ante*.

4979. — — — —**Report of speech heard by witness.**—*R. v. MARTIN* (1848), 6 State Tr. N. S. 925.

Annotation.—*Mentd.* *R. v. Duffy* (1849), 7 State Tr. N. S. 795.

4980. — — — —**Report of proceedings at which**

witness present.—*DYER v. BEST* (1866), 1 L. R. 1 Exch. 152; 4 H. & C. 189; 35 L. J. Ex. 105; 13 L. T. 753; 30 J. P. 151; 12 Jur. N. S. 142; 14 W. R. 336.

Annotations.—*Mentd.* *Lewis v. Davis* (1875), 1 L. R. 10 Exch. 86; *Robinson v. Currey* (1881), 7 Q. B. D. 465; *Forbes v. Samuel* (1913), 109 L. T. 599.

4981. Note—Taken by counsel.—*LAWES v. REED*, No. 4942, *ante*.

4982. — **Of evidence to be given—Prepared by solicitor.**—*ANON.* (1753), Amb. 252; 3 Keny. 27; cited in 3 Term Rep. at p. 752; 96 E. R. 1295, 1 L. C.

Annotations.—*Folld.* *Shaw v. Lindsey* (1808), 15 Ves. 380. *Refd.* *Doe d. Church & Phillips v. Perkins* (1790), 3 Term Rep. 749; *Hood v. Pinum* (1831), 4 Sim. 101.

4983. — **Taken by judge.**—*BALME v. HUTTON* (1830), cited in 2 Lew. C. C. at p. 152; *subsequent proceedings* (1833), 1 Cr. & M. 262, Ex. Ch.

Annotations.—*Refd.* *Lawes v. Reed* (1835), 2 Lew. C. C. 152; *R. v. Cuffey* (1848), 12 J. P. 807. *Mentd.* *Crosfield v. Stanley* (1832), 4 B. & Ad. 87; *Groves v. Cowham* (1833), 10 Bing. 5; *Garland v. Carlisle* (1837), 4 Bing. N. C. 7; *Grainger v. Hill* (1838), 5 Scott, 561; *Belcher v. Magnay*, *Cheston v. Gibbs*, *Edwards v. Evans* (1843), 7 Jur. 1160; *Tharpe v. Stallwood* (1843), 1 Dow. & L. 24; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1; *Whitmore v. Greene* (1844), 2 Dow. & L. 174; *Cannan v. S. E. Ry.* (1852), 7 Exch. 843; *Holmes v. Tutton* (1855), 5 E. & B. 65; *Stanger v. Wilkins* (1855), 19 Beav. 626; *Billiter v. Young* (1856), 6 E. & B. 1; *Hale v. Allnutt* (1856), 25 L. J. C. P. 267; *Edwards v. Scarsbrook* (1862), 3 B. & S. 280; *Re Nurse, Ex p. Foxley* (1868), 17 L. T. 623.

4984. Observations before surveyor—At time of making survey.—A paper, containing the observations of a surveyor at the time of making a survey, & to the substance of which he had deposed before the comrs. who examined him, not admissible in evidence, as an exhibit.

The surveyor says, "When I made this survey, I was of opinion," etc.; the question is, ought he to be thus examined as to that opinion? In law, such a paper would not be admitted as evidence, although a witness would be permitted to refresh his memory, as to what was his opinion at the time of making his survey, by reference to such a paper (*LEACH, M.R.*).—*TWORT v. JEFFERIES* (1832), 1 L. J. Ch. 218.

4985. Office journal—Facts within knowledge of witness.—*BUTLIN v. BARRY*, No. 4934, *ante*.

4986. Proceedings in another court.—A witness cannot have the proceedings in another ct. put into his hands for the purpose of refreshing his memory as to matters on which he is giving evidence.—*HALLIDAY v. HOLGATE* (1867), 17 L. T. 18, N. P.; *subsequent proceedings* (1868), 1 L. R. 3 Exch. 299, Ex. Ch.

Annotations.—*Mentd.* *Mulliner v. Florence* (1878), 3 Q. B. D. 484; *Yungmann v. Briesemann* (1892), 67 L. T. 642; *Cox v. Liddell* (1895), 2 Mans. 212; *Durham v. Robertson*, [1898] 1 Q. B. 765; *Hughes v. Pump House Hotel Co.*, [1902] 2 K. B. 190; *Whiteley v. Hill*, [1918] 2 K. B. 808; *Ellis's Trustee v. Dixon-Johnson*, [1924] 2 Ch. 451.

4987. Receipt—Unstamped.—Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to

refresh his memory.—*RAMBERT v. COHEN* (1802), 4 Esp. 213, N. P.

Annotation.—*Refd.* *Hill v. Barry* (1842), 7 Jur. 10.

4988. — — — — — **—**—An accountable receipt for money given by the agent of one who receives money from different customers for the purpose of investing annuities, etc., requires a stamp. Such agent having become blind, the receipt, although unstamped, may be read over to him in ct. for the purpose of refreshing his memory.—*CATT v. HOWARD* (1820), 3 Stark. 3, N. P.

Annotation.—*Refd.* *Clarke v. Chaplin* (1847), 5 Ry. & Can. Cas. 294.

4989. — — — — — **—**—*HISCOX v. BATCHELOR*, No. 4930, *ante*.

4990. Statement — By prisoner — Made before coroner.—Written notes made by the coroner of a statement made in his presence during an inquest by prisoner may be used by him at the trial, in order to refresh his memory as to what that statement was. The reading of such written notes does not entitle prisoner to have the depositions of other witnesses taken in the course of the same inquest read.—*R. v. WIGGINS* (1867), 31 J. P. 728; 10 Cox, C. C. 562.

4991. — — — — — **Made before magistrate.**—Where prisoner refused to sign his examination before the magistrate or to admit its truth, the ct. allowed parol evidence of prisoner's statement to be given, & permitted the magistrate's clerk to refresh his memory from the document.—*R. v. DEWHURST* (1825), 1 Lew. C. C. 47.

4992. — — — — — **—**—On an examination on a charge of felony before a magistrate, prisoner was asked if he wished to put any question to a witness against him. Instead of asking anything, he made a statement, which was written down on the depositions, but not signed by prisoner, who had received no caution:—*Held*: this statement was not evidence *per se*, but any one who heard prisoner make it might give evidence of it, refreshing his memory from what was thus written down; but in such a case prisoner ought to be told that that was not the proper time for him to make a statement.—*R. v. WATSON* (1851), 3 Car. & Kir. 111.

4993. — — — — — **Previously made by witness.**—A witness's previous written statement may be used to refresh his memory when exhausted.—*CHESTER (CITY) ELECTION PETITION, HEYWOOD v. DODSON & LAWLEY* (1880), as reported in 44 L. T. 285.

Annotation.—*Mentd.* *Salisbury Borough Case* (1883), 4 O.M. & H. 21.

4994. Tradesman's books.—The books of a tradesman are not evidence for him, but they may be used by him to refresh his memory.—

v. DEAR (1851), 18 L. T. O. S. 99.

E. Reference to Copies of Documents.

4995. General rule.—A clerk to a tradesman entered the transactions in trade, as they occurred,

the writer to refresh his memory.—*GIBSON v. STEVENSON* (1822), 3 Murr. 208.—*SCOT*.

p. Report.—A witness before giving his evidence may be allowed to look at a written report made by him on the subject.—*THOMSON v. BISSETT* (1823), 3 Murr. 294.—*SCOT*.

q. Certificate.—A certificate by a witness is not evidence, but is good to refresh his memory.—*GIBSONS v. MARR* (1823), 3 Murr. 258.—*SCOT*.

r. Log-book.—The log-book is just a memorandum, & there is no objection to the mate who kept it looking at it to refresh his memory.—*WIGHT v. LIDDEL* (1829), 5 Murr. 35.—*SCOT*.

m. Bill of exchange.—Where the question was whether the notice of this honour of a bill had been duly intimated the witness adduced to prove the notice of dishonour was entitled, if he chose, to refresh his memory by looking at a marking by him on the bill.—*THOMSON v. LEITH BANK* (1838), *Macfarlane*, 85.—*SCOT*.

n. Document in possession of witness—Since occurrence.—A witness allowed to refresh his memory by reference to a written document which had been in his possession uninterrupted since the occurrence in question.—*H.M. ADVOCATE v. WILSON* (1861), 4 Irv. 42.—*SCOT*.

o. Letter.—A letter may be used by

4984 i. Observations made by surveyor—At time of making survey.—A surveyor, who had made a survey of land by direction of the Govt., may refer to a plan of it made by himself shortly after the survey filed in the Crown Land Office, & upon which survey a grant of the land issued, for the purpose of enabling him to state the courses & distances which he run, his field notes of the survey having been lost.—*NILES v. BURKE* (1873), 14 N. B. R. (1 Pug.) 237.—*CAN*.

4994 i. Tradesman's books.—An entry in a merchant's books, good as a memorandum to refresh the memory of a witness.—*ROBERTSON v. EDINBURGH & LEITH SHIPPING CO.* (1820), 2 Murr. 366.—*SCOT*.

Sect. 6.—Examination: Sub-sect. 7, E., F. & G.]

into a waste-book, from his own knowledge; & the tradesman copied the entries, day by day, into a ledger, in the presence of the clerk, who checked them as they were copied:—*Held*: the clerk, in an action brought by the tradesman for goods sold & delivered, might use the entries in the ledger to refresh his memory, although the waste-book was not produced, nor its absence accounted for, the entries in the ledger being in the nature of entries made by the clerk himself.

The rule, that the best evidence must be produced, precludes a witness from refreshing his memory with a copy of an instrument which might itself be used for refreshing his memory, as much as it precludes the admission in evidence of the copy of an instrument which would be evidence in itself.—*BURTON v. PLUMMER* (1834), 2 Ad. & El. 341; 4 Nev. & M. K. B. 315; 4 L. J. K. B. 53; 111 E. R. 132.

4996. When permissible—Witness having independent recollection of facts.]—*TANNER v. TAYLOR* (1750), cited 3 Term Rep. at p. 754; 100 E. R. 811.

*Annotations:—*Consd. *Doe d. Church & Phillips v. Perkins* (1790), 3 Term Rep. 749. *Refd.* *R. v. St. Martin's, Leicester* (1834), 2 Ad. & El. 210; *Hill v. Barry* (1842), 7 Jur. 10.

4997. —.]—*KINGSTON'S (DUCHESS) CASE* (1770), 20 State Tr. 355.

*Annotations:—*Refd. *Hill v. Barry* (1842), 7 Jur. 10. *Mentd.* *Galbraith v. Neville* (1789), 1 Doug. K. B. n.; *Wilson v. Rastall* (1792), 4 Term Rep. 753; *Kennell v. Abbott* (1799), 4 Ves. 802; *White v. Hall* (1806), 12 Ves. 321; *Curling v. Thornton* (1823), 2 Add. 6; *It. v. Knaptoft* (1824), 2 B. & C. 883; *Stafford v. Clark* (1824), 9 Moore, C. P. 724; *Bland v. Lynam* (1827), 5 L. J. O. S. C. P. 87; *Martin v. Nicolls* (1830), 3 Sim. 458; *Thompson v. Blackhurst* (1833), 1 Nev. & M. K. B. 266; *Bandon v. Beecher* (1835), 9 Bl. N. S. 532; *Doe d. Peter v. Watkins* (1837), 3 Bing. N. C. 421; *R. v. Wye* (1838), 7 Ad. & El. 761; *R. v. Caley* (1841), 5 Jur. 709; *R. v. Sow* (1843), 4 Q. B. 93; *Meddowcroft v. Huguenin* (1844), 4 Moo. P. C. C. 386; *Robertson v. Struth* (1844), *Dav. & Mer.* 772; *Barrs v. Jackson* (1845), 1 Ph. 582; *Tarry v. Newman* (1846), 15 M. & W. 645; *De Bode v. R.* (1848), 13 Q. B. 364; *Bailey v. Harris* (1849), 13 Jur. 341; *It. v. Smith O'Brien* (1849), 7 State Tr. N. S. 1; *R. v. Basingstoke* (1850), 14 Q. B. 611; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *R. v. Blakemore* (1852), 2 Den. 410; *R. v. Haughton* (1853), 1 B. & B. 501; *Shedden v. Patrick* (1854), 23 L. T. O. S. 194; *R. v. Harrington Middle Quarter* (1855), 4 B. & B. 780; *Cammell v. Sewell* (1858), 3 H. & N. 617; *Liverpool Bank v. Foggo* (1860), 2 L. T. 594; *Routledge v. Hislop* (1860), 2 E. & E. 549; *Accidental Death Insce. v. Mackenzie* (1861), 5 L. T. 20; *Howlett v. Tarte* (1861), 10 C. B. N. S. 813; *Hunter v. Stewart* (1861), 4 De G. F. & J. 168; *The Justyn* (1862), 6 L. T. 553; *Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *Rogers v. Hadley* (1863), 9 Jur. N. S. 898; *Simpson v. Foggo* (1863), 8 L. T. 61; *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (1866), 10 Moo. Ind. App. 540; *R. v. Fanning* (1866), 10 Cox, C. C. 411; *Patch v. Ward* (1867), 3 Ch. App. 203; *Finney v. Finney* (1868), L. R. 1 P. & D. 483;

PART V. SECT. 6, SUB-SECT. 7.—E.

5000 i. When permissible—Witness originally acquainted with fact.]—A witness stated that as agent for pltf. he gave deft. certain parcels to deliver, with a memorandum of charges on each to collect, that witness had entered in a memorandum book all the parcels given to deft., that he had given this book to pltf., & had since searched among papers left by him pltf.'s agent for it, but without success. The witness produced a statement made from the memorandum book, & said he recollected the delivery of the parcel, his recollection not depending on the book, but that he could not speak of the sums except from the memorandum book:—*Held*: the non-production of the memorandum book was not sufficiently accounted for to admit secondary evidence of its contents.—*STOVEL v. ALLEN* (1851), 1 C. P. 300.—*CAN.*

5000 ii. —.]—*DAYNES v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1912), 22 W. L. R. 549; 3 W. W. R. 193; 7 D. L. L. 767.—*CAN.*

5000 iii. —.]—A witness may refresh his memory by reference to entries in a book: which entries were made by another person under witness's directions from documents written by witness at the time of the transactions & which entries were regularly compared by witness with the original memoranda.—*TALBOT DE MALAHIDE (LORD) v. COSACK* (1864), 17 I. C. L. R. 213.—*IR.*

5000 iv. —.]—Where entries are copied by a witness into a ledger from a rough day-book which was posted by him from small books kept by another person, & such small books have been destroyed, & it does not appear that when the facts recorded occurred or were entered in the small books witness was aware of them, &

Stimson v. Farnham (1871), L. R. 7 Q. B. 175; *Ochsenbain v. Papeller* (1873), 8 Ch. App. 695; *Plitters v. Allfrey* (1874), L. R. 10 C. P. 29; *Dover v. Child* (1876), 34 L. T. 737; *Leggott v. G. N. Ry.* (1876), 1 Q. B. D. 599; *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Priestman v. Thomas* (1884), 9 P. D. 210; *Caird v. Moss* (1886), 33 Ch. D. 22; *Seton v. Lafone* (1886), 18 Q. B. D. 139; *Borough v. Collins* (1890), 15 P. D. 81; *Kingston-upon-Hull Corp. v. Harding* (1892), 62 L. J. Q. B. 55; *A.-G. for Trinidad & Tobago v. Eriché*, [1893] A. C. 518; *Wallis v. Hands* (1893), 62 L. J. Ch. 586; *Boswell v. Coaks* (1894), 6 L. 167; *Ballantyne v. Mackinnon*, [1896] 2 Q. B. 455; *Dalton v. Fitzgerald* (1897), 66 L. J. Ch. 604; *N. E. Ry. v. Dalton Overseers*, [1898] 2 Q. B. 66; *Bynoe v. Bank of England*, [1902] 1 K. B. 467; *Turley v. Daw* (1906), 94 L. T. 216; *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; *Burdett v. Horne* (1911), 27 T. L. R. 402; *Bedford v. Cowtan*, [1916] 1 K. B. 980; *Isaacs v. Saltsstein*, [1916] 2 K. B. 139; *C. (otherwise H.) v. C.*, [1921] P. 399; *Ord v. Ord*, [1923] 2 K. B. 432.

4998. —.]—A witness may use a book containing entries not made from original documents, to enable him to state the time when such entries were made, but not so as to make such entries evidence.—*ROGERS v. MCCARTHY* (1800), 3 Esp. 106, N. P.

4999. — Original unintelligible.]—A witness has no right to refresh his memory with a copy of a paper made by himself six months after he wrote the original, although the original is proved to be so covered with figures that it is unintelligible, the original paper having been written near the time of the transaction.—*JONES v. STROUD* (1825), 2 C. & P. 196, N. P.

5000. — Witness originally acquainted with facts.]—A witness cannot give a copy of a shop book in evidence to prove facts contained in the shop book; but if he was originally acquainted with the facts themselves he may refer to such copy to refresh his memory (*BAYLEY, J.*).—*ANON.* (1827), 1 Lew. C. C. 101.

5001. — Printed copy of surveyor's report.]—A, a surveyor, made a survey or report, which he furnished to his employers: being afterwards called as a witness, he produced a printed copy of this report, on the margin of which he had, two days before, to assist him in giving his explanations as a witness, made a few jottings. The report had been made up from his original notes, of which it was in substance, though not in words, a transcript:—*Held*: he might look at this printed copy of the report, to refresh his memory.—*HORNE v. MACKENZIE* (1839), 6 Cl. & Fin. 628; *Macl. & Rob.* 977; 7 E. R. 834, H. L.

*Annotation:—**Mentd.* *Reeco v. Miller* (1882), 8 Q. B. D. 626.

5002. — Original lost.]—To refresh the memory of a witness, a document was put into his hand. This document was not in his writing, but he deposed that at the time of the transactions in question, & while they were fresh in his recollection,

in no way supervised the entries in the small books, the witness can have no remembrance of their occurrence, & cannot look at any of the documents to refresh a memory which never existed.—*R. v. BORRETT* (1905), 24 N. Z. L. R. 584.—*N.Z.*

5000 v. —.]—A witness who took a pre-recognition cannot refresh his memory by referring to his pencil notes of it made at the time.—*GRAHAM v. WESTERN BANK OF SCOTLAND & LUMSDEN* (1865), 37 Sc. Jur. 304.—*SCOT.*

5002 i. — Original lost.]—When a person has made extracts from a paper, he may, after the loss of the original, refresh his memory by reference to such extracts.—*DOE v. JACK* (1849), 1 All. 476.—*CAN.*

5002 ii. —.]—A witness who was present at a meeting & took notes, which were afterwards printed, can refer to the printed copy, after the

he made certain memoranda; that afterwards, at a distance of two or three months, those memoranda were copied by another person into the book now produced; that he, witness, inspected the copy, when made, & compared it with the original, at the time, & that he found it to be correct. The original was lost; the person who had made the copy was living:—*Held*: the copies of the memoranda, in the book now produced, were admissible for the purpose of refreshing the witness's memory.—*TALBOT DE MALAHIDE (LORD) v. CUSACK (1864)*, 12 L. T. 678.

5003. —.]—*R. v. HARVEY (1869)*, 11 Cox, C. C. 546.

Annotations:—*Mentd.* *R. v. Silverlock (1894)*, 63 L. J. M. C. 233; *R. v. Derrick (1910)*, 5 Cr. App. Rep. 162; *R. v. Rickard (1918)*, 119 L. T. 192.

F. For What Purposes Memory may be refreshed.

5004. To refresh recollection of handwriting.]—Although comparison of handwriting is not admissible evidence, when the fact to be proved is the handwriting of a particular person, whose supposed signature is upon a paper put into the witness's hand, yet, if such witness has a document, to which is affixed the handwriting of that person, as to whose signature the question arises, & which document he knows to have his genuine subscription, he has a right to recur to it for the purpose of refreshing his memory; a basis being first laid in his having once seen deft. sign his name, though he had forgotten the character of his handwriting.—*BURR v. HARPER (1816)*, Holt, N. P. 420, N. P. *Annotation*:—*Consd.* *Doe d. Mudd v. Suckermore (1836)*, 5 Ad. & El. 703.

5005. —.]—Where a witness has seen a party write his name once, he may use that document as a means of refreshing his recollection of the handwriting so as to enable him to swear to the same signature to another document.—*BORRETT v. JOHNSON (1848)*, 10 L. T. O. S. 465, N. P.

G. Effect of Reference to Document to refresh Memory.

5006. Right of inspection—By other side.]—If a paper be put into the hands of a witness to refresh his memory, counsel on the opposite side have a right to see it; but if it is merely given to him to prove a handwriting to it, they have not.—*SINCLAIR v. STEVENSON (1824)*, 1 C. & P. 582, N. P.

Annotations:—*Refd.* *Burgess v. Bennett (1872)*, 20 W. R. 720. *Mentd.* *Load v. Green (1846)*, 15 M. & W. 216; *Elmes v. Ogle (1851)*, 15 Jur. 180.

5007. —.]—If counsel for deft., in cross-examination put a paper into the witness's hand, to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence; & the opposite counsel may also ask the witness when it was written, without being bound to put it in.—*R. v. RAMSDEN (1827)*, 2 C. & P. 603.

5008. —.]—**Observations on general state of document—No right of reply.]**—If certain parts of a book are used to refresh the memory of a

witness for pltf., & deft.'s counsel, in his address to the jury, observes upon the general state of the book, & refers to other parts of it, such observations do not give pltf.'s counsel the right of reply.—*PULLEN v. WHITE (1828)*, 3 C. & P. 434, N. P.

5009. —.]—The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence.—*PALMER v. MACLEAR & M'GRATH (1858)*, 1 Sw. & Tr. 149; 164 E. R. 670. *Annotation*:—*Mentd.* *Bagshaw v. Pimm (1899)*, 80 L. T. 380.

5010. —.]—**Extent of inspection—Diary.]**—On cross-examination of a witness, the cross-examining counsel is not entitled to inspect the whole of a diary used by the witness to assist his memory, but only such parts as refer to the subject-matter of the suit.—*BURGESS v. BENNETT (1872)*, 20 W. R. 720

5011. —.]—Where a witness produces a diary in order to refresh the memory as to particular dates, its general contents ought to be open to inspection.—*BETTS v. BETTS & BRODRICK, BETTS v. BETTS (1917)*, 33 T. L. R. 200. *Annotation*:—*Mentd.* *Hensley v. Hensley & Nevin (1920)*, 122 L. T. 814.

5012. —.]—**By jury.]**—If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, & the jury may see the entries if they wish to do so; but if the opposite counsel cross-examine as to other entries in the same book, he makes them his evidence.—*GREGORY v. TAVERNOR (1833)*, 6 C. & P. 280; 2 Nev. & M. M. C. 175, N. P.

5013. Right to cross-examine on document—Extent of cross-examination.]—If a witness is called, & refreshes his memory as to the numbers of bank notes, by an entry in a book, the counsel of the opposite party may cross-examine as to the other parts of that entry.—*LOYD v. FRESHFIELD (1826)*, 2 C. & P. 325.

Annotations:—*Mentd.* *Alliance Bank v. Kearsley (1871)*, L. R. 6 C. P. 433; *Okell v. Eaton & Okell (1874)*, 31 L. T. 330.

5014. —.]—*GREGORY v. TAVERNOR*, No. 5012, *ante*.

5015. —.]—If a memorandum be produced to refresh a witness's memory, counsel for the party against whom it is produced may cross-examine upon it, & submit it to the jury, for the purpose of testing the accuracy of the witness, without entitling the opposite party to a reply.—*COLLINS v. WESTERN (1844)*, 3 L. T. O. S. 50.

5016. —.]—**Effect of cross-examination—How far document made evidence.]**—When a book is put into the hands of a witness to refresh his recollection, & questions are asked upon it in cross-examination, the book is not thereby made evidence for the party producing it, though it may be so for the opposite party.—*PAYNE v. IBBOTSON (1858)*, 27 L. J. Ex. 341.

—**Cross-examination generally.]**—See Subsect. 2, *ante*.

destruction of the original notes to show exactly what did take place.—*TAYLOR v. MASSEY (1891)*, 20 O. R. 429.—*CAN.*

5002 iii. —.]—Where a witness of an accident made notes of the occurrence & those original notes were expanded on the following day, & the loss of the original notes, the transcript thereof on the following day, & the accuracy thereof had been proved:—*Held*: the witness was entitled to refresh his memory by referring to the copy.—*DAYNES v. BRITISH COLUMBIA*

ELECTRIC RY. Co. (1912), 17 B. C. R. 498; 49 S. C. R. 518.—*CAN.*

s. —.]—**Original destroyed.]**—A witness permitted to refresh his memory by looking at a declaration as to the weight & number of loads of certain oats, where it was shown that the original from which the declaration was compiled had been destroyed, & the witness swore that he compared the declaration with such original memorandum, that it was an exact copy of the net weights in the original & that it was checked over, on the day

that it was made, with another person.—*MATTHEWSON v. CANADIAN PACIFIC RY.*, [1917] 3 W. W. R. 456; 85 D. L. R. 514; 10 Sask. L. R. 265.—*CAN.*

PART V. SECT. 6, SUB-SECT. 7.—G.

5006 i. Right of inspection—By other side.]—The opposite party is entitled to see any memorandum by which a witness refreshes his memory & to cross-examine upon it.—*MCLEAN v. MERCHANTS BANK (1916)*, 34 W. L. R. 81; 10 W. W. R. 191; 9 Alta. L. R. 471.—*CAN.*

Sect. 6.—*Examination: Sub-sect. 7, G.; sub-sect. 8. Sect. 7: Sub-sects. 1 & 2.]*

5017. Reference to notes of statement by prisoner at inquest—Right to have read depositions of other witnesses at inquest.—*R. v. WIGGINS*, No. 4990, *ante*.

SUB-SECT. 8.—REFUSAL OF WITNESS TO BE EXAMINED.

Refusal to attend.—*See* Sect. 3, sub-sect. 7, *ante*.

5018. Refusal to be sworn—Penalties—Punishment for contempt.—A person having attended under a subpoena as a witness, but refusing to be sworn, ordered to attend to be examined, or stand committed.—*HENNEGAL v. EVANCE* (1806), 12 Ves. 201; 33 E. R. 77, L. C.

Annotation:—Apld. *Brook v. Biddall* (1854), 2 Eq. Rep. 637.

5019. ————*]*—**COMMERCIAL BANK OF SCOTLAND, LTD. & MACEACHRAN v. LLOYD'S GENERAL ITALIAN ASSURANCE CO.** (1886), 2 T. L. R. 780.

5020. Refusal to answer questions—Penalties—Punishment for contempt.—A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or to stand committed.—*AUSTIN v. PRINCE* (1827), 1 Sim. 348; 57 E. R. 607.

— *On ground of privilege.*—*See* Sect. 2, *ante*.

SECT. 7.—FURTHER EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

5021. Discretion of judge to allow.—*ADAMS v. BANKART*, No. 5037, *post*.

5022. ————*]*—Permission to recall a witness is entirely within the discretion of the judge, & that discretion should be exercised with great caution.—*SHEDDEN v. PATRICK & A.-G.* (1869), L. R. 1 Sc. & Div. 470; 22 L. T. 631, H. L.

Annotations:—Consd. *H.M.S. Hawke* (1912), 28 T. L. R. 319; *Nash v. Rockford R. C.* [1917] 1 K. B. 384; *Young v. Grierson, Oldham* (1924), 41 R. P. C. 548.

PART V. SECT. 6, SUB-SECT. 8.

i. Refusal to be sworn—Reasonable excuse.—*CLOUGH v. LEAHY* (1904), 2 C. L. R. 139.—**AUS.**

a. Refusal to answer questions—Reasonable excuse.—*BRADLEY v. FIELD* (1913), 13 S. R. N. S. W. 451; 30 N. S. W. W. N. 135.—**AUS.**

b. ————*]*—*O'DONOGHE v. DONOVAN* (1877), 41 U. C. R. 591.—**CAN.**

c. ————*]*—*Held:* members of a religious teaching fraternity were not excused from answering questions, as to salaries paid to them, on the ground that they had made perpetual vows to devote themselves to the welfare of children & their own sanctification, & that the interests of the school-children might be prejudiced if they answered the questions.—*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES* (1917), 40 O. L. R. 272.—**CAN.**

d. ————*]*—To prove that shares had actually been bought, *pltf.* put in the evidence of a broker that he had purchased the shares on *pltf.'s* order. On cross-examination he refused to say from whom he had bought them, without giving any reason for the refusal.—*Held:* on account of such refusal, no weight should be given to this evidence.—*HICKEY v. LEGRESELEY* (1906), 4 W. L. R. 46; 15 Man. L. R. 304.—**CAN.**

e. ————*]*—*BATEMAN v. SVENSON* (1909), 18 Man. L. R. 493.—**CAN.**

PART V. SECT. 7, SUB-SECT. 1.

5021 i. Discretion of judge to allow.—A deed put in evidence without objection as a registered deed, was afterwards discovered not to have been duly acknowledged, whereupon *def.'s* counsel objected, in his address to the jury, that it did not give livery of seisin. *Semble:* the judge might allow the opposite party to give evidence of livery of seisin.—*SCRIBNER v. McLAUGHLIN* (1849), 1 All. 379.—**CAN.**

5021 ii. ————*]*—*Pltf. co.*, in order to prove a certain notice, called their secretary who testified to the loss of the original & to a sufficient search having been made for it. On cross-examination, he stated that he did not know from whom he had received the original, nor in whose handwriting it was. The paper was tendered, objected to, & rejected, & the judge also refused to permit *pltf.s* then to introduce further evidence to prove it.—*Held:* the discretion of the judge as to the further examination of the witness had not been properly exercised; & the answers of the two *defts.* should have been received.—*WINDSOR MARINE INSURANCE CO. v. LADD* (1871), 8 N. S. R. 493.—**CAN.**

5021 iii. ————*]*—*SIMPSON v. GLASS* (1872), 1 Pug. 99.—**CAN.**

5021 iv. ————*]*—*ALLAN v. MANITOBA & N. W. Ry. Co.*, *Re GRAY* (1893),

5023. — Evidence de bene esse—Appeal pending.—Circumstances in which after a trial the Ct. of Appeal gave leave for certain fresh evidence to be taken *de bene esse* before an examiner in view of the hearing of an appeal from the judgment after the trial.—*THE OLYMPIC, H.M.S. HAWKE*, [1913] P. 238; 83 L. J. P. 127; 28 T. L. R. 319, C. A.

Annotation:—Distd. *Nash v. Rockford R. D. C.*, [1917] 1 K. B. 384.

—*]*—*See, also*, Sub-sect. 2, *post*.

5024. Grounds for allowing.—The re-examination of a witness refused.

The ct. will not lay down that in no possible case, & under no possible circumstances, a witness may not be re-examined; but, under any circumstances, the ct. would accede to such a proposition with extreme jealousy. The party here is applying for the re-examination of her own witness: he has been very fully examined, & concludes his deposition in the strongest terms. It is confirmed by the examiner that he was fully & carefully examined; that the deposition was read over to him on the night on which it was taken; that he attended again on the following day, & the deposition was again read over to him. It would go to the destruction of all evidence whatever if a precedent of this kind were established (*SIR JOHN NICHOLL*).—*REEVES v. REEVES* (1813), 2 Phillim. 117; 161 E. R. 1094.

5025. — Omission of witness to state fact—Intended to be stated.—A witness omitted to state an additional fact he intended to state, & which, in a memorandum previous to his examination, he mentioned he could state.—*Held:* he could not be re-examined, to give him an opportunity of stating such fact.—*ASHEE v. SHIPLEY* (1821), 5 Madd. 467; 56 E. R. 974.

5026. — To prove exhibits.—Order made for the re-examination of a witness for the purpose of proving exhibits, & liberty given to the other party to cross-examine him.—*CLOUDER v. KENDALL* (1845), 4 L. T. O. S. 352.

Rebutting evidence.—*See* Sub-sect. 3, *post*.

— *To impeach credit of witness.*—*See* Sect. 8, sub-sect. 1, *post*.

9 Man. L. R. 388.—**CAN.**

5021 v. ————*]*—Further evidence may be taken. Whether it should be taken or not is a matter for the discretion of the ct. in each case.—*GRISH CHUNDER LAHRI v. SHOSHI SHIKARESWAR ROY* (1900), 1 L. R. 27 Cal. 951; L. R. 27 Ind. App. 110; 4 C. W. N. 631.—**IND.**

5024 i. Grounds for allowing.—An application to open up a judgment on the ground of newly discovered material evidence is properly made in ct. to the judge who tried the action.—*ARMOUR v. MERCHANTS BANK OF CANADA* (1896), 17 P. R. 108.—**CAN.**

5024 ii. ————*]*—The rule with respect to applications for leave to introduce newly discovered evidence is that the newly discovered evidence must be such as reasonable diligence on the part of the party offering it could have secured before the trial or hearing; the newly discovered evidence must be material, going to the merits of the case, & not merely cumulative or corroborative, & must be such as ought to be decisive of the case.—*Re COCHRAN'S TRUSTS* (No. 1) (1919), 52 N. S. R. 271.—**CAN.**

f. Recalling witness.—Where a witness on cross-examination proves documents for *def.*, it must in general be subject to the implied condition that the witness may be recalled by the opposite party after the documents

Power of judge to call & examine witness.]—See No. 4873, *ante*.

—Effect of exercise of power—On right of cross-examination.]—See Nos. 4813–4815, *ante*.

—In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 267, 275, 276, Nos. 2731, 2734, 2851–2855, 2867–2869.

5027. Grounds for refusing—Evidence discoverable before hearing—Delay in application.]—Pltf. was driving upon a highway within defts.' district, of which they were the highway authority. His pony suddenly put his foot through the crust of the highway & fell; pltf.'s arm was broken & his pony injured. He brought an action against defts. for £170 damages, alleging that the accident was caused by the improper construction by defts. of a drain under the highway. At the hearing he failed to prove that defts. had constructed the drain in question, but by arrangement he was allowed, without formal amendment of the pleadings, to contend that the drain was made by the defts.' "predecessors in title" (by which was intended their predecessors in the office of highway authority), & that defts. were liable for their predecessors' misfeasance. On this question the jury found that the accident was caused by the negligent construction of the drain & that the drain was constructed by some of defts.' predecessors in title, & they assessed the damages at £100. On those findings judgment was entered for pltf. Defts. appealed. At the close of their argument resp.'s counsel applied for leave, under R. S. C., Ord. 58, r. 4, to call further evidence that defts. had in fact made the drain in question. The action was tried with the jury in Feb. 1916, & heard on further consideration before the judge on Mar. 29. In the interval some persons residing in the neighbourhood, who had read the report of the case in local papers, offered evidence that defts. had made the drain. Pltf. obtained affidavits in May & in July, after defts. had given notice of appeal, & gave them notice that he should apply to call further evidence, but took no further steps until the appeal came on. The ct. refused the application on the grounds that pltf. had not shown sufficient promptness in applying, & that the ct. were not satisfied that he could not with due diligence have discovered the evidence before the hearing.—*NASH v. ROCHFORD RURAL COUNCIL*, [1917] 1 K. B. 384; 86 L. J. K. B. 370; 116 L. T. 129; 81 J. P. 57; 15 L. G. R. 103, C. A.

*Annotations:—*Consd. *Young v. Grierson, Oldham* (1924), 41 R. P. C. 548. *Refd.* *Ware & De Freville v. Motor Trade Assoc.*, [1921] 3 K. B. 40. *Mentd.* *Maxwell Willshire v. Bromley R. C.* (1917), 87 L. J. Ch. 241.

5028. ——— Books in possession of party.]

On an application for leave to adduce further evidence in the form of certain old books of pltf's.

are in evidence.—*L. v. KERR* (1843), 2 Kerr, 137.—**CAN.**

g. ———.]—If pltf. calls & examines deft. as a witness, he is not, when afterwards examined as a witness in his own case, to be treated as a recalled witness; but his counsel has a right to examine him, & to prove his defence as fully as if deft. had not been previously called as a witness by pltf.—*BETTS v. VENNING* (1873), 1 P. 267.—**CAN.**

h. ———.]—At the trial the judge having declined to allow a witness twice called in the progress of the suit to be recalled, or to wait for the possible arrival of another witness, the ct. refused to review the exercise of his discretion in so doing.—*GLEASON v. WILLIAMS* (1876), 27 C. P. 93.—**CAN.**

k. ———.]—Pltf. recalled a witness who previously gave evidence for him

& left the stand. Defts.' counsel objected to pltf. being allowed to recall, & upon the objection being overruled, objected generally to any of witness' testimony being received:—*Held*: this general objection did not enable defts. to claim that part of the evidence was improperly received, but that the particular evidence complained of should have been objected to.—*ALLEN v. McDONALD* (1881), 20 N. B. R. 533.—**CAN.**

PART V. SECT. 7, SUB-SECT. 2.

5029 i. General rule.]—It is discretionary with the judge at *Nisi Prius* to admit evidence at any time during the trial, even after counsel has addressed the jury.—*DOE v. CONNOLLY* (1856), 3 All. 337.—**CAN.**

5029 ii. ———.]—It is discretionary

which had been discovered since the trial of the action:—*Held*: R. S. C., Ord. 58, r. 4, was emphatic, & must be construed strictly; the books having been throughout in the possession of pltf's, could have been found before the trial of the action but for the fact that the search had been discontinued, & there were no special circumstances within the meaning of the rule; & the motion must be dismissed.—*YOUNG & CO., LTD.*

GRIERSON, OLDHAM & CO., LTD. (1924), 41 R. P. C. 548, C. A.

SUB-SECT. 2.—AT WHAT STAGE OF PROCEEDINGS ADMITTED.

5029. General rule.]—In a suit for an injunction to restrain a nuisance caused by chemical manufacture, pltf.'s counsel applied at the close of his speech for liberty to adduce evidence to explain, as pltf.'s witnesses had had no opportunity of doing, certain evidence of defts.' witnesses as to noxious vapours arising from a material, asphalt, stated to be used in the manufacture of varnish made by pltf., & to show that the word asphalt had a double meaning:—*Held*: the evidence should be admitted.

It is never too late to admit evidence to explain an error arising from the double meaning of a word (*JAMES, L.J.*):—*BIGSBY v. DICKINSON* (1876), 4 Ch. D. 24; 46 L. J. Ch. 280; 35 L. T. 679; 25 W. R. 89, C. A.

*Annotations:—**Mentd.* *Re Caerphilly Colliery Co., Pearson's Case* (1877), 46 L. J. Ch. 339.

5030. ———.]—A judge may at any period in a case allow further evidence to be called by either party for his own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right.—*BUDD v. DAVISON* (1880), 29 W. R. 192.

5031. On leave at trial to amend pleadings.]—Pltf. in a suit in which replication had been filed, & in which the bill had been amended subsequently to the filing of the answer, asked leave at the hearing to amend his bill by inserting an allegation necessary in order to enable him to prove his title to have the relief prayed. He alleged that his evidence contained proof of the allegation to be inserted:—*Held*: (1) under the rules of ct. to the Jud. Act, 1875 (c. 77), Ord. 27, rr. 1 & 6, he might have leave to amend his bill, but he was not to bring any further evidence; (2) deft. should have leave to adduce fresh evidence; (3) pltf. should pay the costs occasioned by the amendment.—*KING v. CORKE* (1875), 1 Ch. D. 57; 45 L. J. Ch. 190; 33 L. T. 375; 24 W. R. 23.

*Annotations:—*As to (1) *Consd.* *Nobel's Explosive Co. v. Jones* (1880), 49 L. J. Ch. 726. As to (3) *Fold.* *Mozeley v. Cowie* (1877), 47 L. J. Ch. 271. *Generally, Mentd.* *Roe v. Davies* (1876), 2 Ch. D. 729.

with a judge at *nisi prius* to receive evidence at any time during the trial.—*STILES v. BREWSTER* (1859), 4 All. 414.—**CAN.**

5031 i. On leave at trial to amend pleadings.]—*Semble*: it is not a proper exercise of his discretionary power for the judge, after the close of the evidence, to allow an amendment of the pleading to raise a point founded on some oral statement by a witness, which may have been perfectly complete so far as it was relevant to the issues which were being tried, but which if it had been given with reference to entering different issues might have been supplemented or qualified by other material evidence.—*GORDON v. MACGREGOR* (1909), 8 C. L. R. 316.—**AUS.**

5031 ii. ———.]—*SCOTT v. PALMER* (1881), 21 N. B. R. 304.—**CAN.**

Secl. 7.—Further evidence: Sub-secls. 2 & 3. A.]

5032. —.]—Evidence was opened showing that on three occasions lithofracture had been imported to London by K. & Co., the bills of lading being made out in the names of K. & Co., & indorsed by their manager in London to defts., who held an importation licence. Defts. having duly obtained leave from the Custom House authorities, had in their own names procured the delivery of these cargoes & transhipped them to lighters, from which they were afterwards taken & dealt with by K. & Co.'s London manager. There was evidence that in procuring the delivery of the cargoes defts. acted merely as Custom House agents for K. & Co., & without remuneration. Pltfs. asked leave to amend by charging defts. with infringement as such agents:—*Held*: pltfs. ought to have liberty to amend without going into further evidence, defts. to have liberty to amend their defence & adduce evidence in support, the costs to be reserved.—**NOBEL'S EXPLOSIVE CO. v. JONES & Co.** (1880), 40 L. J. Ch. 726; 42 L. T. 751; 28 W. R. 653; *reversd.* on other grounds (1882), 8 App. Cas. 1, H. L.

Annotations: **Mentd.** United Telephone Co. v. London & Globe Telephone & Maintenance Co. (1884), 20 Ch. D. 766; **Hadische Anilin und Soda Fabrik v. Basile Chemical Works Bindschieder**, [1898] A. C. 200.

5033. After plaintiff's case closed.—After pltf.'s case has been closed the ct. will not allow him to remedy a defect in his evidence unless it has occurred from inadvertency on the part of his counsel.—**ALDRID v. HALLIWELL** (1815), 1 Stark. 117, N. P.

5034. —.]—In civil cases, the judge will allow pltf.'s counsel, after he has closed his case, to recall a witness to prove a point omitted to be proved in the proper place.—**BROWN v. GILES** (1823), 1 C. & P. 118, N. P.

Annotation: **Mentd.** **Sanders v. Teape & Swan** (1884), 51 L. T. 3.

5035. —.]—If deft.'s counsel cross-examines as to certain misrepresentations made towards deft., & deceptions practised on him, this is to be considered as notice to pltf.'s counsel of the line of defence; & therefore if he has letters of deft., tending to show that he knew the real state of the facts, pltf.'s counsel ought to give them in evidence before pltf.'s case is closed, & he will not be allowed to put them in as evidence in reply.—**WHARTON v. LEWIS** (1824), 1 C. & P. 529, N. P.

5036. —.]—We have agreed that it is better not to lay down any particular rule, but to leave it to the discretion of the judge who tries a cause, under the particular circumstances, to admit or not admit what may be material (**BEST, C.J.**).

5033 i. After plaintiff's case closed.—]—Where after close of pltf.'s case he is allowed to examine deft., this does not re-open the matter, so as to entitle him to call other witnesses.—**WILKES v. HEATON** (1859), 17 U. C. R. 95.—**CAN.**

5033 ii. —.]—**CROSS v.** (1863), 13 C. P. 433.—**CAN.**

5033 iii. —.]—Although petitioner has closed his case without giving further evidence, the trial judge may, as at the trial of an ordinary action, re-open the case, & allow him to put further evidence to prove his status.—**Re MORRIS PROVINCIAL ELECTION** (1907), 6 W. L. R. 742.—**CAN.**

5033 iv. —.]—Deft.'s counsel desired at the close of pltf.'s case, to recall a witness to examine him as to what he said when he spoke of the delivery of the deed, having already had the opportunity of cross-examining him upon the point:—*Held*: it was a

matter within the discretion of the judge, & that he had exercised the discretion wisely.—**GRAHAM v. GRAHAM** (1877), 2 R. & G. 265.—**CAN.**

5040 i. After defence opened.—]—On the examination of witnesses under a commission where pltf. has closed his case, & deft. has called some of his witnesses, pltf. will not be allowed, against deft.'s wish, to recall any of his witnesses or call fresh witnesses.—**BELL v. CLARKE** (1884), 10 V. L. R. 283.—**AUS.**

5042 i. After defendant's case closed.—]—Evidence, which might have been given in chief & was not in contradiction of deft.'s evidence, was given in reply:—*Held*: this was a matter in the discretion of the judge.—**BARNES v. SHARPE** (1910), 11 C. L. R. 462.—**AUS.**

5042 ii. —.]—A variance in the description of the parish in an action of ejectment may be amended after counsel has addressed the jury, & judge

—**WALLS v. ATCHESON** (1826), 2 C. & P. 268, N. P.

5037. —.]—A judge has a discretion whether or not a witness shall be recalled after the party who called him has closed his case.—**ADAMS v. BANKART** (1835), 1 Cr. M. & R. 681; 1 Gale, 48; 5 Tyr. 425; 4 L. J. Ex. 69; 149 E. R. 1254.

5038. —.]—If in trespass for seizing & detaining a dog, deft. refuse to produce the dog, under notice, during the examination of pltf.'s witnesses, he will not be allowed to produce it afterwards for the purpose of invalidating the testimony of those witnesses.—**LEWIS v. HARTLEY** (1835), 7 C. & P. 405, N. P.

5039. —.]—Where the horse warranted is exhibited to the jury in the presence of witnesses during the deft.'s case, pltf. cannot call veterinary witnesses attending the view to give their then opinion, he having had the opportunity of inspection before closing his case.—**OSBORN v. THOMPSON** (1839), as reported in 2 Mood. & R. 254.

5040. After defence opened.—]**TAYLOR v. WADE** (1854), 23 L. T. O. S. 270.

5041. During defendant's case — Experiments made during adjournment.—]—The cause having been adjourned, during defts.' case, it is competent to defts. to recall a witness & prove that he had, in that interval, made certain experiments, to the absence of which allusion had been made on his cross-examination on the previous day.—**BALD-CKOCK v. GREAT WESTERN RY. Co.** (1849), 15 L. T. O. S. 370.

5042. After defendant's case closed.—]**ADAMS v. BANKART**, No. 5037, *ante*.

5043. —.]—On the trial of an action of trover for a bill of exchange, it was proved that defts., who were bankers, had discounted the bill for a customer for whom they were in the habit of discounting bills, & that the bill had been brought to them by the customer's clerk, who was directed to enquire whether they would discount it, & to state to defts. the particulars of an arrangement between the holder of the bill & the customer. Neither party called the clerk as a witness.

The ct. will not grant a new trial on the ground of a refusal by the judge to allow a witness to be called after the case has been closed, unless it is made out very clearly indeed that the judge in refusing has wrongly exercised his discretion.—**MIDDLETON v. BARNED** (1849), 4 Exch. 241; 18 L. J. Ex. 433; 154 E. R. 1200.

Annotation:—**Consd.** **Shaw v. Beck** (1853), **Saund. & M.** 67.

5044. —.]—**Calling defendant by plaintiff.**—]—After deft.'s case had been closed, an application

is not bound to receive new evidence on part of deft. to show that the parish was not rightly stated after the amendment.—**DOE v. PRY** (1849), 1 All. 335.—**CAN.**

5042 iii. —.]—Deft. having by his answer set up several matters of defence, which, through oversight, he had omitted to give evidence of, the ct., at the hearing, directed the cause to stand over, with liberty to both parties to give evidence upon those points.—**NORTHEY v. MOORE** (1856), 5 Gr. 609.—**CAN.**

5042 iv. —.]—Pltf. should go into the whole of his case in the first instance. It is not competent for pltf. to rely upon a *prima facie* case in the first instance & then support it by further evidence in reply. It is in the discretion of the judge whether he will allow pltf. to give evidence in reply, but such discretion may be reversed by the ct.—**NEARY v.** 7 N. S. R. 495.—**CAN.**

by pltf.'s counsel for leave to call as his witness a deft. whom he had expected to be called in support of deft.'s own case refused, pltf.'s counsel admitting that he had not been misled by any representation to the effect that deft. would be called.—*BARKER v. FURLONG*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 T. L. R. 406.

Annotations.—*Mentd.* Consolidated Co. v. Curtis, [1892] 1 Q. B. 495; *Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71.

5045. After defendant's case summed up.]—

(1) Upon the trial of issues in a patent case pltf. is entitled to call evidence in reply, for the purpose of rebutting a case of prior user set up by deft.; (2) but after the evidence for the defence has been summed up, deft. will not be allowed to adduce further evidence in answer to that given by pltf. in reply.—*PENN v. JACK* (1866), L. R. 2 Eq. 314; 14 L. T. 495; *sub nom.* *PENN v. JACK, PENN v. BIBBY, PENN v. FERNIE*, 14 W. R. 760; *on appeal, sub nom. PENN v. BIBBY*, 2 Ch. App. 127, L. C.

Annotations.—*As to* (1) *Consd.* *Adair v. Young* (1879), 40 L. T. 61. *Expld.* *Vernon v. St. James, Westminster, Vestry* (1880), 49 L. J. Ch. 130.

5046. During summing up of plaintiff's case.]—After the counsel for pltf. had commenced his summing up, deft. allowed to be called.—*ROCKCLIFFE v. PEARCE* (1858), 1 F. & F. 300, N. P.

5047. After hearing of case—Before judgment given.]—Nothing would be more dangerous to the administration of justice than to allow a party, after a case has been argued, to supply the very defect upon which the judgment of the ct. is about to be pronounced (*WIGRAM, V.-C.*).—*LANGFORD v. BRIGHTON, LEWES & HASTINGS RY. CO.* (1845), 4 Ry. & Can. Cas. 69.

5048. ———.]—After a cause has been heard, & before judgment given, the ct. will not allow either party to introduce additional evidence except by the consent of the other party.—*GIPPS v. GIPPS & HUME* (1863), 3 Sw. & Tr. 116; 1 New Rep. 481; 32 L. J. P. M. & A. 78; 7 L. T. 861; 9 Jur. N. S. 233; 11 W. R. 402; 164 E. R. 1217; *on appeal* (1864), 11 H. L. Cas. 1, H. L.

5049. — During judgment.]—A seaman returning to his ship from shore fell from the gangway & was drowned. On the hearing of a claim by the dependants the deputy judge began to give his award in favour of the dependants when it was pointed out to him that there had been no evidence that the seaman went on shore with leave. The deputy judge thereupon had a witness recalled upon this point, & being satisfied from this that the seaman had been given leave, awarded for the dependants.—*Held*: the judge was entitled to hear the evidence in this way.—*PETERS v. ARGOL (OWNERS)* (1912), 5 B. W. C. C. 414, C. A.

5047 i. After hearing of case—Before judgment given.]—*OULTON v. READ* (1865), 6 All. 283.—*CAN.*

5047 ii. ———.]—*FREEMOLD LOAN & SAVINGS' CO. v. MCLEAN* (1892), 8 MAN. L. R. 331.—*CAN.*

5047 iii. ———.]—When a case has been closed the ct. will only recall a witness for the purpose of clearing up some doubtful point in the evidence, & will not exercise this power in order to enable one of the parties to prove a fact material to his case.—*NELSON v. BUCHANAN* (1897), 16 N. Z. L. R. 69.—*N.Z.*

l. ———.]—*FAWCETT v. FAULKNER* (1903), 40 N. S. R. 398.—*CAN.*

m. ———.]—The master of a fishing boat made a claim against the owners for wages, & the owners counter-claimed against him for the value of missing gear. At the close of the hearing, judgment was reserved; & before judgment was given, the master

applied to reopen the case & for leave to give further evidence to account for the missing gear.—*Held*: such an application should be granted only in a very special case.—*BROWN v. THE ALLIANCE NO. 2* (1914), 27 W. L. R. 704; 16 D. L. R. 413; 19 B. C. R. 520.—*CAN.*

n. — Where party added.]—Where after the evidence at the hearing was closed on both sides, the ct. ordered the cause to stand over to add a party, further evidence between the original parties is inadmissible at the adjourned hearing.—*A-G. v. TORONTO STREET RY. CO.* (1868), 15 Gr. 187.—*CAN.*

o. After judgment in appeal—Pending further appeal.]—After the judgment of the Ct. of Appeal affirming the judgment of the trial judge had been pronounced, drawn up, & entered, & while an appeal was pending therefrom to the Supreme Ct. of Canada,

5050. After judgment—To influence costs.]—A witness cannot be called after judgment for the purpose of influencing the costs of the action.—*BRISTOL CORPN. v. GREAT WESTERN RY. CO. & MIDLAND RY. CO.* (1916), 80 J. P. 201; 14 L. G. R. 756; *on appeal, sub nom. GREAT WESTERN RY. CO. & MIDLAND RY. CO. v. BRISTOL CORPN.* (1918), 87 L. J. Ch. 414, H. L.

SUB-SECT. 3.—REBUTTING EVIDENCE.

A. In General.

5051. Discretion of judge to allow.]—It is in the discretion of the judge, subject to the reviewal of the ct. to determine in what stage of the cause evidence may be produced. In trespass for false imprisonment deft. pleaded the pltf. had stolen deft.'s chaff; he also pleaded that his chaff had been stolen, & that he had reasonable ground to suspect pltf. Pltf. gave evidence, in the first instance, to account for her possession of chaff. Dft.'s witnesses proved that the chaff in the pltf.'s possession was similar in quality to that lost by deft. (*inter alia*) that in both there was linseed:—*Held*: the judge had rightly exercised his discretion in allowing pltf. to call a witness in reply to account for the presence of linseed in the chaff found in pltf.'s possession.—*WRIGHT v. WILLCOX* (1850), 9 C. B. 650; 19 L. J. C. P. 333; 15 L. T. O. S. 228; 14 Jur. 746; 137 E. R. 1047.

Annotations.—*Appld.* *Shaw v. Beck* (1853), 8 Exch. 392; *Adair v. Young* (1879), 40 L. T. 61. *Consd.* *Maclaren v. Davis* (1890), 6 T. L. R. 372. *Expld.* *R. v. Crippen*, [1911] 1 K. B. 119. *Refld.* *Penn v. Jack* (1866), 14 L. T. 495.

5052. ———.]—Action claiming an injunction against the master of a ship in which a set of pumps, alleged to be an infringement, was used, as well as against the makers. Pltf. brought evidence at the trial in support of the case raised by his pleadings & particulars of infringement, & to meet the case raised by defts. on their pleadings & particulars of objections. Dfts. went into evidence on a much wider issue than that raised by the pleadings, etc. Pltf. applied to adduce evidence in reply by adducing instances of infringement other than those mentioned in the particulars of infringement, & which he had obtained during the course of the trial:—*Held*: under the circumstances he was entitled to bring in this evidence.—*ADAIR v. YOUNG* (1879), 40 L. T. 61; *on appeal*, 11 Ch. D. 136, C. A.

5053. ———.]—*MACLAREN & SONS v. DAVIS* (1890), 6 T. L. R. 372, D. C.

5054. What is rebutting evidence—Not mere confirmation of original case.]—Any evidence that

pltf. moved for leave to adduce further evidence for the purpose of showing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document:—*Held*: the application would be refused.—*DURBER WATCH CASE MANUFACTURING CO. v. TAGGART* (1899), 20 C. L. T. 374; 19 P. R. 233.—*CAN.*

PART V. SECT. 7, SUB-SECT. 3.—A.

5051 i. Discretion of judge to allow.]—It does not necessarily follow, that because pltf.'s witness when recalled to rebut deft.'s evidence, makes statements which in fact amount to a new case for pltf., the judge must therefore refuse to allow such statements to go to the jury.—*JEVLIN v. CHOCKER* (1850), 7 U. C. R. 398.—*CAN.*

5054 i. What is rebutting evidence—Not mere confirmation of original case.]—Evidence is admissible to contradict a statement of a fact made by a witness

evident (LORD STOWELL).—*CREWE v. CREWE* (1800), 3 Hag. Ecc. 123; 162 E. R. 1102.

Annotations.—*Mentd.* Phillips v. Phillips (1846), 4 Notes of Cases 523; *Gipps v. Gipps & Hume* (1863), 3 Sw. & Tr. 116; *Churchward v. Churchward*, [1895] F. 7.

5064. ———. *—M.* petitioned for a decree of nullity of marriage by reason of the alleged frigidity, etc., of H., the man, owing to which the alleged marriage had not been consummated. H. traversed the alleged frigidity, etc. At the hearing H. gave evidence that the non-consummation was caused by the pain felt & distress expressed by M. when he attempted to have connection. The evidence was objected to on the ground that such cause of non-consummation should have been alleged in the answer, but the ct. admitted the evidence, saying, that evidence in reply might be called, if the ct. should think that petitioner was taken by surprise.—*M. (FALSELY CALLED H.) v. H.* (1864), 3 Sw. & Tr. 517; 33 L. J. P. M. & A. 159; 10 L. T. 787; 13 W. R. 108; 161 E. R. 1376; *sub nom. MARSHALL (FALSELY CALLED HAMILTON) v. HAMILTON*, 10 Jur. N. S. 853.

Annotations.—*Mentd.* T. v. M. (falsely called T.) (1865), L. R. 1 P. & D. 31; Lewis (falsely called Hayward) v. Hayward (1866), 35 L. J. P. & M. 105; Dickinson v. Dickinson, [1913] P. 198; Scott v. Scott, [1913] A. C. 417.

5065. ———. *Where defence disclosed.*—*Deft.* called witnesses to prove exemption from tithe by reason of the barrenness of the land:—*Held*: although in the re-examination of a witness for pltf. a question had been asked as to the fertility of the land, pltf. was entitled to adduce evidence in reply to disprove the defence.—*GRESWOLDE v. KEMP* (1842), Car. & M. 635, N. P.

5066. ———. *By cross-examination.*—*COPE v. THAMES-HAVEN DOCK CO.*, No. 4907, ante.

to call F. in reply to *deft.*'s case, & the admission of his evidence was not such a surprise on *deft.* as to entitle him to a new trial.—*ADAMS v. FERGUSON* (1858), 4 All. 102.—*CAN.*

r. Malicious prosecution—*To disprove plea of defendant.*—*EASTWOOD v. STRIBLING* (1900), 26 V. L. R. 129.—*AUS.*

s. Defamation—*To show motive—Revenge.*—*HALL v. MARCHANT*, [1914] St. L. Qd. 174.—*AUS.*

t. As to revocation of licence—*To cut timber.*—Where pltf., in trespass for cutting & carrying away timber, issue being joined on a revocation of licence, called the agent of *deft.* to prove that he had revoked the licence to him, & the witness denied such revocation:—*Held*: pltf. might call other witnesses to prove that they had heard this witness admit that the licence had been revoked to him, & that the witnesses knew that he had still gone on & cut the timber after he had made the admission.—*MENAB v. STINSON* (1842), 6 O. S. 445.—*CAN.*

u. Whether evidence which might have been admitted—In first instance.—*Semble*: pltf. in ejectment relying on the opening of his case upon a *prima facie* title by possession, & being met by proof on the part of *deft.* of a prior possession cannot repel such proof by attempting to show that the possession of *deft.* is that of a tenant to him, pltf., as landlord. He should go into his case fully in the first instance.—*DOE d. OSBORNE v. McDUGALL* (1849), 6 U. C. R. 135.—*CAN.*

b. ———.—*Witness for pltf.* denied on cross-examination having made a statement in presence of L., who was afterwards called by *deft.*, & contradicted him:—*Held*: pltf. might call evidence in reply to rebut L.'s testimony & confirm that of his own witness; such evidence not being properly part of pltf.'s case in the first

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5067. ———. *By pleadings.*—In an action to restrain *defts.* from erecting a urinal in a mews, the statement of claim alleged that the soil of the mews was vested in & was the absolute property of three of pltf's. The statement of defence did not admit this allegation; but alleged that the mews had long been a highway dedicated to the public. At the trial of the action several witnesses were examined on both sides; & at the close of *defts.*' evidence, pltf's. applied for leave to call evidence in reply, to show that the soil of the mews had not been dedicated to the public:—*Held*: as pltf's. were distinctly apprised by the pleadings before the trial of the action what the nature of the defence would be, the application must be refused.—*VERNON v. ST. JAMES, WESTMINSTER VESTRY* (1880), 49 L. J. C. 130; 42 L. T. 82; on appeal, 16 Ch. D. 449, C. A.

Annotations.—*Mentd.* Gas Light & Coke Co. v. St. Mary Abbots, Kensington, Vestry (1884), Chb. & El. 368; Sellers v. Matlock Bath L. B. (1885), 14 Q. B. D. 928; Graham v. Newcastle-upon-Tyne Corp'n. (1892), 67 L. T. 260; Pethick v. Plymouth Corp'n. (1894), 70 L. T. 304; Parish v. London City Corp'n. (1901), 67 J. P. 55; East Fremantle Corp'n. v. Arnolds, [1902] A. C. 213; A.-G. & London Property Investment Trust v. Richmond Corp'n. & Gosling (1903), 89 L. T. 700; Mayo v. Seaton U. D. C. (1903), 2 L. G. R. 127; A.-G. v. Dorchester Corp'n. (1906), 4 L. G. R. 675; Mudge v. Penge U. D. C. (1916), 115 L. T. 679.

5068. In action of detinue.—*To prove in what right subject-matter received.*—If a *deft.*, in an action of detinue for papers, set up as a defence that he delivered up the papers to K., in pursuance of a notice from pltf.'s attorney to that effect, pltf.'s counsel may call K. as a witness in reply, to prove that he received the papers in another right, & not on behalf of pltf.—*ANDERSON v. PASSMAN* (1835), 7 C. & P. 193, N. P.

Instance.—*WHIRLPLEY v. RILEY* (1851), 2 All. 275.—*CAN.*

c. ———.—Where a party upon whom the *onus* of proof lies produces a receipt before the master, or other proof of a nature generally conclusive, & closes his evidence, & the other side produces testimony tending to shake this evidence, further evidence in support should be allowed to be produced, though in strictness it may be such as might have been produced in the first instance.—*MOODY v. MCCANN* (1860), 1 Ch. Ch. 88.—*CAN.*

d. ———.—When *deft.* on the trial swore to a final settlement & an order given pltf. for the balance, the ct. refused to grant pltf. a new trial on an affidavit stating that the paper sworn to as having been an order had been found since the trial, & that it was not an order, but a statement of an account with another party. Pltf. should have rebutted the testimony as to the settlement & order, & given secondary evidence of the contents of the paper, first proving its loss.—*CYR v. HART* (1873), 2 Pug. 71.—*CAN.*

e. ———.—In an action of replevin, pltf. proved ownership & rested his case. *Deft.* then moved for a nonsuit. Pltf. offered evidence in rebuttal to meet the case made by *deft.*, which was rejected, on the ground that evidence to prove the non-existence of the tenancy alleged would be merely confirmatory of pltf.'s case, & the action was disposed of by allowing *deft.*'s application for a nonsuit:—*Held*: in the circumstances, the rejection of the evidence tendered by pltf. in rebuttal could be sustained only on the ground that the *onus* of proof on the issues to which it related was at the outset of the case on pltf.—*MCADAM v. KICKBUSH* (1905), 11 B. C. R. 488.—*CAN.*

f. Action of ejectment—*To rebut plea of title by possession.*—In an action

of ejectment by a son against his father, pltf. claimed under a deed from *deft.*. There was evidence to show that since this deed *deft.* had been more than twenty years in possession without any recognition of pltf.'s right. Pltf. to repel this evidence, attempted to show that during a part of that period *deft.* was in possession as agent of his, pltf.'s brother, to whom he had given a lease, & among other evidence he offered a paper in *deft.*'s handwriting, purporting to be a lease from pltf. to his brother, of certain lands, including the premises in question, for a part of the time during which *deft.* claimed to have held adversely. At the foot, but not in *deft.*'s writing, was written pltf.'s name, & the word "copy." No proof was offered respecting this paper, except that it was in *deft.*'s handwriting:—*Held*: such paper should have been received.—*MCQUEEN v. MCQUEEN* (1852), 10 U. C. R. 193.—*CAN.*

g. Collateral matters.—*Defts.* called pltf. & after asking him some questions produced a deposition made by him before a magistrate, which was at variance with his answers. He admitted the contradiction, but said his present evidence was correct, & gave as an explanation that he was much confused at the time, being without papers which he wished to refer to & that all he said was not in the deposition:—*Held*: this explanation was a collateral matter, & *defts.* therefore could not call the magistrate to disprove it.—*BEEMER v. KERR* (1864), 23 U. C. R. 537.—*CAN.*

h. To disprove signature.—Where a witness, on cross-examination, denied having signed a paper, but which was not then shown to him, & the opposite party afterwards produced the paper, & gave evidence to prove the witness' signature to it, the witness may be recalled to disprove the signature.—

Sect. 7.—Further evidence: Sub-sect. 3, B.; sub-sect. 4. Sect. 8: Sub-sect. 1, A.]

5069. To disprove alibi.]—Pltf. in an action on the case gave, as confirmatory evidence of deft.'s having committed the tort proved at L. proof that he was seen near the spot at the time in question, & deft. called witnesses, who swore that deft. was at R. at that time. Pltf. was allowed to give in reply additional evidence of deft.'s being at L. such evidence being a direct contradiction of the new fact of deft.'s being at R.—*v. AYNWORTH* (1838), 2 Mood. & R. 168, N. P.

Annotation:—Apld. Rogers v. Manley (1880), 42 L. T. 584.

5070. ———.]—Pltf. rested his case partly on an alleged conversation between himself & deft. at pltf.'s house on a certain evening in the presence of pltf.'s wife. Pltf.'s wife was cross-examined as to the substance of the alleged conversation, but not as to the fact of deft. having been in the house on that occasion. Deft. having in his examination in chief denied that he was in the house at all on the evening in question, leave was given to pltf. after the evidence on both sides was closed, to call further evidence to rebut deft.'s denial.—*ROGERS v. MANLEY* (1880), 42 L. T. 584.

5071. In action for false imprisonment—To prove ownership.]—BLACKBURN *v.* ——— (1813), 2 L. T. O. S. 96.

5072. ———. To explain circumstances set up by defence.]—WRIGHT *v.* WILLCOX, No. 5051, ante.

5073. In action on bill of exchange—Proof of signature.]—PHILPOT *v.* STEDMAN (1816), 6 L. T. O. S. 319.

5074. In interpleader proceedings—Validity of deed of assignment.]—Upon the trial of an interpleader issue in a county ct. for the purpose of trying the title to certain goods taken in execution, pltf., in support of his title, gave in evidence a deed, which was valid upon the face of it, by which execution debtor had assigned to him the goods in question; but the witness called to prove the execution of the deed was cross-examined by

defts., with a view to show that the deed was therefore void:—*Held: pltf. was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the judge to do so, & although the nature of the defence appeared by the cross-examination of the attesting witness; & the judge was wrong in refusing to receive evidence in reply, to rebut a case of fraud set up by defts. to invalidate the deed.*—*SHAW v. BECK* (1853), 8 Exch. 392; 1 Saund. & M. 67; 20 L. T. O. S. 211; 17 J. P. 72; 155 E. R. 1401.

Annotations:—Consd. Penn v. Jack (1866), L. R. 2 Eq. 314; *Vernon v. St. James, Westminster Vestry* (1880), 49 L. J. Ch. 130.

5075. In patent action—To disprove instances of prior use.]—PENN *v.* JACK, No. 5045, ante.

5076. ———.]—When a deft. to a patent suit in which replication is filed has given evidence of instances or prior user not mentioned in his answer, & leave has been granted to pltf. to adduce fresh evidence to disprove these instances, deft. will not necessarily be entitled to bring further evidence to rebut the fresh evidence so adduced by pltf.—*POUPARD v. FARDELL* (1869), 18 W. R. 59.
———.]—*See, generally, PATENTS.*

SUB-SECT. 4.—ON APPEAL.

In civil proceedings.]—See, generally, PRACTICE. In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 512–516.

SECT. 8.—IMPEACHING CREDIT OF WITNESS.

SUB-SECT. 1.—PARTY'S OWN WITNESS.

A. In General.

See Criminal Procedure Act, 1865 (c. 18), s. 3.

5077. Discretion of judge to allow credit of witness to be impeached.]—I mean to decide this, & no further. That in each particular case there must be some discretion in the presiding judge,

that defts. should not be permitted to contradict their own witness:—*Held: the trial erred in his refusal to admit such evidence.*—*MARUZECKA v. CHARLESWORTH* (1916), 33 W. L. R. 823; 9 W. W. R. 1313.—*CAN.*

q. To corroborate statement of witness for Crown.]—In a trial for murder a witness who swore he identified prisoner as one of the persons who committed the murder, was cross-examined on behalf of prisoner as to an alleged conversation which he had shortly after the commission of the crime, in which he was alleged to have stated that prisoner was not the guilty party; the witness denied that he made such a statement, & prisoner as a substantial part of his defence produced A. & B. who were present at the alleged conversation to contradict the witness. At the close of prisoner's case the Crown was allowed to go into a rebutting case in order to produce C. & D., who were present at the alleged conversation, to corroborate the statement of the witness & contradict A. & B.—*R. v. WHELAN* (1881), 14 Cox, C. C. 595.—*IR.*

r. To rebut statements made extra-judicially.]—Defender, who had cross-examined one of pursuer's witnesses, offered to contradict the statements made by that witness on cross-examination by proving counter statements extra-judicially made by him when not on oath:—*Held: such proof was incompetent.*—*HERCULES INSURANCE Co. v. HUNTER* (1836), 14 Sh. (Cl. of Sess.) 1137; 15 Sh. (Cl. of Sess.) 1318; 32 Fac. Coll. App. 62.—*SCOT.*

TOMKINS v. THIBBETS (1868), 1 Han. 317.—*CAN.*

k. To rebut inference of negligence.]—When pltf. gives the evidence of medical men as to the proper treatment of cases of frozen limbs, the necessity of frequent visits, & their practice in particular cases; deft. may give evidence of the treatment of other cases of a similar character, & of the results, in order to rebut the inference of negligence arising from the evidence on the part of pltf.—*KEY v. THOMSON* (1868), 1 Han. 207.—*CAN.*

l. To show that admission was to discredit plaintiff.]—Where deft. on cross-examination was asked if he had not made an admission to T. of his agreement, the breach of which was complained of, & denied it, it is competent for pltf. to rebut this evidence by showing deft. had made the admission for the purpose of discrediting deft., even though it also affected pltf.'s case.—*WHITTAKER v. PUG* 436.—*CAN.*

To repel allegation of unchastity.]—On the trial of an action for breach of promise of marriage, where pltf. gave evidence of her seduction by deft., the latter, by his cross-examination of pltf., attempted to show her unchastity before her acquaintance with him:—*Held: this gave her the right to repel the imputation involved in such cross-examination, not only her own evidence, but also to licite her character by*
l.—BURKE v. SCRIPPER (1876),

n. Denial of fact on animation of plaintiff.—*D.* testimony as to that fact—Whether rebutting evidence admitted.]—The fact of pltf. having denied on cross-examination a fact afterwards testified to by deft., will not prevent pltf. calling witnesses to rebut deft.'s testimony on the point as to which pltf. had been cross-examined.—*DOE d. BARNES v. BELYEA* (1880), 19 N. B. R. 541.—*CAN.*

o. Evidence in rebuttal after re-examination.]—The judge at the trial consulted, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the *onus* of which was on defts., & for assessment of damages. Deft.'s counsel cross-examined one of pltf.'s witnesses on the question of fraud, & pltf. re-examined him upon the cross-examination:—*Held: such re-examination did not deprive pltf. of his right to call witnesses in reply to deft.'s evidence of fraud; at all events, this was a matter for the judge at the trial.*—*McDONALD v. MURRAY* (1884), 5 O. R. 559.—*CAN.*

p. Refusal to allow—To correct judge's assumption.]—Where deft. called by defts. made certain statements upon cross-examination, & while it was proceeding the judge stated that he was going to assume certain facts from those statements & defts. proposed to call the other defts. to show that the judge's assumption was wrong, but the judge refused to such evidence on the ground

as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice (ABBOTT, C.J.).—**BASTIN v. CAREW** (1824), Ry. & M. 127, N. P.

Annotation.—**Consd. Price v. Manning** (1889), 42 Ch. D. 372.

5078. —. —. —.]—On the trial of an issue from the Ct. of Ch., with power to pltf. to examine deff. as a witness:—*Held*: as matter of right, pltf.'s counsel might cross-examine deff., although called as his witness; deff. standing in a situation necessarily adverse.

If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination (BEST, C.J.).—**CLARKE v. SAFFERY** (1824), Ry. & M. 126, N. P.

Annotation.—**Consd. Price v. Manning** (1889), 42 Ch. D. 372.

5079. —. —. —.]—**PARKIN v. MOON**, No. 4835, *ante*.

5080. —. —. —.]—**R. v. MURPHY**, No. 4756, *ante*.

5081. —. —. —.]—A party to an action who calls an opponent as a witness has no right to cross-examine him, however hostile he may be, without leave of the judge. Whether the witness is a litigant or not, it is a matter of discretion in the judge whether he shows himself so hostile as to justify his cross-examination by the party calling him.—**PRICE v. MANNING** (1889), 42 Ch. D. 372; 61 L. T. 537; 37 W. R. 785; *sub nom. PRICE v. MANNING, MANNING v. PRICE*, 58 L. J. Ch. 649, C. A.

5082. —. —. —.]—*Whether subject to review*.—**GREENOUGH v. ECCLES**, No. 5107, *post*.

5083. —. —. —.]—At the trial of an action deff.'s counsel, in order to show that a witness called by him was hostile, & to obtain leave to treat him as such under Common Law Procedure Act, 1854 (c. 125), s. 22, asked the judge to look at an affidavit made by the witness in a former action. The judge, being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to show that he was hostile, refused to look at the affidavit. On motion for new trial:—*Held*: the discretion given to the judge under above sect. was absolute, & the ct. had no jurisdiction to review his decision.

PART V. SECT. 8, SUB-SECT. 1.—A.

5082 i. *Discretion of judge to allow credit of witness to be impeached—Whether subject to review*.—The ct. will not review the discretion of the judge at the trial in receiving evidence to contradict a party's own witnesses as being adverse, nor in receiving evidence on the part of the defence after the close of pltf.'s case, even though for the purpose of corroborating the defence.—**HERBERT v. MERCANTILE FIRE INSURANCE CO.** (1878), 43 U. C. R. 384.—**CAN.**

5088 i. *What is hostility—Evidence unfavourable to party calling witness*.—Where a witness being called to prove pltf.'s case persists in making positive, though very improbable statements, disproving it, the ct., in the absence of any other witness, will not allow the case to go to the jury.—**VINCENT v. SRAQUE** (1847), 3 U. C. R. 283.—**CAN.**

5088 ii. —. —. —.]—Where one of the parties to a suit is called as a witness by the other it is discretionary with the judge to allow him to be examined as a hostile witness, & to restrict his own conduct to the style of an examination-in-chief. The opposite party on the record is not necessarily a hostile witness; his conduct on the stand is the proper test.—**ATKINSON v. ATKINSON** (1862), 5 All. 271.—**CAN.**

5088 iii. —. —. —.]—If a witness called to prove a case unexpectedly gives evidence in opposition to it,

the judge may allow the party calling such witness to treat him as hostile & to cross-examine him; though the effect of doing so may be to discredit his testimony.—**DAVIDSON v. ARSINEAU** (1862), 5 All. 289.—**CAN.**

5088 iv. —. —. —.]—In trespass against the sheriff for taking goods, pltf. called the bailiff who made the seizure & sale. He swore that pltf., after giving notice of his claim to the goods, withdrew it, & that the sale went on. Pltf. offered to disprove the withdrawal:—*Held*: such evidence was inadmissible as relevant to the issue, though contradicting pltf.'s own witness.—**ROBINSON v. RYNOOLLS** (1864), 23 U. C. R. 560.—**CAN.**

5088 v. —. —. —.]—**ALMON v. LAW** (1894), 26 N. S. R. 310.—**CAN.**

5088 vi. —. —. —.]—Pltf.'s counsel read to his own witness statements made by witness at a coroner's inquest & ask him to confirm them. No ruling was obtained that the witness was adverse, but the questions were admitted subject to objection:—*Held*: inadmissible, because such questions were either an attempt on counsel's part to have evidence at the inquest sworn to before the jury, or an attempt to contradict his own witness for which no foundation was laid.—**McGOWAN v. WARNER** (1913), 41 N. B. R. 524; 14 E. L. R. 47; 15 D. L. R. 134.—**CAN.**

5088 vii. —. —. —.]—A witness who is unfavourable is not necessarily hostile;

RICE v. HOWARD (1880), 10 Q. B. D. 681; 55 L. J. Q. B. 311; 34 W. R. 532; 2 T. L. R. 457, D. C.

Annotations.—**Consd. R. v. Williams** (1913), 77 J. P. 240

Reid. R. v. Smith (1909), 2 Cr. App. Rep. 86.

5084. —. —. —.]—*Semble*: there would have to be very exceptional circumstances to justify an appeal to the Ct. of Criminal Appeal from the ruling of a judge at a trial that a witness for the Crown should be treated as a hostile witness, if, indeed, an appeal lay upon that ground at all.—**R. v. WILLIAMS** (1913), 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. Rep. 133, C. C. A.

Annotations.—*Reid. R. v. Birch* (1924), 93 L. J. K. B. 385.

Mentd. R. v. White (1922), 17 Cr. App. Rep. 60.

5085. What is hostility—Witness a hostile litigant.—**CLARKE v. SAFFERY**, No. 5078, *ante*.

5086. —. —. —.]—**PRICE v. MANNING**, No. 5081, *ante*.

5087. —. —. —.]—*Party obliged to call witness*.—The rule is, that where the law obliges a party to call a witness, he may contradict him. **R. v. CARPENTER** (1844), 1 Cox, C. C. 72.

5088. —. —. —.]—*Evidence unfavourable to party calling witness*.—**GREENOUGH v. ECCLES**, No. 5107, *post*.

5089. —. —. —.]—*Witness contradicting certificate previously given by him*.—A surgeon called for pltf., to whom he had given a certificate of serious injury, contradicting it, & alleging that it was collusively given, was allowed to be treated as adverse.—**MARTIN v. TRAVELLERS' INSURANCE CO.** (1859), 1 E. & P. 505, N. P.

Annotations.—*Mentd. Hamlyn v. Crown Accident Insce.* (1893), 68 L. T. 701; *Fenton v. Thorley*, [1903] A. C. 443.

5090. —. —. —.]—*Witness tampered with*.—If it is reasonably supposed that a witness has been tampered with, he may be treated as hostile with a view to discover the fact.—**HEREFORD CITY CASE** (1860), 14 L. T. 347.

5091. —. —. —.]—*Witness in communication with other side*.—(1) A witness who gives evidence fairly in favour of one side, & does not fence or prevaricate, cannot be treated as a hostile witness by the counsel by whom he is called.

(2) A witness who is shown to have been in

a hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth.—**LUCHIRAM MOTILAL ROID v. RADHA CHAIKIAN PONDAR** (1921), 1 L. R. 40 Calc. 93.—**IND.**

5088 viii. —. —. —.]—A party cannot discredit his own witness; but, if a witness turn out adverse & unwilling to speak the truth, justice may require a relaxation of this rule.—**MANUEL v. FIASER** (1819), 1 Murr. 386.—**SCOT.**

5088 ix. —. —. —.]—To entitle a party calling a witness to cross-examine him on the ground of hostility, such witness must appear to the ct. to be hostile, but the mere fact that he gives evidence adverse to such party & contrary to what was expected does not necessarily render him hostile.—**FARMER & FARMER'S TRUSTEE v. McMILLAN** (1905), T. H. 134.—**S. AF.**

5088 x. —. —. —.]—To entitle a party to cross-examine a witness called by him, such witness must, in the opinion of the ct., be proved to be adverse. An allegation that the witness, on a previous occasion, has made a statement inconsistent with his present testimony, is immaterial to prove that he is adverse. This fact can only be proved from his demeanour in the box, his position towards, or relationship to, the party calling him & the general circumstances of the case.—**MEYER'S TRUSTEE v. MALAN** (1911), T. P. D. 559.—**S. AF.**

Sect. 8. — Impeaching credit of witness: Sub-sect. 1, A., B. & C. (a) & (b).]

communication with the other side is not necessarily a hostile witness.

(3) What passes in the office of the agent of the sitting member after the election cannot be used to prove a witness hostile for the purpose of establishing a case against the sitting member.—*NORTHALLERTON BOROUGH CASE, THORNTON'S CASE (1866), 14 L. T. 304.*

5092. — Two equally credible witnesses contradicting each other.—When two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one & accredit the other.—*SUMNER & LEIVESLEY v. BROWN (JOHN) & CO. (1909), 25 T. L. R. 745.*

5093. — Witness giving evidence at variance with previous statement.—(1) The hostility must be shown in open ct. When one wants to cross-examine one's own witness, one cannot take as the ground of hostility the fact that he does not now make the statement which he had made before (*JELLE, J.*).

(2) If the learned judge had thought the witness hostile, he might have allowed him to be asked if he had made a statement (*WALTON, J.*).—*R. v. SMITH (1909), 2 Cr. App. Rep. 86, C. C. A.; subsequent proceedings, 2 Cr. App. Rep. 106, C. C. A.*

5094. — Must be shown in open court.—*R. v. SMITH, No. 5093, ante.*

B. By Cross-Examination.

5095. When allowed.—*BASTIN v. CAREW, No. 5095, ante.*

5096. — Witness a hostile litigant.—*CLARKE v. SAFFERY, No. 5078, ante.*

5097. ——*PRICE v. MANNING, No. 5081, ante.*

5098. ——*R. v. MURPHY, No. 4756, ante.*

5099. ——If on the trial of a charge of murder a witness for the prosecution shows any unfair bias, the counsel who calls him may cross-examine him.—*R. v. CHAPMAN (1838), 8 C. & P. 558.*

Mentd. R. v. Guttridge (1840), 9 C. & P. 228; R. v. Sealte (1841), 9 Dowl. 553; R. v. Andrews (1844), 2 Dowl. & L. 10.

5100. — To show inducements to betray party calling witness.—The counsel calling a witness who has given unfavourable evidence on cross-examination, may on re-examination ask him questions to show inducements to betray the party who has called him.—*DUNN v. ASLETT (1838), 2 Mood. & R. 122, N. P.*

—(1) The situation in which a witness stands towards either party, does not give the party calling the witness a right to cross-examine him unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one.

(2) If a witness for a prosecution disprove prosecutor's case, prosecutor may call other witnesses to prove the facts denied by the former witness, & thus incidentally contradict that witness & show him to be unworthy of credit; but prosecutor cannot adduce any evidence not otherwise admissible for the sole purpose of discrediting his own witness.—*R. v. BALL (1839), 8 C. & P. 745.*

5102. — Witness giving evidence at variance with previous statement.—*R. v. SMITH, No. 5093, ante.*

Cross-examination, generally, see *Sect. 6, sub-sect. 2, ante.*

C. By Reference to Previous Statements.

(a) In General.

5103. When allowed.—A. was called as a witness by deft., to prove a partnership, but he proved the contrary; deft. then tendered in evidence an answer of A. to a bill filed in Chancery, in which A. swore that up to a certain time he was a partner with deft.:—*Held*: it was competent to deft., after A. had denied the partnership, to prove the existence of it by other witnesses.

Semble: The answer [to the bill] was not admissible in evidence, because the only effect of it was to discredit A. deft.'s own witness.

I doubt whether deft. was at liberty to put in the answer in Chancery of the witness in order to discredit him. It was competent to pltf. in cross-examination to have asked the witness if he had sworn, in his answer in Chancery, contrary to the fact he was then deposing to; & if he had said that he had not, then pltf., in order to discredit him, might have given the answer in evidence; but he could not do so without putting the preliminary question to him. But I think deft. ought not to have been permitted so to discredit his own witness. The present impression of my mind therefore is, that the answer ought not to have been received in evidence (*BAYLEY, J.*).—*EWER v. AMBROSE (1825), 3 B. & C. 746; 5 Dow. & Ry. K. B. 629; 3 L. J. O. S. K. B. 115; 107 E. R. 910. Annotations:—Consd. Wright v. Beckett (1834), 1 Mood. & R. 414. Refd. Bradley v. Ricardo (1831), 8 Bing. 67.*

5104. ——Where a witness gives on cross-examination unfavourable testimony to the party calling him, & on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him by showing he had given such different account.—*HOLDSWORTH v. DARTMOUTH CORPN. (1838), 2 Mood. & R. 153, N. P.*

Annotations:—Consd. Winter v. Butt (1841), 2 Mood. & R. 357; Melhuish v. Collier (1850), 15 Q. B. 878.

5105. ——(1) Although the general rule is, that, on the trial of a cause, a party shall not discredit his own witness, yet, if the witness unexpectedly gives adverse evidence, the party may ask him if he has not, on a particular occasion, made a contrary statement; & the question & answer may be stated by the judge to the jury with the rest of the evidence; the judge cautioning them not to infer, merely from the question, that the fact suggested by it is true. *Qu.*: whether, in such case the party may contradict the witness by evidence as to such former statement.

(2) If a witness called in support of a case unexpectedly gives evidence in opposition to it, the party calling him may go on to prove the case by other witnesses; & it will be no objection to the proof of any relevant fact that the statement of it contradicts, & thereby indirectly discredits, the first witness. The fact is relevant, though it be not part of the transaction on which the issue turns, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case. Thus, if pltf.'s first witness denies a material fact, & states that persons connected with pltf. have offered him money to assert it, pltf. may call those persons, not only to prove the fact, but to disprove the attempt at subornation.—*MELHUISE v. COLLIER (1850), 15 Q. B. 878; 19 L. J. Q. B.*

PART V. SECT. 8, SUB-SECT. 1.—*C. (a).*

5103 l. When allowed.—It is not

competent to prove that a witness had, when examined on precognition, made a statement different from that given

by him in the witness-box.—*H.M. ADVOCATE v. O'DONNELL, 2 Irv. 236.—SCOT.*

493; 15 L. T. O. S. 474; 11 Jur. 621; 117 E. R. 690.

Annotations:—As to (1) *Refd.* R. v. White (1922), 17 Cr. App. Rep. 60. As to (2) *Refd.* Greenough v. Eccles (1859), 5 C. B. N. S. 786.

5106. —[—]—Deft. allowed to contradict his own witness, by showing a statement made by him directly contrary to the evidence given by him.—*DEAR v. KNIGHT* (1859), 1 F. & F. 433.

5107. —[—]—A witness whose testimony turns out to be unfavourable to the calling him is not therefore an "adverse" witness within the meaning of sect. 22 of C. L. P. Act, 1854. To make him an "adverse witness," so as to entitle the party calling him to contradict him by other evidence showing that he has made at other times a statement inconsistent with his present testimony, he must in the opinion of the presiding judge be adverse in the sense of showing a hostile mind. *Semble*: whether adverse or not, is for the judge & not for the ct. to determine.—*GREENOUGH v. ECCLES* (1859), 5 C. B. N. S. 786; 28 L. J. C. P. 160; 33 L. T. O. S. 91; 5 Jur. N. S. 766; 7 W. R. 341; 141 E. R. 315.

Annotations:—*Consd.* Amstell v. Alexander (1867), 16 L. T. 830. *Refd.* Rice v. Howard (1886), 16 Q. B. D. 681.

5108. —[—]—If a party has been induced to bring a case into ct. from a statement which a witness has previously made in a ct. of bkpey., & the witness gives different evidence in ct., he may be examined as to his former statement as an adverse witness (*ERLE, C.J.*).—*POUND (ASSIGNEE OF DOD) v. WILSON* (1865), 4 F. & F. 301.

5109. —[—]—Where in an indictment for rape a witness to whom prosecutrix had made a statement shortly after the commission of the alleged offence, being asked on cross-examination as to the particulars of such statement, gave an answer which was different from that which the prosecuting counsel was instructed she had made:—*Held*: it was competent for counsel for the prosecution, in re-examination, to ask the witness whether she had not at other times made a different statement, & one inconsistent with her present testimony, to certain persons named; & also to call such persons to give evidence of the statements so made to them under 28 & 29 Vict. c. 18, s. 3.—*R. v. LITTLE* (1883), 15 Cox, C. C. 319.

5110. —[—]—*R. v. SMITH*, No. 5093, *ante*.

5111. Effect of references to document—Not positive evidence.—*R. v. DIBBLE*, No. 5115, *post*.

5112. —[—]—Where a witness for the prosecution proves "adverse" & is shown to have made at other times a statement inconsistent with his present testimony, such statement is not

evidence against the accused of the allegations which it contains, but is relevant only to the credit of the witness.—*R. v. WHITE* (1922), 17 Cr. App. Rep. 60, C. C. A.

Annotation:—*Refd.* R. v. Birch (1921), 93 L. J. K. B. 385.

Examination as to documents generally, see Sect. 6, sub-sect. 6, *ante*.

(b) *To What Statements Reference may be made.*

5113. General rule—Series of documents.—A statement to contradict the evidence of a witness under C. L. P. Act, 1854, s. 22, may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of his evidence.—*JACKSON v. THOMASON* (1861), 1 R. & S. 745; 31 L. J. Q. B. 11; 6 L. T. 104; 8 Jur. N. S. 134; 10 W. R. 42; 121 E. R. 891.

5114. Affidavit.—On a petition by a bkpt. to annul, an affidavit stating the substance of the examination of a third person before the comrs. cannot be read.—*Re NEWALL, Ex p. NEWALL* (1838), 3 Mont. & A. 666; 3 Deac. 333.

5115. Confession.—*Semble*: where on the trial of C. A. is called as a witness for the prosecution & says that he himself is guilty but C. is innocent of the crime charged, & then his written confession implicating C. is put to him in cross-examination as a hostile witness, the confession does not become evidence admissible against C.—*R. v. DIBBLE* (1908), 72 J. P. 498; 1 Cr. App. Rep. 155, C. C. A.

—*Refd.* R. v. White (1922), 17 Cr. App. Rep. 60.

5116. Depositions.—When a witness upon a trial gives evidence contradictory to facts contained in a deposition made by such witness in a former proceeding in the same case, the judge may order such deposition to be read, in order to impeach the credit of the witness.—*R. v. OLDROYD* (1805), Russ. & Ry. 88, C. C. R.

Annotation:—*Consd.* Wright v. Beckett (1834), 1 Mood. & R. 414.

5117. —[—]—*R. v. WILLIAMS*, No. 4964, *ante*.

5118. Statement to party's solicitor.—Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralise his evidence, show that he had before the trial given to the attorney an account of the transaction entirely different from that sworn to by him at the trial.—*WRIGHT v. BECKETT* (1834), 1 Mood. & R. 414, N. P.

Annotations:—*Apld.* Dunn v. Aslett (1838), 2 Mood. & R. 122. *Refd.* Melhuish v. Collier (1850), 15 Q. B. 878.

5119. —[—]—The counsel calling a witness who

in giving his evidence on a former trial relating to the same matter, he had not made certain statements respecting it without proving by the record that a former trial took place, & where he denies making the statement, a person who heard his evidence on the former trial, & took it down in writing, so far as he was able, may be called to contradict him, if he can speak positively as to the statements denied by plff., though he did not take down the whole of his evidence.—*BRYSON v. HAMILTON* (1873), N. B. Dig. 350.—*CAN.*

5118 ii. —[—]—Depositions made & signed by a party at an inquest may be received in evidence to contradict him whether the inquest was illegally taken or not, as being statements made on a previous occasion.—*WHITTAKER v. WELCH* (1874), 2 Pug. 438.—*CAN.*

5118 iii. —[—]—*RUSHTON v. GRAND TRUNK Ry. Co.* (1903), 23 C. L. T. 295; 6 O. L. R. 425; 2 O. W. R. 654.—*CAN.*

PART V. SECT. 8, SUB-SECT. 1. — C. (b).

a. General rule.—Where a witness is charged with a design to misrepresent in consequence of his relation to a party or to the cause, it may be shown that he made a statement similar to his present testimony before that relationship existed.—*FLANAGAN v. FAHY*, [1918] 2 I. R. 361.—*IR.*

t. —[—]—It is incompetent to prove an extrajudicial statement by a witness, in order to discredit him.—*HYALOP v. MILLER* (1816), 1 Murr. 43.—*SCOT.*

a. —[—]—Where either of the parties to a cause intends to discredit a witness by adducing proof of his having, on a previous occasion, made a statement at variance with his testimony, a foundation for such proof must be laid by specifically interrogating the witness himself whose evidence it is proposed to discredit, as to the time, place, & person, when, where, & to whom such statement was

made.—*GALL v. GALL* (1870), 9 Macph. (Ct. of Sess.) 177; 43 Sc. Jur. 92.—*SCOT.*

b. —[—]—Where the ct. is of opinion that a witness is hostile to the party by whom he is called, the ct. may allow such witness to be cross-examined as to whether he has made a former statement relative to the subject-matter of the action inconsistent with his present testimony, & if he does not admit that he made such statement proof may be given that he did in fact make it.—*HARVEY v. THOMAS* (1907), 24 S. C. 463.—*S. AF.*

c. —[—]—Evidence to contradict a witness as to previous statements made by him inconsistent with his present testimony is only admissible where the previous statements are relative to the subject-matter of the present proceedings.—*SAIZMANN v. HOLMES* (1914), App. D. 471.—*S. AF.*

5116 i. Depositions.—Plff. examined as a witness in his own cause may be asked on cross-examination for the purpose of discrediting him, whether,

Bing. 57; 1 Moo. & S. 133 1 L. J. C. P. 30; 131 E. R. 321.

Annotation:—*Refd.* Davidson v. Davidson (1856), Dea. & Sw. 167.

5134. ———. ———.]—*Semble*: resps. who produce the pauper as a witness, may call evidence to contradict him as to a particular fact to which he has sworn, but they must do so at the risk of the pauper being thereby entirely discredited; & if evidence be material, of failing to make out a case against appts.—*R. v. BINLEY (INHABITANTS)* (1831), 1 L. J. M. C. 2.

SUB-SECT. 2.—OPPONENT'S WITNESS.

A. In General.

See Criminal Procedure Act, 1865 (c. 18), ss. 3, 4.

5135. Jurisdiction of court to allow credit of witness to be impeached.]—*THE CENTURION* (1823), 1 Hag. Adm. 162, n.; 166 E. R. 58.

Annotation:—*Mentd.* Mersey Docks & Harbour Board v. Turner (1893), 9 T. L. R. 624.

5136. ——— On new trial—Discovery of evidence since previous trial.]—A suit being instituted by an infant by his mother as his next friend, the object of which was in effect to establish his legitimacy, the ct. directed an issue to be sent to law to be tried, & the first trial was in favour & the second against the legitimacy. On application for a new trial it was asked that ptff.'s mother might be ordered to be examined as to the fact whether certain declarations deposed to at the former trials by some of the witnesses as having been made by her to them were so made by her; & after taking time to consider the ct. consented to remove the mere technical objection arising from her position in the cause, but would not interfere to prevent any other objection being raised that could be raised.

A witness had been produced at the second trial, whose character was not known at the time, but who it was stated on affidavit had been convicted of an unnatural offence. The rule of the law being that if the depositions at a former trial are read at the new trial, evidence as to credit cannot be gone into, it was also asked that if this witness should not be produced at the new trial, but his depositions at the former trial read, evidence might be gone into as to credit. The ct. gave leave.—*HARGRAVE v. HARGRAVE* (1849), 12 L. T. O. S. 444; 13 Jur. 403.

PART V. SECT. 8, SUB-SECT. 2.—A.

5135 i. Jurisdiction of court to allow credit of witness to be impeached.]—

Where ptff. calls deft. as his witness, & is allowed by the judge at *Nisi Prius* to treat him as hostile, he may put leading questions with the direct object of eliciting evidence in support of his case, but he cannot put questions merely for the purpose of affecting the credibility of the witness.—*SMITH v. MCKENZIE* (1881), 1 N. Z. L. R. C. A. 1.—*N.Z.*

d. ——— On appeal.]—Where deft. was not cross-examined at trial: *Held*: his credibility could not be impeached on appeal, he not having had an opportunity of giving an explanation or of adducing corroborating evidence.—*NEW HAMBURG MANUFACTURING CO. v. WEBB* (1911), 18 O. W. R. 216; 2 O. W. N. 588; 23 O. L. R. 44.—*CAN.*

e. Evidence of general bad character.]—Ptff., in an action for false imprisonment & malicious prosecution brought against deft., a constable, for arresting him for obscene language, put in evidence a prior conviction of & wife for keeping a dis-

orderly house, which had been quashed on appeal, in order to show want of reasonable & probable cause for deft.'s prosecution of ptff. Thereupon deft. cross-examined ptff., & gave evidence as to ptff.'s general bad character:—*Held*: such evidence was improperly received.—*FITCH v. MURRAY* (1876), *Temp. Wood*, 74.—*CAN.*

f. No cross-examination of witness on commission—Whether witnesses may be examined at trial—As to character of witness.]—Where the evidence of a witness had been taken on commission, & no questions had been asked her as to her character:—*Held*: at the trial witnesses could not be cross-examined as to the bad character of such witness.—*CHESTER v. CHESTER* (1893), *H. 157*.—*S. AF.*

PART V. SECT. 8, SUB-SECT. 2.—B.

g. What questions may be asked—Previous statement.]—In an action against a municipality for negligently constructing a drain & thereby causing injury to ptff., ptff., who was a witness on his own behalf, was cross-examined as to a letter written by his attorney to defts., & giving a different account

5137. ——— Witness not guilty of any particular offence.]—*R. v. ROOKWOOD* (1696), 13 State Tr. 130; 4 Harg. St. Tr. 649; Holt, K. B. 683; 90 E. R. 1277.

Annotations:—*Mentd.* *R. v. Loyer* (1722), 8 Mod. Rep. 82; *R. v. Kinloch* (1746), 18 State Tr. 395; *Howard v. Shipley* (1803), 4 East, 180; *R. v. Duffy* (1849), 7 State Tr. N. S. 795; *R. v. Heane* (1864), 4 B. & S. 917; *Mulcahy v. R.* (1867), 15 W. R. 446.

—Evidence of general inveracity.]—*See* Sub-sect. 2, E., *post*.

B. By Cross-Examination.

5138. When allowed—Necessity for distinct charge to which to cross-examine.]—It is not usual to cross-examine witnesses to character, except the counsel cross-examining have some distinct charge to which to cross-examine them.—*R. v. HODGKISS* (1836), 7 C. & P. 298.

5139. ———.]—A witness cannot be cross-examined for the purpose of contradicting him, except on points relevant to the issue.—*Re PALMER, Ex p. PALMER* (1832), 1 Deac. & Ch. 371; 1 L. J. Bey. 75, Ct. of R.

5140. ——— Necessity for examination-in-chief.]—In an action for libel where there is no plea of justification, questions cannot be asked, tending to show ptff.'s previous bad character in mitigation of damages. Where a witness has said nothing in examination-in-chief he cannot be cross-examined to discredit him.—*BRACEGIRDLE v. BAILEY* (1859), 1 F. & F. 536, N. P.

Annotation:—*Refd.* *Scott v. Sampson* (1882), 8 Q. B. D. 491.

5141. ———.]—Without a plea of immorality, deft. will not be allowed to give that fact in evidence as avoiding a contract, but may do so to impeach ptff.'s credibility.—*MACNABB v. JOHNSON* (1860), 2 F. & F. 293, N. P.

5142. What questions may be asked—Motive of witness—Revenge.]—*R. v. YEWIN* (1811), 2 Camp. 638, n., N. P.

Annotation:—*Refd.* *A.-G. v. Hitchcock* (1847), 1 Exch. 91.

5143. ———.]—A witness for the prosecution having denied on cross-examination that he had had a quarrel with the prisoner, & had threatened to be revenged on him, the ct. allowed the defence to adduce evidence in contradiction.—*R. v. SHAW* (1888), 16 Cox, C. C. 503.

5144. ——— Previous statement—Form of question.]—(1) If it be shown that depositions were regularly returned by the magistrate to the proper officer, & it be proved by the latter that

of the accident from that given by ptff. in his evidence-in-chief. He answered questions whether he had made a statement like that contained in the letter, & whether he had instructed any one to write to that purport. The judge here stopped the cross-examination, holding that the questions could not be proceeded with unless the letter were put in evidence:—*Held*: the judge was wrong in stopping the cross-examination of ptff., & counsel for defts. was entitled to ask ptff. whether he had not made a statement to his attorney like that contained in the letter.—*YATES v. DUBBO MUNICIPAL DISTRICT* (1882), 3 N. S. W. L. R. 315.—*AUS.*

h. ———.]—On the trial of a cause the judge refused to allow defts.' counsel to read to witness B. what S. had sworn was said by him, B. about making a mistake, in order to ask B. whether such statement was true or not:—*Held*: the judge was right, & B. could only be asked to give his version of the conversation.—*See* *WALKER* (1881), 21 N. B. R. 31.—*CAN.*

given to prove her loose character.—*CARPENTER v. WALL* (1840), 11 Ad. & El. 803; 3 Per. & Dav. 457; 9 L. J. Q. B. 217; 4 Jur. 904; 113 E. R. 619.

Annotation :—*Refd.* A. G. v. Hitchcock (1847), 1 Exch. 91.

5160. ———.]—Letters relating to the charge written by one of the scholars who is examined as a witness for the prosecution, may, on her denial of the handwriting, be proved & given in evidence on the part of deff. for the purpose of affecting the witness's credit, & showing the capacity of the scholars to conspire to make a false charge against him, although prosecutrix is not proved to have received the letters, or had any knowledge of their contents.—*R. v. McGAVARON* (1852), 3 Car. & Kir. 320; 6 Cox, C. C. 64.

5161. ———.]—Where a deff., who claimed to be the owner of a mill, denied on cross-examination that he had ever stated that he was tenant only, pltf. was allowed under C. L. P. Act, 1854 (c. 125), s. 23, to call a witness to prove that on a certain occasion deff. had described himself as such, though the same witness had previously been called & examined.—*SYKES v. HAIG* (1880), 44 L. T. 57.

5162. ———.]—*R. v. SHAW*, No. 5143, *ante*.

Cross-examination in reference to previous statement—Form of question.—*See* Part V., Sect. 8, sub-sect. 2, B., *ante*.

(b) *To What Statements Reference may be made.*

5163. Affidavit—Made by illiterate person.—The veracity, or even accuracy, of an ignorant & illiterate person, is not to be conclusively tested by comparing an affidavit made by him, with his *viva voce* testimony; discrepancies between them are not conclusive against his testimony.—*JOHNSTON v. TODD* (1843), 5 Beav. 597; 49 E. R. 710.

—.]—*See, also*, Nos. 4892-4898, *ante*.

5164. Depositions—Before coroner.—*R. v. BARNET*, No. 4903, *ante*.

5165. — **Before commissioner.**—*Semble* : an examination of a party before the commr., may be read to discredit an affidavit of the same witness made upon a petition.—*Ex p. MARJORIBANKS* (1817), 1 De G. 466.

Annotation :—*Mentd.* *Re Mellor, Ex p. Wayman* (1854), 1 Bankr. & Ins. lt. 213.

5166. — **Before magistrate—Not signed by witness.**—A paper purporting to be a previous examination of the witness as to the matter in issue, taken before a magistrate, & signed by him, but not by the witness, was not admitted to be read in evidence, in order to discredit him.—*TREMAN v. HENWELL* (1736), *Lee temp. Hard.* 306; 95 E. R. 198.

5167. — **Set out in conviction.**—The conviction of a person before a justice of the peace, of obstructing officers, in which the evidence given is set out, cannot be given in evidence to contradict what is sworn by a witness at the trial as to what he swore before the justices.—*R. v. HOWE* (1808), 1 Camp. 461; 6 Esp. 124, N. P.
—.]—*See, also*, CRIMINAL LAW, Vol. XIV., pp. 271, 272.

5168. Letter written by witness.—A letter written by a witness may be given in evidence to

contradict the testimony given by him at the trial.—*DE SAILLY v. MORGAN* (1798), 2 Esp. 691.

5169. Written statement—Made to solicitor.—A witness who made an affidavit on behalf of pltf. in a cause, had at another time made to the solr. for deff. statements inconsistent with those which he had made in his affidavit. The solr. had taken down these statements in writing at the time, & the witness had signed the written statement. The solr. made this statement an exhibit to an affidavit which he made in the cause on behalf of deff. :—*Held* : this exhibit was inadmissible in evidence. The proper way to make it admissible would have been to summon the witness for cross-examination, & to put the written statement in his hand & question him upon it, but even then it could only be used to discredit him.—*HEMMING v. MADDICK* (1872), 7 Ch. App. 395; 41 L. J. Ch. 522; 26 L. T. 565; 20 W. R. 433, L. J.J.

Annotations :—*Mentd.* *Pugh & Sharman's Case* (1872), L. R. 13 Eq. 566; *Heritage v. Paine* (1876), 2 Ch. D. 594; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705.

5170. — **Made to other side.**—A railway porter closed the handle of a carriage door just as the train was starting, & in some manner slipped & fell between the train & the platform & was seriously injured. No one on the platform actually witnessed the accident, but the station-master two days afterwards obtained written statements from two passengers to whom the porter had been talking just before the train started. At the arbitration they gave evidence in favour of the workman, inconsistent with those statements, which were in fact put to them in cross-examination. The county ct. judge disbelieved the evidence of appet's witnesses, & found that appet. had not discharged the onus of proof which was upon him & that the accident happened by reason of the workman doing something entirely for his own pleasure, & therefore the accident did not arise out of his employment. On appeal it was argued that the facts contained in the statements had influenced the judge's mind :—*Held* : apart from such statements, which though inadmissible as direct evidence were properly admitted to discredit the witnesses, there was evidence to support the county ct. judge's finding & no misdirection.—*PARSONS v. SOMERSET JOINT COMMITTEE OF SOUTH WESTERN & MIDLAND RY. COS.* (1916), 9 B. W. C. 532, C. A.

5171. Unstamped document.—A party cannot be cross-examined as to the contents of a document not admissible for want of a stamp. *BAKER v. DALE* (1858), 1 F. & F. 271.

In criminal proceedings.—*See* CRIMINAL LAW, Vol. XIV., pp. 407-410.

D. By Evidence of Previous Convictions.

5172. How far permissible.—A party to a cause who gives evidence in support of his case may be cross-examined as to whether he has ever been convicted of a felony or misdemeanour, & if he denies or refuses to answer it, the opposite party may prove such conviction under Common Law Procedure Act, 1854 (c. 125), s. 25, although the

who is ruled to be hostile on the ground that the evidence showed that she had previously made a statement inconsistent with part of her testimony on the trial.—*GATES v. LOHNES* (1898), 31 N. S. R. 221.—*CAN.*

dered in evidence for the purpose of contradicting a witness :—*Held* : to be improperly received where the attention of the witness was not called to the writing before it was tendered.—*BLOIS v. MIDLAND RY. CO.* (1905), 39 N. S. R. 242.—*CAN.*

action of damages at the instance of a widow against the owner of a stage coach, on the ground that her husband's death was caused by the fault of the driver, defender having pleaded that he was not liable in respect he had taken all precautions necessary by supplying an experienced driver, & having cross-examined pursuer's witnesses as to the driver's general character :—*Held* : pursuer was entitled

PART V. SECT. 8, SUB-SECT. 2.—
C. (b).

a. *Depositions.*—A deposition ten-

PART V. SECT. 8, SUB-SECT. 2.—D.

5172 i. *How far permissible.*—In an

Sect. 8.—Impeaching credit of witness: Sub-sect. 2, D., E., F. & G.; sub-sect. 3.]

fact of such conviction be altogether irrelevant to the matter in issue in the cause.—*WARD v. SINFIELD* (1880), 49 L. J. Q. B. 696; 43 L. T. 253, D. C.

—In criminal proceedings.]—See CRIMINAL LAW, Vol. XIV., pp. 445 *et seq.*

5173. Denial or non-admission of conviction—Right of other side to prove conviction—Although irrelevant to matter in issue.]—*WARD v. SINFIELD*, No. 5172, *ante*.

Proof of conviction.]—See Part IV., Sect. 11, sub-sect. 4, *ante*.

E. By Evidence of General Inveracity.

5174. How inveracity proved.]—*MAWSON v. HARTSINK* (1802), 4 Esp. 102, N. P.

*Annotation:—***Refd.** *R. v. Rowton* (1865), 5 New Rep. 428.

5175. —.]—*ANON.* (1814), 3 Ves. & B. 93; 35 E. R. 414, L. C.

Refd. *Trevanion v. Trevanion* (1837), 1 Curt. 406.

5176. —.]—When a witness's character is attacked in a ct. of justice, the questions should be confined to his general conduct, & should not point at specific charges.—*SHARP* (1817), Holt, N. P. 541, N. P.

5177. —.]—If it is sought to discredit the testimony of a witness, it must be done by bringing evidence to prove that he is a person not deserving of credit, not that the evidence he has given is false. —*LEWELLIN v. PACE* (1852), 20 L. T. O. S. 150; 1 W. R. 28.

5178. —.]—In order to impeach the credit of witnesses for the prosecution, the prisoner may call witnesses to prove, that from their knowledge of the general reputation of the witnesses for the prosecution, they would not believe them upon their oaths.—*R. v. BROWN & HEDLEY* (1867), L. R. 1 C. C. R. 70; 36 L. J. M. C. 59; 16 L. T. 304; 31 J. P. 500; 15 W. R. 795; 10 Cox, C. C. 453, C. C. R.

5179. —.]—*STEBBINGS v. LONDON & NORTH WESTERN RY. CO.* (1899), 63 J. P. Jo. 138.

F. In Particular Proceedings.

Affiliation proceedings.]—See *BASTARDY*, Vol. III., pp. 397, 398, Nos. 326, 327.

Criminal proceedings.]—See CRIMINAL Vol. XIV., pp. 364-366.

Election petitions.]—See *ELECTIONS*, Vol. XX., p. 166.

to put in evidence convictions for reckless driving against the driver, she having founded on these convictions on record.—*MCARTHUR v. CROALL* (1852), 24 Sc. Jur. 170; 1 Stuart, 296. —SCOT.

PART V. SECT. 8, SUB-SECT. 2.—E.

5174 i. How inveracity proved.]—On the trial of an action brought by plff. claiming damages for injuries received by being thrown from his wagon in consequence of the defective condition of a highway in deft. municipality, evidence was given of the individual opinions of plff. held by his neighbours as to his general reputation for veracity. Deft.'s counsel thereupon proposed to ask the question, "Whose opinion do you know?" The evidence having been excluded:—*Held*: the judge erred in doing so, & the question should not have been disallowed.—*MESSENGER v. TOWN OF BRIDGETOWN* (1900), 33 N. S. R. 291; *affd.* 31 S. C. R. 379.—CAN.

PART V. SECT. 8, SUB-SECT. 2.—G.

1. Question collateral to issue.]—

Action for seduction.]—See Nos. 5158, 5159, *ante*.

G. Conclusiveness of Answers of Witness.

See Criminal Procedure Act, 1865 (c. 18), ss. 3-5.

5180. Question collateral to issue.]—If a witness is on cross-examination asked a question on some collateral matter, in order to affect his credit, he cannot be contradicted by calling another witness for that purpose.—*R. v. RUDGE* (1803), Peake, Add. Cas. 232, N. P.

5181. —.]—A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue; for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony.—*SPENCELEY v. DE WILLOTT* (1800), 7 East, 108; 3 Smith, K. B. 289, 321; 103 E. R. 42.

*Annotations:—***Consd.** *A.-G. v. Hitchcock* (1847), 11 Jur. 478; *Davidson v. Davidson* (1856), Dea. & Sw. 167.

Refd. *R. v. Watson* (1817), 2 Stark. 116; *Sergeant v. Caunt* (1834), 1 Curt. 3.

5182. —.]—Any question may be put to a witness in cross-examination, the answer to which may have a tendency to discredit him; but if such a question be collateral to the matter in issue, the answer which the witness gives must be taken as conclusive, & other witnesses cannot be called to contradict him.—*HARRIS v. TIPPETT* (1811), 2 Camp. 637, N. P.

*Annotation:—***Refd.** *R. v. Watson* (1817), 2 Stark. 116.

5183. —.]—*R. v. WATSON*, No. 4035, *ante*.

5184. —.]—If on cross-examining a witness, an irrelevant question be put, evidence cannot be produced to disprove his answer, but it must be taken for better or worse.—*Re LORD, Ex p. ARNSBY* (1833), 2 Deac. & Ch. 212, Ch. of R.

*Annotation:—***Mentd.** *Re Smith, Ex p. Baldwin* (1834), 3 L. J. Rey. 80.

5185. —.]—Facts collateral to the point in issue, cannot be pleaded in exception to the character of a witness.

At common law there can be no doubt that if a witness be asked a question, foreign to the issue in the cause, the party asking that question must abide by the answer he receives, & cannot be admitted to produce evidence for the purpose of showing that the witness in this respect has been guilty of perjury (*DR. LUSHINGTON*).—*SERGEANT v. SERGEANT* (1834), 1 Curt. 3; 163 E. R. 1.

5186. —.]—If upon cross-examination a question be put to a witness touching a fact or a declaration, verbal or written, foreign to the issue to be

asking a question irrelevant to the issue is bound by the answer of the witness, & cannot call evidence to contradict him.—*TROTTER v. BENNETT* (1852), 3 N. S. W. L. R. 161.—AUS.

5180 ii. —.]—A person having a paper title to land of which he was not the actual owner, created a mtge. thereon, to a person not a party to a suit, by the party beneficially interested, to get rid of another mtge. created by him on the estate, was asked if he had given notice of the claim of the real owner, when creating the first mtge., which he asserted he had given, & also denied having made such mtge.:—*Held*: not a collateral issue, & evidence was admissible to contradict him.—*GRAY v. COTCHER* (1868), 15 Gr. 419.—CAN.

5180 iii. —.]—*COURTNEY v. BOWIE* (1872), 17 L. C. J. 47.—CAN.

5180 iv. —.]—A witness can properly be asked, on cross-examination, if he has not changed his signature since the action began, but the opposing party must be satisfied with his answer,

& cannot go further & give affirmative evidence of the fact.—*ALEXANDER v. VYE* (1889), 16 S. C. R. 501.—CAN.

5180 v. —.]—*WHITE v. PILKINGTON* (1851), 1 S. 107.—S. AF.

5180 vi. —.]—C. sued G. for damages for slander in stating that she had committed adultery with a boy, & G. justified the statement. A witness other than the boy was called for deft. to prove an admission by plff. to him. In cross-examination he stated that he was perfectly impartial, & had no interest in the case:—*Held*: evidence was inadmissible to contradict this witness upon his statements made in cross-examination, that he had not been unduly familiar with deft., & that he was not her paramour, as the answers were to questions not necessarily tending to show partiality.—*CRANKSHAW v. GALLOWAY* (1887), 5 S. C. 202.—S. AF.

p. Notconclusive.]—When a party to a suit calls the opposite party he is not necessarily concluded by his answers.—*MUIR v. CULLY* (1852), 10 U. C. R. 321.—CAN.

tried, the party so putting the question must abide by the answer, & cannot be permitted to contradict it by other testimony for the purpose of discrediting the witness.—*TREVANION v. TREVANION* (1836), 1 Curt. 406; 163 E. R. 140; *affd.* (1837), 1 Curt. 480.

*Annotations:—***Refd.** Brown v. Brown (1850), 7 Notes of Cases, 391. **Mentd.** Keating v. Brooks (1845), 4 Notes of Cases, 253.

5187. —.]—TENNANT v. HAMILTON, No. 4844,
ante.

5188. —[]—A witness who was examined for plff. to prove a contract was cross-examined for deft. upon a subject irrelevant to the matter in dispute between the parties. Deft. then examined witnesses to contradict the statement made by plff.'s witness with regard to such irrelevant matter:—*Held*: it was not competent for a party to call witnesses to contradict evidence which was immaterial to the question at issue.—*GODDARD v. PARR* (1855), 24 L. J. Ch. 783; 20 L. T. O. S. 19; 3 W. R. 633.

5189. —.]—Deft. charged with an indecent assault upon plff.'s wife, having been cross-examined as to alleged indecencies as to other persons, & denied them; evidence in disproof of these imputations on one side, or in support of them on the other, was rejected as relating to issues quite collateral; plff. being bound by deft.'s answers as to these collateral matters.—*TOLMAN v. JOHNSTONE* (1860), 2 F. & F. 66, N. P.

5190. —.]—A resp. who, in his answer, simply denies the cruelty charged in a petition, may cross-examine petitioner, if called, as to her general conduct, for the purpose of impeaching her credit, but her answer as to any matters not bearing upon the issue cannot be contradicted.—**BAKER v. BAKER** (1863), 3 Sw. & Tr. 213; 32 L. J. P. M. & A. 145; 9 L. T. 117; 11 W. R. 502; 164 E. R. 1255.

5191. — Where a single instance of prior user is relied on to support a petition for the revocation of a patent, & a witness thereto gives in cross-examination other instances of prior user, evidence cannot be called to disprove these other instances, for, although the result might be to discredit the witness, yet such evidence would be as to matters not relevant to the issue before the ct. — *Re HAGENMACH'S PATENTS*, [1898] 2 Ch. 280; 67 L. J. Ch. 675; 15 R. P. C. 431.

5192. ——— What matters are collateral to issue — Feelings of witness towards party.]—R. v. YEWIN (1811), 2 Camp. 638, n., N. P.

Annotation :- **Consd. A.-G. r. Hitchcock (1847), 1 Exch. 91.**

5193. — [Imputation of offence.] — R. v. WATSON, No. 4035, *ante*.

5194. Relationship between witness & party.]—THOMAS *v.* DAVID, No. 4779, *ante*.

5195. General credit of witness.]—Facts collateral to the issue upon the record cannot be given in evidence to discredit a witness.

You may call a witness to contradict any fact material to the issue but not to contradict such as goes only to the general credit of the witness, for that is a collateral issue (ALDERSON, B.).—HARRISON v. GORDON (1838), 2 Lew. C. C. 150.

5196.—[*See* **5195**.]—The credit of witnesses cannot be considered as collateral to the issue, or the very best means of ascertaining the truth would be shut out. It is not what witnesses swear, but what they swear truly, to which the ct. must look. I am disposed to admit evidence of this kind (*Dr. LUSHINGTON*).—*BROWN v. BROWN* (1850), as reported in 7 Notes of Cases, 391.

Annotations.—**Mentd.** Zycklinski v. Zycklinski (1862), 2 Sw. & Tr. 420; Rutter v. Rutter, [1921] P. 136.

5197. — — — Allegation of offer of bribe.] —In an information against deft. for using a cistern, in the making of malt, without making an entry thereof, a witness was asked by deft.'s counsel if he had not stated to one C. that the excise officers had offered him £20 to say the cistern had been used ; the witness having denied the alleged statement :—*Held* : evidence could not be given to show that he had in fact made the statement.

Where a witness is examined as to a fact, with a view to show that he is biased as to the cause, & he denies the fact, evidence may be offered in contradiction to prove the fact.—*A.-G. v. Hitchcock* (1847), 1 Exch. 91; 2 New Pract. Cas. 321; 16 L. J. Ex. 259; 9 L. T. O. S. 270; 11 J. P. 904 11 Jur. 478; 151 E. R. 38.

Annotations — **Consol.** Alcock v. Royal Exchange Assen (1849), 13 Q. B. 292; R. v. Burke (1858), 8 Cox, C. C. 44
Reid. Re Warstaff, Warstaff v. Julland (1907), 98 L. T. 149.
Mentd. Boyle v. Wiseman (1853), 1 Jur. N. S. 894
Arnold v. Hamel (1854), 9 Exch. 404; R. v. Cargill [1913] 2 K. B. 271.

5198. ----- Blas of witness.] -A.-G. v.
HITCHCOCK, No. 5197, ante.

5199. ——— Statement of fact not within knowledge of witness.]—In an action upon a joint & several promissory note professed to be made by A. & B. deft. being the administrator of A.; the defence set up was, that pltf. had forged the note & another note also & deft. was asked on cross-examination whether he had not heard B. say after the case had been before the magistrates, when a charge of forgery with reference to the note was preferred against pltf., that he, B., was sorry he had forgotten he had signed two notes. Deft. answered in the negative:— *Held*: another witness could not be called to show that he was present at the time, & that B. had made the statement.

The issue sought to be raised is purely collateral. It is a statement made in the presence of debt. of a fact not within his own knowledge (*ALDERSON, B.*).—*PALMER v. TROWER* (1852), 8 Exch. 247; 22 L. J. Ex. 32; 155 B. R. 1338.

5200. ----- Previous offence of similar nature to that charged.]—*TOLMAN v. JOHNSTONE*, No. 5189, *ante*.

5201.—**Witness's previous knowledge of party.**—In a criminal case, the sole witness to the commission of the offence having sworn that she did not know the prisoner at the time, evidence was admitted for the defence that she had in fact known him for years.—*R. v. DENNIS* (1862), 3 F. & F. 502.

Question as to previous conviction Denial of conviction. — See Sub-sect. 2, D, *ante*.

Question as to previous statement. Denial of statement. — See Sub-sect. 2, C. (a), *ante*.

SUB-SECT. 3. - RE-ESTABLISHING CREDIT OF WITNESS.

5202. When allowed.]—R. v. MURPHY (1753),
19 State Tr. 693.

Annotation:—**Mentd.** R. v. Coogan (1787), 1 Leach, 449.

5203. — Denial of Imputations.]—Where the character of pltf. or deft. on the record is attempted to be impeached in the cross-examination of the adversaries' witnesses, if those witnesses deny the imputation intended to be conveyed, the party shall not be admitted to go into evidence of his character.—**KING v. FRANCIS** (1800), 3 Esp. 116, N. P.

5204. — Express imputation of fraud.]—
Evidence to support the character of a witness is

Sect. 8. — Impeaching credit of witness: Sub-sect. 3. Sect. 9: Sub-sects. 1, 2, 3 & 4.]

not admissible, unless fraud is expressly imputed to him.—*DURHAM (Bp.) v. BEAUMONT* (1808), 1 Camp. 207, N. P.

*Annotations:—***Refd.** *Stobart v. Dryden* (1836), 1 M. & W. 615. **Mentd.** *Provis v. Reed* (1829), 5 Bing. 435.

5205. — In action for seduction.]—*BATE v. ILL*, No. 4840, *ante*.

5206. —.]—A witness was asked, on cross-examination, whether he had not become bail for a witness previously examined. He replied, Yes, & that he believed it was on a charge of keeping a gaming-house. In order to prevent any imputation against the character of the party so accused, the ct. at the suggestion of counsel, allowed such party to be called up again, & asked whether the charge was in fact true or false.—*R. v. NOEL* (1834), 6 C. & P. 336.

5207. How credit re-established.]—Specific facts cannot be pleaded in order to support the character of a witness's testimony, who has been impeached on the ground of general bad conduct.—*LAMBERT v. LAMBERT* (1831), 1 Curt. 6; 163 E. R. 3.

5208. — Production of inadmissible document.]—A witness cross-examined as to the contents, inadmissible in evidence, of a document may put it in, not as evidence of the truth thereof, but to prove that his testimony at the trial was not an afterthought.—*R. v. BENJAMIN* (1913), 8 Cr. App. Rep. 146, C. C. A.

SECT. 9. — CORROBORATION.

1. — IN GENERAL.

5209. Whether necessary.]—It is not necessary in any case at common law that a proof of matter of fact should be made by more than one witness, for a single testimony of one credible witness is sufficient to prove any fact (*HOLT, C. J.*).—*SHOTTER v. FRIEND* (1690), Carth. 142; 3 Mod. Rep. 283; *Holt, K. B.* 751; 2 Salk. 547; 90 E. R. 687; *sub nom. SHATTER v. FRIEND*, 1 Show. 172; *sub nom. SHORTER v. FRIEND*, Comb. 160.

*Annotations:—***Consd.** *Breedon v. Gill* (1696), 1 Ld. Raym. 219. **Refd.** *Marriot v. Marriot* (1725), 1 Stra. 666; *Home v. Camden* (1795), 2 Hy. Bl. 533; *Evans v. Evans* (1844), 1 Rob. Eccl. 165; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697. **Mentd.** *Chamberlaine v. Hewson* (1694), 5 Mod. Rep. 69; *Anon.* (1729), Fitz-G. 82; *Goodright d. Roffe v. Harwood* (1773), Loft. 252; *Gould v. Gapper* (1804), 5 East, 345; *Combe v. Edwards* (1878), 3 P. D. 103; *West Peckham (Vicar & Churchwardens), Dalison Intervening v. Geary* (1889), Trist. 189; *R. v. Tristram*, [1902] 1 K. B. 816.

5210. — Party to suit giving evidence.]—The evidence of a party to the suit in his own favour, although uncorroborated, is admissible evidence, & may influence the ct. as a jurymen.—*BROWNE v. COLLINS* (1872), 21 W. R. 222.

— **In particular cases.]—***See* Sect. 9, sub-sect. 5, *post*.

5211. What constitutes corroboration — Not evidence of mere probability.]—Evidence of mere probability of a transaction is not evidence to corroborate a single witness. To constitute evidence corroborative, the evidence must have

relation to the transaction itself.—*SIMMONS v. SIMMONS* (1847), 1 Rob. Eccl. 566; 5 Notes of Cases, 324; 11 Jur. 830; 163 E. R. 1137. *Annotations:—***Refd.** *Burder v. O'Neill* (1863), 9 L. T. 232; *Norwich (Bp.) v. Berney* (1866), 36 L. J. Eccl. 8. **Mentd.** *Weatherley v. Weatherley* (1854), 1 Ecc. & Ad. 193; *Davidson v. Davidson* (1856), Dea. & Sw. 132, 167; *Russell v. Russell*, [1895] P. 315.

5212. Effect of corroboration—Extends to whole testimony.]—Where the evidence given by an interested party is corroborated in a substantial matter, it confirms the credit not only of the statements expressly supported, but also of all statements made by the interested party.—*MINISTER OF STAMPS v. TOWNEND*, [1909] A. C. 633; 79 L. J. P. C. 5; 101 L. T. 354, P. C.

SUB-SECT. 2. — EVIDENCE OF ACCOMPLICE.

5213. Necessity for corroboration.]—The only evidence that a codicil was a forged instrument was the affidavit of the surviving accomplice, who had no interest, & had left the country:—**Held:** further evidence was necessary in corroboration before revoking the probate of the codicil.—*In the Goods of RUSH* (1819), 13 L. T. O. S. 450; 13 Jur. 712.

In criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., pp. 460–462, Nos. 4891–4919.

Sufficiency of corroboration—In criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., pp. 462–465, Nos. 4920–4959.

SUB-SECT. 3. — EVIDENCE OF CHILDREN.

In criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., pp. 455, 456, Nos. 4817–4826.

Competency of children to give evidence.]—*See* Sect. 1, sub-sect. 1, A. (a), *ante*.

SUB-SECT. 4. — CLAIMS AGAINST DECEASED PERSONS.

5214. Former rule.]—A., in Jan. 1853, gave to B. his I.O.U. for £65. After A.'s death, B. having claimed the amount, his receipt for the amount was produced. B. swore positively that the amount had never been paid:—**Held:** the ct. could not act on his unsupported testimony against the written evidence.—*Re FARROW'S ESTATE* (1856), 22 Beav. 400; 52 E. R. 1162.

5215. —.]—The ct. will not act upon the unsupported testimony of a claimant upon the estate of a deceased person.—*GRANT v. GRANT* (1865), 34 Beav. 623; 6 New Rep. 347; 34 L. J. Ch. 641; 12 L. T. 721; 11 Jur. N. S. 787; 13 W. R. 1057; 55 E. R. 776.

*Annotations:—***Consd.** *Browne v. Collins* (1872), 21 W. R. 222. **Refd.** *Moore v. Moore* (1874), L. R. 18 Eq. 474; *Williams v. Mercer* (1882), 51 L. J. Q. B. 594. **Mentd.** *Baddeley v. Baddeley* (1878), 9 Ch. D. 113; *Re BRETON'S ESTATE, Breton v. Woolven* (1881), 17 Ch. D. 416.

5216. —.]—The ct. will not act on the unsupported testimony of a person in his own favour.

PART V. SECT. 9, SUB-SECT. 2.

5213 I. Necessity for corroboration.]—UNITED STATES EXPRESS CO. v. DONOHUE (1887), 14 O. R. 333.—**CAN.**

5213 II. —.]—*Re* MONTEITH, MERCHANTS BANK v. MONTEITH (1885), 10 O. R. 529.—**CAN.**

5213 III. —.]—The rule as to corroboration of the evidence of an accomplice is not one of strict law but only

one of prudence, & does not apply to civil actions.—*GRAHAM v. BRITISH CANADIAN LOAN & INVESTMENT CO.* (1898), 12 Man. L. R. 244.—**CAN.**

PART V. SECT. 9, SUB-SECT. 4.

q. General rule.]—Upon a petition for a vesting order of shares standing in the names of trustees dead or out of the jurisdiction, the ct. will require

evidence to corroborate the claim of petitioner to be solely beneficially entitled to the shares.—*Re MITCHELL'S (LADY) TRUST ESTATE* (1879), 5 V. L. R. 42.—**AUS.**

r. —.]—The evidence given by an interested party as to his dealings with a person since deceased, should in the absence of corroboration be regarded with extreme suspicion.—

Money, which was standing in the funds in the name of a married woman, was claimed after her decease & that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother & proof that the dividends had been received by her with the assent of the daughter & her husband :—*Held* : the claim of the mother was established.

I quite assent to the statement that the ct. cannot act on the unsupported testimony of a person in his own favour. Were it otherwise, in the course of the administration of a testator's estate in the ct., any person might come in & say testator owed me £1,000, & substantiate it by his own unsupported oath. It never is my practice to allow a claim upon the unsupported testimony of the claimant; there must be some attendant circumstances, or some facts established *aliunde*, which corroborate the claim, & these may be rebutted by the other side (*ROMILLY, M.R.*).—*Down v. Ellis* (1865), 35 Beav. 578; 55 E. R. 1021.

5217. —.].—The ct. will never give a person anything on his own uncorroborated statement against another after that other's death.—*ROGERS v. POWELL* (1869), 38 L. J. Ch. 618; 18 W. R. 282. *Annotation* :—*Apld.* *Hughes v. Seanor* (1869), 18 W. R. 108.

5218. —.].—*HUGHES v. SEANOR* (1869), 18 W. R. 108; *on appeal* (1870), 18 W. R. 1122, L. C.

5219. —.].—Where a claim is made against the estate of a deceased person, the ct. will never act upon the uncorroborated evidence of the claimant.—*MORLEY v. FINNEY* (1870), 18 W. R. 490.

5220. —.].—Evidence of a plff. on his own behalf as to a bargain with a man since dead ought, in the absence of corroboration, to be disregarded.—*HILL v. WILSON* (1873), 8 Ch. App. 888; 42 L. J. Ch. 817; 29 L. T. 238; 21 W. R. 757, L. J.J.

Annotations :—*Consd.* *Re Richardson, Shillito v. Hobson* (1885), 30 Ch. D. 396. *Mentd.* *Henry v. Smith* (1895), 39 Sol. Jo. 559.

MORRISSEY v. CLEMENTS (1885), 11 V. L. R. 13.—*AUS.*

a. —.].—When it is sought to fix the estate of deceased with a liability, upon the uncorroborated evidence of an interested witness, the evidence ought to be very clear & free from suspicion.—*Ex p. SIMPSON* (1874), 2 Pug. 142.—*CAN.*

t. —.].—*BROWN v. CAPRON* (1876), 21 Gr. 91.—*CAN.*

a. —.].—The provision of the statute that requires corroborative evidence to be adduced, where one of the parties to an alleged contract is dead, is not that the evidence of the party setting up the claim must be corroborated in every particular; it is sufficient if independent support is given to the party's statements in so many instances that it raises in the mind of the ct. the conviction that such statements may be depended on even in respect of those matters in which there is no corroboration.—*McDONALD v. MCKINNON* (1878), 26 Gr. 12.—*CAN.*

b. —.].—When each item in an account against the estate of deceased is an independent transaction, & constitutes a separate & independent cause of action some essential corroboration of the interested party's evidence must be adduced as to each item.—*Re Ross* (1881), 29 Gr. 385.—*CAN.*

c. —.].—*K.* had assigned the moneys due to him by *S.* :—*Held* : *K.*, who was a witness, was not "an opposite or interested party to the suit," & his evidence therefore did not require corroboration as against the exors. of *S.*—*Watson v. SKYERS* (1881), 6 A. R. 559.—*CAN.*

d. —.].—To enable an opposite or interested party to recover in an action against the estate of deceased it is sufficient if his evidence is corroborated, *i.e.* strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements of facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.—*RADFORD v. MACDONALD* (1891), 18 A. R. 167.—*CAN.*

e. —.].—Whilst the evidence of claimant against the estate of deceased should be clear & convincing & if not corroborated, will not be readily acted on, there is no absolute rule of law requiring such corroboration in this Province.—*DODGE v. MIMMS* (1900), 13 Man. L. R. 48.—*CAN.*

f. —.].—*BATZOLD v. UFFER* (1902), 22 C. L. T. 257; 4 O. L. R. 116; 1 O. W. R. 381.—*CAN.*

g. —.].—By R. S. N. S. (1900), c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself, or his wife, or both, unless it is corroborated by other material evidence :—*Held* : such evidence may be corroborated by circumstances or fair inference from facts proved.—*McDONALD v. McDONALD* (1903), 33 S. C. R. 145.—*CAN.*

h. —.].—In a claim against estate of deceased if it were felt, after careful examination, that claimant's evidence was evidence of truth, it should be acted upon, & should not be disallowed simply because it was not corroborated.—*BAKEWELL v. MACKENZIE* (1905), 1 W. L. R. 68.—*CAN.*

5221. —.].—The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of claimant applies to cases of alleged debt as well as to cases of alleged gift.

The rule is a rule of prudence, rather than of law; & in an action tried by a jury it is the duty of the judge to recommend the jury to disregard the unsupported evidence of claimant; but if they should decline to do so, & should find for the claimant, *quacre*, if their verdict could be interfered with.

An English widow lady residing in Paris in a house which belonged to her for her separate use, married an English gentleman, & by the marriage settlement certain plate which formerly belonged to her first husband was settled to her separate use. After the marriage, her husband having family plate of his own, sent it to his wife's house in Paris, & she then sent her own plate to her son by her first marriage. Upon the death of the husband his family plate, & also a marble bust of himself, was in his wife's house at Paris. In a suit for the administration of his estate his wife claimed the plate as having been given her in exchange for her own plate, & the bust as having been presented to her by her husband :—*Held* : the surrounding circumstances did not furnish corroborative evidence in support of the claim by the wife to the plate & bust, & as the claim rested on her unsupported testimony it could not be allowed.—*Re FINCH, FINCH v. FINCH* (1883), 23 Ch. D. 267; *sub nom.* *Re WYNNE-FINCH, WYNNE-FINCH v. WYNNE-FINCH*, 48 L. T. 129; 31 W. R. 526, C. A.

Annotations :—*Consd.* *Wildish v. Fowler* (1888), 5 T. L. R. 113. *N.F.* *Hawlinson v. Scholes* (1898), 79 L. T. 350.

5222. Modern rule.—There is no rule of law which requires the evidence of a single witness in support of a claim against the estate of a deceased person to be corroborated.—*FOULGER v. FERNES* (1885), 1 T. L. R. 343.

5223. —.].—There is no rule of law which

k. —.].—*SIMPKIN v. PATON* (1908), 9 W. L. R. 111; 18 Man. L. R. 132.—*CAN.*

l. —.].—There is no rule of law that requires the evidence of a claimant against the estate of deceased to be corroborated, but it is a rule of prudence not to give credence to the unsupported testimony of claimant.—*Re MONTGOMERY, LUMBERS v. MONTGOMERY* (1911), 17 W. L. R. 77; 20 Man. L. R. 444.—*CAN.*

m. —.].—It is only when the exors. have made out a *prima facie* case that operates in their favour that the opposite party is required to furnish corroborative evidence.—*GROAT v. KINNAIRD* (1914), 29 W. L. R. 675; 7 W. L. R. 264; 20 D. L. R. 421; 7 Alta. L. R. 390.—*CAN.*

n. —.].—In an action for administration deft., administratrix, contended that she was entitled to her own right to four properties which deceased held at the time of his death :—*Held* : in setting up this contention, she was in effect making a claim against the estate of deceased, & her evidence required corroboration.—*VOYER v. LEPAGE* (1914), 28 W. L. R. 394; 19 D. L. R. 52; 8 Sask. L. R. 139.—*CAN.*

o. —.].—Where a party has proved his case upon a promissory note against deceased by corroborative evidence & the defence was that the note had been paid the ct. can receive evidence that plff.'s evidence is true.—*MCGREGOR v. CURRY* (1914), 31 O. L. R. 261; 20 D. L. R. 706; 6 O. W. N. 202.—*CAN.*

p. —.].—Where a husband made

Sect. 9.—Corroboration: Sub-sects. 4 & 5., Sect. 10:

precludes a claimant from recovering against the estate of a deceased person, on his own testimony without corroboration, although the ct. will in general require such corroboration.—*Re HODGSON, BECKETT v. RAMSDALE* (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; 51 L. T. 222; 34 W. R. 127; 2 T. L. R. 73, C. A.

Annotations.—*Folld. Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637; *Rawlinson v. Scholes* (1898), 79 L. T. 350. *Refd. Wildish v. Fowler* (1888), 5 T. L. R. 113. *Mentd. Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; *Mooro v. Knight*, [1891] 1 Ch. 547; *McLeod v. Power*, [1898] 2 Ch. 295; *Isaacs v. Salbstein*, [1916] 2 K. B. 139.

5224. —.]—There is no rule that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion.—*Re GARNETT, GANDY v. MACAULAY* (1885), 31 Ch. D. 1, C. A.

Annotations.—*Folld. Re Farman, Farman v. Smith* (1887), 57 L. J. Ch. 637. *Refd. Mason v. Mason* (1886), 2 T. L. R. 266; *Wildish v. Fowler* (1888), 5 T. L. R. 113.

5225. —.]—There is no absolute rule as to corroboration being necessary in the case of a claim against the estate of a deceased person.—*Re GRIFFIN, GRIFFIN v. GRIFFIN*, [1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442; 15 T. L. R. 78; 43 Sol. Jo. 90.

Annotations.—*Mentd. Re Smith, Bull v. Smith* (1901), 84 L. T. 835; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

5226. —.]—There is no rule that the ct. must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. Such uncorroborated evidence should be examined with care, & even with suspicion, but if in the result it convinces the ct. that the claim should be allowed, the ct. should allow the claim.—*RAWLINSON v. SCHOLES* (1898), 79 L. T. 350; 15 T. L. R. 8, D. C.

claim against estate of deceased uncle of his wife for board & lodgings furnished to the uncle.—*Held*: the wife was an opposite interested party, & her corroboration of her husband's claim did not satisfy Evidence Act, s. 11.—*LORDINGHAM v. SKINNER* (1915), 30 W. L. R. 741; 8 W. W. R. 52; 21 D. L. R. 300; 21 B. C. R. 41.—**CAN.**

q. —.]—Where a husband seeks to have it declared that deceased held certain lands as a trustee for him, his own evidence requires corroboration.—*BACHAND v. BACHAND* (1916), 33 W. L. R. 713; 9 W. W. R. 1184.—**CAN.**

r. —.]—In proving claims against the estate of deceased where the contract or liability depends upon parol evidence, & where the evidence of deceased would have been most important, the parol evidence of claimant must be supported by some attendant circumstances, or some facts established *alunde* which corroborate the claim. Even if the requiring of some corroboration is a matter of practice, & not a binding rule of law, it is a salutary practice, & should not lightly be neglected.—*McKINNON v. SHANKS* (1916), 34 W. L. R. 761; 10 W. W. R. 895; 26 Man. L. R. 427; 25 D. L. R. 77.—**CAN.**

s. —.]—Proof of facts sufficient to make out an express agreement must be given in order to support a claim made by a son against the estate of his deceased father that the son was to have the property upon which the father resided as an inducement for the son to remain at home & work the property.—*Held*: such agreement, assuming it to have been e, cannot be enforced in the absence of corroborative evidence.—*Re*

FRASER'S ESTATE (1918), 52 N. S. R. 122.—**CAN.**

t. —.]—In a claim against the estate of deceased where there are in issue a large number of items so distinct that they might form separate causes of action, corroborative evidence directed specially to each is *prima facie* essential to meet the requirements of Evidence Act; yet, where an underlying connection between several items is testified to by the interested party, & his evidence is corroborated with respect to some of the items so as to satisfy the mind of the ct. not only of the truthfulness & correctness of his testimony with regard to the latter items, but of his general credibility, his evidence is thereby corroborated as to the residue of the items.—*MURPHY v. BENJAMIN* (1920), 47 O. L. R. 426; 54 D. L. R. 248; 18 O. W. N. 175.—**CAN.**

u. —.]—The ct. ought not to disallow a claim for an alleged obligation of deceased merely because claimant's evidence is not corroborated. It ought to examine that evidence with care, even with suspicion, but if completely satisfied of its truth it should act upon it.—*YOUNGMEYER v. MCGARR* (1920), 1 W. W. R. 146; 50 D. L. R. 113; 13 Sask. L. R. 34.—**CAN.**

v. —.]—*DOMINION TRUST CO. v. INGLIS*, [1921] 1 W. W. R. 677.—**CAN.**

w. —.]—Nature & extent of the corroboration which the ct. requires in acting on the testimony of an interested claimant against the assets of deceased considered.—*CRONE v. HEGARTY* (1879), 3 L. R. Ir. 50.—**IR.**

5227 i. Application of rule—Joint
—.]—Where two people make

5227. Application of rule—Joint claimants.—In 1902 their father told ptfs., his two unmarried daughters, that they would be entitled on his death to the proceeds of certain policies of insurance effected on his life, & on many subsequent occasions he repeated this statement & told them how they would be able to obtain the money after his death. The father had made his will in 1897, but it contained no mention of the policies, nor were they mentioned in a codicil which he executed in 1906. After their father's death ptfs. claimed the proceeds of the policies.—*Held*: being a claim against the estate of a deceased person, ptfs.' testimony required corroboration, & there was no such corroboration.

A joint claim by two persons against the estate of a deceased person cannot be maintained unless there is independent corroboration in addition to what is supplied by each of the claimants giving the same testimony as the other.—*VAVASSEUR v. VAVASSEUR* (1909), 25 T. L. R. 250.

Annotation.—*Mentd. Re Innes, Innes v. Innes*, [1910] 1 Ch. 188.

5228. — *Debt.*—*Re FINCH, FINCH v. FINCH*, No. 5221, *ante*.

5229. — *Gift.*—A. purchased 64 shares in the name of B., but had the certificates of them delivered to himself. On A.'s death the certificates of fifty of the above shares were in his possession. In a suit by A.'s extrix., for the purpose of obtaining a declaration that B. was a trustee for her of the fifty shares, the certificates of which were in A.'s possession at his death, B. swore that after the purchase all the above 64 shares were given to him by A., but that on the occasion of such gift he took the certificates of fourteen only of such shares, & left the certificates of the remaining shares in A.'s possession. There was no other evidence than that of B. in support of the alleged gift.—*Held*: the unsupported evidence of B. was insufficient to establish that the fifty shares were

a joint claim against the estate of deceased, independent corroboration is required in addition to that supplied by each telling the same story as the other.—*LORDINGHAM v. SKINNER* (1915), 30 W. L. R. 741; 8 W. W. R. 52; 21 D. L. R. 300; 21 B. C. R. 41.—**CAN.**

5229 i. — *Gift.*—*WILSON v. HOWE* (1902), 23 C. L. T. 137; 5 O. L. R. 323; 1 O. W. R. 272; 2 O. W. L. 52.—**CAN.**

5229 ii. —.]—The testimony of one of defts. that ptff.'s testator had given him a strip of land, saying, "If it is of any use to you, you can take it," was admissible, & did not, as a matter of law, require corroboration.—*WORSNOR v. WOOD* (1911), 19 W. L. R. 533.—**CAN.**

5229 iii. —.]—Ptff. claimed that certain land belonged to him although bought & transferred in the name of his wife who had subsequently died. Statements proved by other parties made by his wife while ill shortly prior to her death to the effect that she desired to transfer the property to him, that otherwise "there might be trouble" for him, & that she "wanted to make everything right" for him.—*Held*: to be sufficiently corroborative.—*EVANS v. TRUSTS & GUARANTEE CO.* (1920), 3 W. W. R. 103.—**CAN.**

5229 iv. —.]—In an action by the exor. of deceased husband against the widow for payment to the executory estate of two sums of money, the one contained in a deposit-receipt in the widow's name, & the other in account-current in her name, the widow pleaded that the sums were a donation *inter vivos* to her by her late husband.—*Held*: the parole evidence of donee, corroborated as it was by the evidence

to B.—**FORREST v. FORREST** (1865), 5 New Rep. 299; 34 L. J. Ch. 428; 11 L. T. 763; 11 Jur. N. S. 317; 13 W. R. 380.

5230. ———.]—**Re FINCH, FINCH v. FINCH**, No. 5221, *ante*.

5231. ———.]—**Donatio mortis causa.**]—A gift by a dying man of a banker's deposit receipt under such circumstances as to constitute it a good *donatio mortis causa* will be upheld, even though the only evidence in support of the claim be that of the donee, if the ct. considers that evidence trustworthy.—**Re FARMAN, FARMAN v. SMITH** (1887), 57 L. J. Ch. 637; 58 L. T. 12; 4 T. L. R. 108.

Annotation.—**Refd.** Wildish v. Fowler (1888), 5 T. L. R. 113.

5232. ———.]—**VAVASSEUR v. VAVASSEUR**, No. 5227, *ante*.

Gifts generally, *see* GIFTS.

5233. ———.]—**Trust in favour of claimant.**]—The ct. will not establish a trust in favour of a plff. where his own evidence in support of it is uncorroborated.—**POOLE v. FOXWELL** (1861), 11 L. T. 411; 13 W. R. 199.

5234. ———.]—In the absence of proof of an unequivocal, complete, & final intention on the part of a husband to constitute himself a trustee for his wife, the ct. will not after his death, upon her uncorroborated statement that he expressly authorised her to carry on the business, on her own account, of a farm which she had rented before marriage, & to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm which were invested by him during his lifetime.—**Re WHITTAKER, WHITTAKER v. WHITTAKER** (1882), 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787.

SUB-SECT. 5.—IN PARTICULAR PROCEEDINGS.

Action for breach of promise.]—*See* HUSBAND & WIFE.

Proceedings for contempt of court.]—*See* CONTEMPT OF COURT, Vol. XVI., p. 71, Nos. 855-858.

Criminal proceedings.]—*See* CRIMINAL LAW, Vol. XIV., pp. 460-467, 535-537, Nos. 4887-4972, 6056-6078.

5235. Proceedings relating to immorality.—**General rule.**]—The evidence of prisoners, under

of two other witnesses, & by the real evidence of the documents, established the donation.—**THOMSON'S EXECUTORS v. THOMSON** (1882), 9 R. (Ct. of Sess.) 911; 19 Sc. L. R. 653.—**SCOT.**

5231 i. ———.]—**Donatio mortis causa.**]—**DAVIS v. WALKER** (1902), 23 C. L. T. 83; 5 O. L. R. 173; 1 O. W. R. 745.—**CAN.**

5231 ii. ———.]—Any evidence which is sufficient to prove any fact against the estate of deceased is sufficient to prove a *donatio mortis causa*; that is, any evidence which is believed & is corroborated as required by the statute may be acted upon.—**Re REID (1903)**, 23 C. L. T. 334; 6 O. L. R. 421; 2 O. W. R. 918.—**CAN.**

5231 iii. ———.]—**M.** when on her death bed, & no one else but her sister being present, handed her sister a sum of money saying: "This is for you, I want you to keep it as I have willed you nothing".—**Held:** the gift was a *donatio mortis causa*, but failed because of lack of corroboration.—**McGUIRE v. McGUIRE** (1917), 50 N. S. R. 477.—**CAN.**

d. ———.]—**Agreement to pay wages.**]—**TUCKER v. McMAHON** (1886), 11 O. R. 718.—**CAN.**

conviction, although they are competent witnesses, is not entitled to full credence when they depose to gross & disgusting acts, & are not confirmed by other testimony.—**BURDER v. HODGSON** (1846), 4 Notes of Cases, 483.

5236. ———.]—**ROBERTS v. OWEN (DANIEL) & Co.** (1888), 5 T. L. R. 11.

5237. ———.]—**MOORE v. OXFORD (Bp.)**, [1904] A. C. 283; 73 L. J. P. C. 43; 90 L. T. 425, P. C.

Annotations.—**Refd.** Wakeford v. Lincoln (Bp.), [1921] 1 A. C. 813. **Mentd.** Ely (Bp.) v. Close, [1913] P. 184.

— **Affiliation proceedings.**]—*See* BASTARDY, Vol. III., pp. 394-397, 406, Nos. 317-325, 397.

— **In ecclesiastical courts.**]—*See* Nos. 5235-5237, *ante*; ECCLESIASTICAL LAW, Vol. XIX., p. 333, Nos. 1443, 1444.

Matrimonial causes.]—*See* HUSBAND & WIFE.

Proceedings for removal of paupers.]—*See* POOR LAW.

Prosecutions for driving motor car at excessive speed.]—*See* STREET & AERIAL TRAFFIC.

Prosecutions for personation at elections.]—*See* Parliamentary Registration Act, 1843 (c. 18), s. 88.

SECT. 10.—ATTESTING WITNESSES.

SUB-SECT. 1. IN GENERAL.

5238. Who are attesting witnesses—Person not asked to attest—Subsequently signing.]—A person who sees an instrument executed, but is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness.—**McCRAW v. GENTRY** (1812), 3 Camp. 232, N. P.

5239. ———.]—**Witness of corporate seal.**]—Upon a deed sealed with the corporate seal of the Governor, etc., of the Bank of England, these words were written round the seal, "Sealed by order of the Governor & Ct. of Directors of the Bank of England, on, etc., John Knight, Secretary":—**Held:** Knight was not to be considered as an attesting witness.

Qu.: whether a person who formally attests the affixing to a deed the seal of a corp., need be called as an attesting witness.—**DOE d. BANK OF ENGLAND v. CHAMBERS** (1836), 4 Ad. & El. 410;

supplied, the books of the tenant, in which the transactions were set out, & cheques handed by him in favour of the landlord.—**Held:** to be sufficient corroboration of his evidence, although the cheques did not show on their face whether they had been given on account of rent or in respect of advances.—**Re JELLY, UNION TRUST CO. v. GIBSON** (1903), 23 C. L. T. 327; 6 O. L. R. 481; 2 O. W. R. 966.—**CAN.**

h. ———.]—**Statutory declaration of deceased.**]—The action was brought to recover a secret profit made, as was alleged, on the sale to plff. of two parcels of land by deceased, acting ostensibly as an agent. One of the parcels had been purchased by deceased in his own name, & the agreement for purchase had been assigned by him to plff., & a statutory declaration had been made by deceased that he had purchased as plff.'s agent.—**Held:** this was sufficient corroboration as to this parcel, but the two transactions, being distinct, corroboration as to the one parcel was of no avail as far as the other was concerned, & there being no corroboration as to the plff. could not succeed.—**DANBY v. NATIONAL TRUST CO., LTD.** (1915), 30 W. L. R. 461; 22 D. L. R. 153.—**CAN.**

e. ———.]—**Whether inferences sufficient.**]—The "material evidence" in corroboration, required by Evidence Act, R. S. O., 1887, c. 61, in an action against the estate of deceased may be direct or may consist of inferences or probabilities arising from other facts & circumstances tending to support the truth of the witness's statement.—**GREEN v. McLEOD** (1896), 23 A. R. 676.—**CAN.**

f. ———.]—**Employee of interested party.**]—The provisions of Alberta Evidence Act, s. 12, that in an action by or against the administrators, etc., of deceased "an opposite or interested party" shall not obtain judgment on his own evidence in respect of any matter occurring before the death of deceased without corroboration does not apply to the evidence of an employee of the interested party, even though the interested party is a corp.—**IMPERIAL BANK v. TRUSTS & GUARANTEE CO., LTD.**, [1921] 1 W. W. R. 801.—**CAN.**

g. **What is corroborative evidence—Books of claimant.**]—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, & for goods

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6 Nev. & M. K. B. 539; 1 Har. & W. 749; 5 L. J. K. B. 123; 111 E. R. 811.

Consd. Deffell v. White (1866), L. R. 2 C. P. 144.

5240. — Name of witness written in pencil by party.]—Where an agreement contained an attestation clause, & subjoined to it, the name of a person as an attesting witness, but the name was written in pencil, & not by the supposed witness, but by one of the parties to the instrument:—*Held*: there was no *prima facie* evidence of there being an attesting witness, so as to render it necessary to call the supposed witness.—*CUSSESS v. SKINNER* (1813), 11 M. & W. 161; 12 L. J. Ex. 347; 152 E. R. 758.

Mentd. Pearce v. Foster (1885), 55 L. J. Q. B. 121.

5241. — Solicitor attesting insolvency petition.]—An attorney who, in compliance with a rule of the Ct. of Bkpcy., has attested an insolvent's petition for protection, under 5 & 6 Vict., c. 116, is not an attesting witness, such as to render it necessary that he should be called to prove the petition.

We think it quite enough that the Bkpcy. Ct. acted on it (*per Cur.*).—*BAILEY v. BIDWELL* (1844), 13 M. & W. 73; 2 Dow. & L. 245; 13 L. J. Ex. 204; 153 E. R. 30.

Annotations:—Refd. Streeter v. Bartlett (1848), 5 C. B. 562. *Mentd.* Harvey v. Towers (1851), 6 Exch. 656; Smith v. Braine (1851), 16 Q. B. 244; Berry v. Alderman (1853), 23 L. J. C. P. 34; Fitch v. Jones (1855), 2 L. J. Q. B. 293; Rappael v. Bank of England (1855), 17 C. B. 161; Hall v. Featherstone (1858), 3 H. & N. 284; Hogg v. Sken & Vincent (1865), 18 C. B. N. S. 426.

—[*See, also*, *BILLS OF SALE*, Vol. VII., p. 82, Nos. 470, 471.

5242. Who may attest—Not party to transaction.]—If deft.'s signature is attested by the party to whom a warrant of attorney is given, it may be verified by another person.—*HIND & CLARKE v. KINGSTON* (1838), 1 Will. Woll. & H. 181.

5243. — — —.]—A person who is appointed by a creditor under Bkpcy. Act, 1883 (c. 52), Sched. I., r. 15, to act as his proxy, cannot himself be the attesting witness to the instrument of proxy.

A party to the transaction cannot be an attesting witness (*per Cur.*).—*Re PARROTT, Ex p. CULLEN*, [1891] 2 Q. B. 151; 60 L. J. Q. B. 567; 64 L. T. 801; 39 W. R. 543; 7 T. L. R. 564; 8 Morr. 185, D. C.

—[*See, also*, *BILLS OF SALE*, Vol. VII., p. 81, Nos. 460-462; *DEEDS*, Vol. XVII., pp. 207, 208, Nos. 189-192.

SUB-SECT. 2. NECESSITY FOR CALLING ATTESTING WITNESSES.

A. In General.

See Criminal Procedure Act, 1865 (c. 18), s. 7.

5244. General rule—Name of fictitious person put as subscribing witness.]—If the name of a fictitious

person be put as a subscribing witness to a deed, proof of the party's handwriting is sufficient.—*FASSETT v. BROWN* (1790), Peake, 33, N. P.

5245. — —.]—A party producing, at the trial of a cause, a deed which has been some months in his possession, is not excused from proving the execution because he received such deed from the adverse party, who formerly claimed a benefit under it.—*VACHER v. COCKS* (1830), 1 B. & Ad. 145; 8 L. J. O. S. K. B. 341; 109 E. R. 741.

Annotations:—Refd. Carr v. Burdiss (1835), 5 Tyr. 309. *Mentd.* Thomas v. Connell (1838), 4 M. & W. 267; Bills v. Smith (1865), 6 B. & S. 314; *Re Vautin, Ex p. Saffery* (1900), 69 L. J. Q. B. 703.

— Production of document after notice to produce.]—*See* Sub-sect. 2, C. (d), *post*.

5246. — —.]—*JACKSON v. BOWLEY* (1811), Car. & M. 97, N. P.

5247. — Effect of Evidence Act, 1851 (c. 99).]

—Sect. 2 of the above Act, which renders the parties to a suit competent & compellable to give evidence, has not altered the rule of law which requires a written instrument to be proved by the attesting witness.—*WHYMAN v. GARTH* (1853), 8 Exch. 803; 1 C. L. R. 482; 22 L. J. Ex. 316; 17 Jur. 559; 1 W. R. 373.

Annotations:—Refd. Rowlandson v. Fenton & Rogers (1853), 17 Jur. 606. *Mentd.* Henman v. Lester (1862) 12 C. B. N. S. 776.

5248. — Validity & payment of consideration contested.]—It is necessary to prove a deed by the attesting witness, where its validity & the payment of the consideration is contested by a person not a party to it.—*LEIGH v. LLOYD* (1865), 35 Beav. 455; 55 E. R. 972; *on appeal*, 2 De G. J. & Sm. 330, L. C.

B. In respect of What Instruments.

(a) Instruments required by Law to be Attested.

What documents require attestation.]—*See* *BILLS OF SALE*, Vol. VII., p. 81; *DEEDS*, Vol. XVII., p. 207, Nos. 183-187.

Where document cancelled.]—*See* Nos. 5263, 5264, *post*.

When calling attesting witness dispensed with.]—*See* Sect. 10, sub-sect. 2, C., *post*.

(b) Instruments not required by Law to be Attested.

5249. General rule.]—*BLAKE v. PHINN* (1817), 3 C. B. 976; 16 L. J. C. P. 159; 8 L. T. O. S. 366, 391; 136 E. R. 391.

5250. — —.]—A lease provided that, in case of a dispute, the subject-matter thereof should be referred to the arb'n. of three persons, one to be named by each of the two parties to the lease, & the third by the two so first chosen; & if either party should neglect to name an arbitrator within seven days after notice in writing from the other requiring him so to do, then the dispute was to stand referred to the person who should have been named by the party giving such notice; & the submission might, at the instance of either party, be made a rule of ct. A dispute arose, & one party named an arbitrator, & the other party did

PART V. SECT. 10, SUB-SECT. 2.—A.

k. General rule.]—*CITY MUTUAL LIFE ASSURANCE SOCIETY v. ELLIOT* (1897), 18 N. S. W. L. R. 391; 19 N. S. W. W. N. 95.—*AUS.*

l. — —.]—The subscribing witness to a deed need not be produced if the handwriting of the party making the instrument can be otherwise proved.—*WOODS v. FRASER* (1857), 2 Thom. 184.—*CAN.*

m. — —.]—None but a subscribing witness will be examined *vis à* *vis* to prove a deed.—*WILSON v. MEAD* (1732), How. C. S. 84.—*IR.*

n. — —.]—If pltf. declare upon a deed, & there be no plea of *non est factum*, he cannot read any part of the deed which is not on the record, without proving it by an attesting witness.—*SMITHWICK v. BEARY* (1851), 1 L. C. L. R. 344; 3 Ir. Jur. 333.—*IR.*

o. — — Attestation not contested.]—

On the question of law whether a document was properly executed, the attesting witness not being called by pltf. & no reason given except the poor one that he was no longer in pltf.'s employ:—*Held*: as there was no contest that the document was duly signed & attested, the best plan was to assume that the attesting witness' evidence was given.—*NICHOLS & SHEPARD Co. v. SKEDANUK* (1913), 24 W. L. R. 184; 4 W. W. R. 577; 11 D. L. R. 199.—*CAN.*

not do so within seven days after receipt of notice of the arbitrator's being named :—*Held* : the submission to arbn., & the appointment of the arbitrator, might be made a rule of ct. under C. L. P. Act, 1851 (c. 125), s. 17.

The lease had one attesting witness, but no affidavit of his was produced before the ct. :—*Held* : notwithstanding that, the submission might be made a rule of ct. under sect. 17 of above Act, as sect. 26 rendered it unnecessary to prove the lease by the attesting witness, because no attesting witness was required.—*Re NEWTON & HETHERINGTON* (1865), 19 C. B. N. S. 342 ; 144 E. R. 819 *sub nom.* *NEWTON v. HETHERINGTON*, 6 New Rep. 235 ; 12 L. T. 633 ; 13 W. R. 863.

Annotation :—*Reid. Re Willcox & Storkey* (1866), L. R. 1 C. P. 671.

5251. All parties not before court—Ex parte application.—In an *ex p.* case it is necessary to prove a deed by the attesting witness, notwithstanding C. L. P. Act, 1854 (c. 125), s. 26.—*Re REAY'S ESTATE* (1855), 3 Eq. Rep. 512 ; 24 L. T. O. S. 323 ; 1 Jur. N. S. 222 ; 3 W. R. 312.

Annotations :—*Distd. Re Dierden* (1864), 4 New Rep. 394. *N.F. Re Mair's Estate* (1873), 42 L. J. Ch. 882. *Distd. Worthington v. Moore* (1891), 64 L. T. 338.

5252. —[—]—An appointment of new trustees, not required to be by deed or to be attested, was made by deed, executed abroad by the donee of the power, who was resident abroad, & his execution of it was attested by a witness also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, & was supported by proof of the handwriting of the signature of the appointor to the deed :—*Held* : petitioner must prove the handwriting of the attesting witness, or, failing that, must show that they had endeavoured to find a witness in England who could speak to his handwriting, & failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor.—*Re RICE* (1886), 32 Ch. D. 35 ; 55 L. J. Ch. 799 ; 54 L. T. 589 ; 34 W. R. 747, C. A. *Annotation* :—*Distd. Worthington v. Moore* (1891), 64 L. T. 338.

5253. All parties before court—Unopposed petition.—On an unopposed petition for payment out of ct. of purchase-money paid in by a railway co. :—*Held* : proof of the handwriting of attesting witnesses to a deed affecting petitioner's title was sufficient evidence of the execution of the deed.—*Re MAIR'S ESTATE* (1873), 42 L. J. Ch. 882 ; 28 L. T. 760 ; 21 W. R. 749.

5254. —[—]—In a case where all the parties are represented before the ct. it is not necessary to prove by the attesting witness a deed for the validity of which attestation is not necessary within the meaning of C. L. P. Act, 1851 (c. 125), s. 26.—*WORTHINGTON v. MOORE* (1891), 64 L. T. 338 ; 7 T. L. R. 313.

Necessity for attestation.—*See DEEDS*, Vol. XVII., p. 207, Nos. 183–187.

(c) Ancient Documents.

See Part IV., Sect. 13, sub-sect. 1, *ante*.

(d) Instruments Enrolled.

5255. General rule.—*THURLE v. MADISON* (1655), Sty. 462 ; 82 E. R. 864.

5256. — *Bargain & sale.*—Indenture of bargain & sale enrolled, may be given in evidence without proving the execution.—*SMART v. WILLIAMS* (1694), Comb. 247 ; 3 Lev. 387 ; 90 E. R.

457 ; *sub nom.* *SMARTLE d. NEWPORT v. WILLIAMS*, 1 Salk. 280 ; Bull. N. P. 246 a. *Annotations* :—*Consd. Tinkler v. Walpole* (1811), 14 East, 226. *Mentd.* *Stanyngnought v. Cosins* (1746), Barnes, 456 ; *Birch v. Wright* (1786), 1 Term Rep. 378 ; *Hall v. Doe d. Surtees* (1822), 5 B. & Ald. 687.

5257. —[—]—*HOLCROFT v. SMITH* (1702). *Freem. Ch.* 259 ; 1 Eq. Cas. Abr. 224 ; 22 E. R. 1196.

5258. — *Deed enrolled under Fines & Recoveries Act, 1833 (c. 74).*—[—]—A., being entitled as *i* tenant in tail to a sum of stock, executed a disentailing deed, which was duly enrolled in Chancery, & presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate of the clerk of enrolments indorsed, but no evidence was given of the execution of the deed :—*Held* : petitioner's title was not made out by the production of the deed, & evidence of his execution of the deed ought to be given.—*BISHOP v. DE BURGH* (1845), 15 L. J. Ch. 35 ; 6 L. T. O. S. 295.

5259. Evidence of enrolment—Indorsement of clerk of enrolments.—The indorsement by the clerk of the enrolments of the day of the enrolment, by way of date, is a part of the record, & cannot be averred against ; nor is evidence admissible to show that it was in fact enrolled on some other day, & that although the date be written on an erasure.—*R. v. HOPPER* (1817), 3 Price, 495 ; 110 E. R. 332.

Annotations :—*Reid. Magrath v. Hardy* (1858), 1 Arn. 352. *Doe d. Williams v. Lloyd* (1840), 1 Scott, N. R. 505.

5260. —[—]—The following memorandum was indorsed on a deed, which conveyed lands to charitable uses. "Enrolled in his Majesty's High Ct. of Chancery, Dec. 17, 1836, being first duly stamped according to the tenor of the statutes made for that purpose. D. Drew." It was proved that shortly before the trial, Mr. Drew acknowledged the signature was his & that he was, at the time he so acknowledged it, the clerk of the enrolments :—*Held* : the memorandum must be considered as having been made by the proper officer, & was sufficient evidence of the enrolment of the deed under Charitable Uses Act, 1736 (c. 36).—*DOE d. WILLIAMS v. LLOYD* (1840), 1 Man. & G. 671 ; 1 Scott, N. R. 505 ; 10 L. J. C. P. 128 ; 133 E. R. 501.

(e) Lost, Altered, or Cancelled Documents.

5261. Lost instrument—Names of attesting witnesses not known.—Where a bond is lost & plff. does not know who the subscribing witnesses are he may call another person. *Attiler* if it appears who the subscribing witnesses are.—*KEELING v. BALL* (1796), Peake, Add. Cas. 88.

Annotations :—*Reid. R. v. St. Giles, Camberwell* (1853), 22 L. J. M. C. 54. *Mentd.* *Doe d. Mudd v. Suckermore* (1837), 5 Ad. & El. 703.

—[—]—*See, also*, No. 5309, *post*.

5262. Altered instrument.—Upon the trial of an issue whether the date of an annuity deed has not been altered, the attesting witness must be called.—*EDINBURGH v. CRUDELL* (1817), 2 Stark. 284, N. P.

5263. Cancelled instrument.—An instrument executed in the presence of a subscribing witness cannot be proved by any other person, even after it is cancelled.—*BRETTON v. COPE* (1791), Peake, 43, N. P.

Annotation :—*Reid. Davis v. Bank of England* (1824), 2 ; 393.

that it should be proved.—*WALPOLE v. WALPOLE* (1811), 1 Leg. Rep. 162. *IR.*

PART V. SECT. 10, SUB-SECT. 2.—
B. (e).

p. Erasure in lease more than
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thirty years old.]—Where there is an erasure in a lease more than thirty years old, if the erasure be noticed in the attestation, it is not necessary

Sect. 10.—Attesting witnesses: Sub-sect. 2, B. (e), (f) & (g) & C. (a) i.]

5264. —[—]—Under the plea of *plene administravit* to an action of *assumpsit*, an administrator may prove the expenses of administration, & show that he has retained money to that amount. In order to prove payment of the intestate's debts upon bond, which bonds are stated to have been burnt on payment of the debt, the existence of the bonds must be proved by means of the attesting witnesses. —*GILLIES v. SMITHER* (1819), 2 Stark. 528, N. P.

5265. Attestation torn off.—[—]*HONEYMAN v. LEWIS* (1851), 23 L. J. Ex. 204; 23 L. T. O. S. 80.

(f) *Wills.*

(g) *Other Instruments.*

5266. Deed coming out of possession of adverse party—Possessed of beneficial interest thereunder.]—In an action by a lessee against the assignee of a lease, pltf. having proved the execution of the counterpart of the lease, deft. put in the original lease, which was produced by a party to whom he had assigned it:—*Held*: it was not necessary for pltf. to call the subscribing witness to prove the execution of the lease.

The deed came out of the possession of a party who must be considered as identified with deft., & it was a deed under which deft. & the party claiming under him had taken all the interest which they professed to take (*BAYLEY, J.*).—*BURNETT v. LYNCH* (1826), 5 B. & C. 589; 8 Dow. & Ry. K. B. 368; 4 L. J. O. S. K. B. 274; 108 E. R. 220.

*Annotations:—***Reid.** *Wright v. Doe d. Tatham* (1834), 1 Ad. & El. 3. **Mentd.** *Walker v. Moore* (1829), 8 L. J. O. S. K. B. 159; *Marzetti v. Williams* (1830), 1 B. & Ad. 415; *Hancock v. Cuffyn* (1832), 8 Bing. 358; *Wolveridge v. Steward* (1833), 1 Cr. & M. 644; *Humble v. Langston* (1841), 7 M. & W. 517; *Yates v. Aston* (1843), 4 Q. B. 182; *Edwards v. Bates* (1844), 7 Man. & G. 590; *Magnay v. Edwards* (1853), 17 Jur. 839; *Smith v. Peat* (1853), 9 Exch. 161; *Rolin v. Steward* (1854), 14 C. B. 595; *Walker v. Bartlett* (1856), 18 C. B. 845; *Mathew v. Blackmore* (1857), 1 H. & N. 762; *Nokes v. Fish* (1857), 3 Drew. 735; *Dutton v. Powles* (1861), 2 B. & S. 174; *Maugham v. Sharpe* (1864), 17 C. B. N. S. 443; *Grissell v. Bristowe* (1868), L. R. 3 C. P. 112; *Rudge v. Bowman* (1868), L. R. 3 Q. B. 689; *Sheppard v. Murphy* (1868), 16 W. R. 948; *Bowring v. Shepherd* (1871), 21 L. T. 721; *Moule v. Garrett* (1872), L. R. 7 Exch. 101; *Kellock v. Enthoven* (1874), L. R. 9 Q. B. 241; *Whitaker v. Forbes* (1875), 45 L. J. Q. B. 140; *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Baynes v. Lloyd*, [1895] 2 Q. B. 610.

Compare Sect. 10, sub-sect. 2, C. (d), post.

5267. Memorandum indorsed on agreement.]—In *assumpsit* upon an agreement between pltf. & defts. & a memorandum of even date indorsed thereon, to explain & vary the terms of the original agreement, which was expressly referred to as "the within-mentioned agreement," the consideration for defts.' promise was alleged to be, the making of the agreement & memorandum, & the undertaking on the part of pltf.

to perform the same. At the trial pltf. called for & proved, defts. producing it, the part of the agreement & memorandum executed by pltf. They then offered in evidence, the part executed by defts.; & after duly proving the execution of the memorandum indorsed thereon, proposed, without calling or accounting for the absence of the subscribing witness, to read the original agreement. The judge rejected it upon a bill of exceptions:—*Held*: the agreement ought to have been received.—*FISHMONGERS' Co. v. DIMSDALE* (1848), 6 C. B. 896; 18 L. J. C. P. 55; 13 L. T. O. S. 345; 136 E. R. 1500, Ex. Ch.

5268. —[—]—On Mar. 17, 1838, an agreement was executed in counterpart, each part being duly stamped with a 35s. stamp, between pltf. & defts. Two or three weeks afterwards, a memorandum was indorsed upon each part of the agreement, for the purpose of more accurately defining the intention of the parties, the memorandum indorsed on the part of the agreement which was in defts.' possession being signed by pltf.' attorney, & being stamped with a 35s. stamp, that indorsed on the part of the agreement in pltf.' possession being signed by defts.' attorney, & stamped with a 20s. stamp. At the trial pltf. called for & read the agreement which was in the hands of defts. with the memorandum indorsed thereon. They then produced their part of the agreement, & after proving the authority of the attorney who had executed it, read the memorandum indorsed on it; & then they proposed to read the agreement, which the memorandum referred to as "the within-mentioned agreement." It was thereupon objected, on the part of defts., that, inasmuch as the agreement was thus incorporated in the memorandum, & both together contained more than fifteen folios, a 35s. stamp upon the memorandum was necessary, in the absence of proof of the agreement it referred to, by calling the attesting witnesses: & the judge ruled that it was inadmissible:—*Held*: upon exceptions to that ruling, the last-mentioned memorandum was sufficiently stamped, & the agreement it referred to admissible in evidence without calling the attesting witnesses.—*FISHMONGERS' Co. v. DIMSDALE* (1852), 12 C. B. 557; 22 L. J. C. P. 44; 21 L. T. O. S. 7; 16 Jur. 799; 138 E. R. 1024, Ex. Ch.

5269. Power of attorney.]—The notarial certificate & seal verified by the British consul, whose handwriting is sworn to, of the execution of a power of attorney, executed in America to a person in London, to receive money here for the party abroad, is not evidence in a ct. of law of the due execution of the instrument, without the affidavit of the subscribing witness.—*Ex p. CHURCH* (1822), 1 Dow. & Ry. K. B. 324.

5270. —[—]—To support an attachment for the non-performance of an award on demand made by a third person who acts under a power of attorney, the execution of the power of attorney must be

evidence.—*BURKE v. MURPHY* (1841), Arm. M. & O. 165.—IR.

b. Instrument executed out of British Dominions.]—In order that an instrument executed out of the British Dominions should be receivable in evidence it must be verified by an affidavit or declaration of its due execution, made by the witness, or one of the witnesses, before a person entitled to take oaths or declarations in the foreign country in which it is executed.—*DILLON v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY* (1901), 20 N. Z. L. R. 188.—N. Z.

PART V. SECT. 10, SUB-SECT. 2.—B. (e).

a. Assignment.—Of jud
Affidavit of subscribing
necessary before attorney compelled to pay over the proceeds of a judgment at the instance of the assignee.—*MURRAY v. JOHNSTON* (1830), 1 All. 697.—CAN.

r. —[—]—In an action by the assignee, proof of obligor's handwriting is sufficient, without calling the subscribing witness.—*TAYLOR v. BURKE* (1861), 5 All. 191.—CAN.

a. Award.]—The attesting witnesses

to an award may be compelled to attend & prove the award.—*TAYLOR v. BOSTWICK* (1859), 1 Ch. Ch. 23.—CAN.

t. Mortgage bond.]—Where one of the witnesses who have attested a mortgage bond is available, the execution of such bond cannot be proved otherwise than by the evidence of such witness.—*VERARAPPA KAVUNDAN v. RAMASAMI KAVUNDAN* (1907), 1 L. R. 30 Mad. 251.—IND.

a. Warrant of attorney.]—A warrant of attorney, although filed in the ct. must be proved by the attesting witness, before it can be received in

shown by the subscribing witness, & a copy of the power of attorney must be left with the party upon whom the demand is made.—*LAUGHER v. LAUGHER* (1831), 1 Cr. & J. 398; 1 Dowl. 284; 1 Tyr. 352; 148 E. R. 1477.

Annotations:—*Reid*. — *v.* — (1839), 3 Jur. 23. *Mentd.* Tebbutt *v.* Ambler (1843), 12 L. J. Q. B. 220.

5271. — *]*—Where money is asked to be paid out of ct. to an attorney, under a power of attorney from the party entitled to the money, his signature is not sufficiently attested by the certificates of a notary public under hand & seal & the official seal of the mayor of the foreign city where he resides, but the same must be proved by affidavit. — *SALVIDGE v. TUTTON* (1853), 22 L. J. Ch. 883.

C. When Calling Attesting Witness dispensed with.
(a) *Attesting Witness Unavailable.*

i. Death of Witness.

5272. Whether proof of handwriting sufficient.]

—*SMART v. WILLIAMS* (1694), Comb. 247; 3 Lev. 387; 90 E. R. 457; *sub nom.* *SMARTLE d. NEWPORT* *v.* *WILLIAMS*, 1 Salk. 280; Bull. N. P. 246 a; *sub nom.* *ANON.* 1 Ld. Raym. 745.

Annotations:—*Reid*. Tinkler *v.* Walpole (1841), 14 East, 226. *Mentd.* Stanynought *v.* Cosins (1746), Barnes, 456; Birch *v.* Wright (1786), 1 Term Rep. 378; Hall *v.* Doe d. Surtees (1822), 5 B. & Ald. 687.

5273. — Whether proof of death necessary.]
—Where a witness is dead who attested a deed, you must prove him to be so.

Where an attesting witness has lived abroad, a strict proof of his death is required, otherwise where he has lived constantly in England.—*HENLEY v. PHILIPS* (1740), 2 Atk. 48; 26 E. R. 426, L. C.

Annotation:—*Mentd.* Tatnall *v.* Hankey (1838), 2 Moo. P. C. C. 342.

5274. — — — — —.]—*BANK v. FARQUES* (1752), Amb. 145; 1 Dick. 167; 27 E. R. 94, L. C.

Annotations:—*Reid*. Cox *v.* Allingham (1821), Jac. 337; Hood *v.* Pimm (1831), 4 Sim. 101.

5275. — — — — —.]—All the subscribing witnesses being dead, comparison of hands is all the evidence which can be given (LORD MANSFIELD, C.J.).—*LUDLAM d. HUNT* (1774), Loft. 362; 98 E. R. 695.

5276. — — — — —.]—In debt on bond, if one of the attesting witnesses be dead & the other beyond the process of the ct., it is sufficient to prove the handwriting of the witness that is dead.—*ADAM v. KEUR* (1798), 1 Bos. & P. 360; 126 E. R. 952.
Annotation:—*Reid*. Andrew *v.* Motley (1862), 12 C. B. N. S.

PART V. SECT. 10, SUB-SECT. 2.—
C. (a) i.

c. Whether proof of handwriting sufficient—Document executed by agent.]

—A document executed by an agent in the name of his principal, the subscribing witnesses being dead or out of the Province, can be proved by proving the handwriting, i.e. by the same evidence which would be sufficient to prove its execution by the principal.—*DICKSON v. JARVIS* (1838), 5 O. S. 694.—*CAN.*

5272 i. — — — — —.]—The execution of a release of dower being disputed, deft. proved the handwriting of P., the subscribing witness, who was dead. Demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged deft.'s name:—*Held*: such evidence was rightly rejected.—*ROSE v. COYLER* (1868), 27 U. C. R. 270.—*CAN.*

5272 ii. — — — — —.]—A deed of conveyance was tendered in evidence which purported to bear the mark of G. as vendor, & which was duly attested by four witnesses. G., however, denied

that she had ever executed the deed, & said that the mark was not hers. All the attesting witnesses were dead. A witness was called who knew the handwriting of one of the attesting witnesses, & who swore that the signature of that witness to the attestation clause of the deed was genuine:—*Held*: the deed was admissible in evidence, its execution by G. being sufficiently proved.—*ABDULLA PARU v. GANNIBAI* (1887), 1 L. R. 11 Bom. 690.—*IND.*

5272 iii. — — — — —.]—Where the witnesses to a deed are dead, it cannot be proved *in voce* by a similitude of hands.—*ROW v. CREAGH* (1748), How. E. E. 461.—*IR.*

5272 iv. — — — — —.]—Both the attesting witnesses to a deed having been proved to be dead:—*Held*: the execution of the deed might be established by proof of the handwriting of one of deceased witnesses.—*MONTGOMERY v. JOYCE* (1840), 1 Craw. & D. 422.—*IR.*

d. Presumption of validity.]—Where a document purporting to be a will & in the handwriting of the person

5277. — — — — —.]—In an action on a promissory note, the subscribing witness being dead, proof of his handwriting, & that deft. was present when the note was prepared, is sufficient without proving the handwriting of deft.

Qu.: if proof of subscribing witness's handwriting alone would have been sufficient.—*NELSON v. WHITTALL* (1817), 1 B. & Ald. 19; 106 E. R. 8.

Annotations:—*Consd.* Bulkeley *v.* Butler (1823), 3 Dow. & Ry. K. B. 625; Whitelocke *v.* Musgrove (1833), 1 Cr. & M. 511. *Reid*. Sewell *v.* Evans, Roden *v.* Ryde (1843), 4 Q. B. 626.

5278. — — — — —.]—Whether further proof of identity necessary.]—Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name & description.—*PAGE v. MANN* (1827), Mood. & M. 79.

Annotation:—*Consd.* Whitelocke *v.* Musgrove (1833), 1 Cr. & M. 511.

5279. — — — — —.]—Where a written instrument sued on is attested by a subscribing witness who is dead or abroad out of the reach of the process of the ct. at the time of the trial, it is requisite to give some evidence that the party who signed the instrument is deft. sought to be charged under it, as well as to prove the handwriting of the subscribing witness.—*WHITLOCKE v. MUSGROVE* (1833), 1 Cr. & M. 511; 3 Tyr. 511; 2 L. J. Ex. 210; 149 E. R. 502.

Annotations:—*Apd.* Jones *v.* Jones (1841), 9 M. & W. 75. *Consd.* Greenfields *v.* Crawford (1842), 9 M. & W. 314; Sewell *v.* Evans, Roden *v.* Ryde (1843), 4 Q. B. 626. *Reid*. Logan *v.* Alder (1832), 3 Tyr. 557, n.

5280. — — — — —.]—*WILLMAN v. WOBRAIL*, No. 5315, *post*.

5281. — — — — —.]—On the trial of an appeal at sessions, a witness proved the contents of a lost deed, & its execution by the parties. He stated, on cross-examination, that the name of B. was written opposite to the names of the parties: that he knew B. who was dead; but that witness did not know B.'s handwriting. The sessions found that B. was the attesting witness, & because there was no evidence of his handwriting, rejected the secondary evidence. On a case stating the above facts:—*Held*: the sessions having found as a fact the identity of the attesting witness & deceased man, further evidence of handwriting was not required.—*R. v. ST. GILES, CAMBERWELL (INHABITANTS)* (1853), 1 E. & B. 642; 22 L. J. M. C. 54; 20 L. T. O. S. 259; 17 J. P. 104; 17 Jur. 161; 1 W. R. 181; 118 E. R. 577.

signing it as testator has no attestation clause, but the two persons whose names are subscribed in writing apparently differing from that of testator & from each other, as witnesses, such document may be capable of proof as a valid will.—*Re BUCKLEY* (1899), 24 V. L. R. 923.—*AUS.*

e. Attestation by mark.]—A holograph will signed at the foot by testator, & containing an attestation clause appeared attested by two marksmen. Their names, as subscribed to the will, the attestation clause, & the words "mark—his" which appeared written above & below crosses opposite each of their names, were in testator's handwriting. At the date of the instrument, two persons of the names so subscribed as those of the attesting witnesses were in his employment. They were both illiterate, & both predeceased him. The document was found shortly after testator's death, in his house, preserved among his other papers:—*Held*: there were reasonable grounds for presuming that the will had been duly executed & attested.—

Sect. 10.—Attesting witnesses: Sub-sect. 2, C. (a) i., ii. & iii.]

5282. Subsequent declarations.—Whether admissible to impeach validity of instrument.]—Where an attesting witness to a written document is dead, evidence of declarations made by him subsequent to his attestation are not admissible to impeach the validity of the execution of that document.—*STOBART v. DRYDEN* (1836), 1 M. & W. 615; 2 Gale, 146; Tyr. & Gr. 899; 5 L. J. Ex. 218; 150 E. R. 581.

*Annotation:—***Refd.** *Haines v. Guthrie* (1884), 13 Q. B. D. 818.

Of will.]—*See* EXECUTORS; WILLS.

ii. *Witness not within Jurisdiction.*

5283. General rule.]—[Hands of persons beyond sea admitted to be proved.—*ANON.* (1701), 12 Mod. Rep. 607; 88 E. R. 1552, N. P.

*Annotations:—***Refd.** *Wardell v. Fernor* (1809), 2 Camp. 282; *White Locke v. Musgrave* (1833), 2 L. J. Ex. 210.

5284. —.]—A lease was attested by three witnesses, & on the trial of an ejectment to recover the lands, it was proved by one witness only, that two of the subscribing witnesses were dead, & that the third was resident at Rotterdam in Holland; yet plff. was admitted to prove the handwriting of all the three witnesses; & having so done, obtained a verdict.—*WEBB v. ST. LAWRENCE* (1751), 3 Bro. Parl. Cas. 610; 1 E. R. 1547, H. L.

5285. —.]—*BANK v. FARQUES* (1752), Amb. 145; 1 Dick. 167; 27 E. R. 94, L. C.

*Annotations:—***Consd.** *Cox v. Allingham* (1821), Jac. 337. **Mentd.** *Hood v. Plumm* (1831), 4 Sim. 101.

5286. —.]—The handwriting & character of a living witness, but who was resident in an enemy's country, admitted to proof.—*MILLER v. SHEPARD* (1758), 2 Lec. 520; 161 E. R. 425.

5287. —.]—*WALLIS v. DELANCEY* (1700), 7 Term Rep. 266, n.; 101 E. R. 967.

*Annotations:—***Refd.** *Nelson v. Whittall* (1817), 1 B. & Ald. 19. **Mentd.** *White Locke v. Musgrave* (1833), 1 Cr. & M. 511.

5288. —.]—An instrument executed abroad & witnessed by a foreigner residing there may be proved by evidence of the handwriting of the witness & of the contracting party; but not by the latter alone.—*BAIRNES v. TROMBOWSKY* (1797), 7 Term Rep. 265; 101 E. R. 966.

*Annotation:—***Consd.** *White Locke v. Musgrave* (1833), 3 Tyr. 541.

5289. —.]—If a subscribing witness to a deed be abroad, out of the jurisdiction of the ct., & not amenable to its process at the time of the trial, evidence of his handwriting is admissible; though it do not appear whether he be domiciled or settled abroad.—*PRINCE v. BLACKBURN* (1802), 2 East, 250; 102 E. R. 361.

*Annotation:—***Refd.** *Hodnett v. Forman* (1815), 1 Stark. 90.

5290. —.]—*CROSBY v. PERCY*, No. 5312, *post*.

5291. —.]—A lease purported to have been signed by the mark of the party; a person proved the handwriting of the subscribing witness, & that he had gone abroad, & another person proved that deft. had spoken of the term that he had under the lease:—*Held*: this was sufficient proof of the execution of the lease by deft.—*DORR v. WHELDON* (1829), 3 C. & P. 613.

*Annotation:—***Mentd.** *Acocks v. Phillips* (1860), 5 H. & N. 183.

CLARKE v. CLARKE (1879), 5 L. R. Ir. 47.—**IR.**

PART V. SECT. 10, SUB-SECT. 2.—
C. (a) ii.

5283 i. General rule.]—Where the sub-

scribing witness to a bond is out of the country, & his handwriting cannot be proved, evidence of the handwriting of obligor is sufficient.—*BENNETT v. McDONALD* (1840), 2 Ont. Dig. 2556.—**CAN.**

5292. —.]—A deed executed in the presence of a subscribing witness, proved to be abroad at the time of the trial, is admissible on proof of the witness's writing, notwithstanding the power to examine on interrogatories under Evidence on Commission Act, 1830 (c. 22), s. 4.—*GRUBB v. EDWARDS* (1810), 2 Mood. & R. 300, N. P.

5293. —.]—*KEEGAN v. OWEN* (1843), 1 L. T. O. S. 390, N. P.

5294. —.]—In an action on an attested agreement, it was proved that the attesting witness formerly lived at Salford, but that about eleven months ago he had gone on board a ship bound for America; that a letter had been received some months after, which was marked in his handwriting "ship letter," & that he had not since been heard of in a lodge of Odd Fellows to which he belonged:—*Held*: sufficient to let in evidence of his handwriting.—*DAVIDSON v. CARR* (1843), 2 Dowl. N. S. 1034; 12 L. J. Ex. 312; 7 Jur. 379.

5295. —.]—It is no objection to the admission of secondary evidence of the execution of a deed, that the attesting witness was in England for a short time (about three weeks) before the trial & was not served with a subpoena, he being absent from England at the time of the trial.—*LANE v. RICHARDSON* (1848), 3 New Pract. Cas. 112; 11 L. T. O. S. 125.

5296. Sufficiency of evidence that witness not within jurisdiction.]—If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an English port by contrary winds, just at the time of the trial.—*WARD v. WELLS* (1809), 1 Taunt. 461; 127 E. R. 913.

5297. — Service in navy.]—If an attesting witness appears, upon search made at the Admiralty, to be serving in the navy, his absence is sufficiently accounted for to render secondary evidence admissible.—*PARKER v. HOSKINS* (1810), 2 Taunt. 223; 127 E. R. 1062.

5298. — Residence in Ireland.]—*Seemle*: where an attesting witness to a bond resides in Ireland, his handwriting may be proved, although no steps have been taken to procure his personal attendance.—*HODNETT v. FORMAN* (1815), Stark. 90, N. P.

5299. — —.]—(1) The attestation of a deed was in the following form: "Sealed & delivered by the within mentioned A. in the presence of C." It was proved by the attesting witness that the signature of C. was of his handwriting, & that he had no recollection of the transaction, but that he should not have signed the attestation if he had not seen the deed executed:—*Held*: sufficient, & the fact that the attesting witness was neither an attorney nor an attorney's clerk made no difference.

(2) A witness who resides in Dublin is out of the jurisdiction of the cts. of this country so as to let in proof of his handwriting, the same as if he were dead.—*DORR d. COUNSELL v. CAPERTON* (1839), 9 C. & P. 112, N. P.

5300. — —.]—A. gave two promissory notes to B. On an action being brought on these notes, it appeared that one of the notes was attested by a man now in Ireland:—*Held*: that note might be read without calling the attesting witness.—*DORMER v. HOWARD* (1849), 12 L. T. O. S. 457, N. P.

5283 ii. —.]—When attesting witnesses are out of the jurisdiction, a will may be proved by evidence of his handwriting.—*WILSON v. COLLUM* (1881), 9 L. R. Ir. 150.—**IR.**

5301. — Absconding to avoid criminal charge.]

—(1) To dispense with the necessity of calling the subscribing witness to a deed, it is sufficient to show that he expressed an intention of leaving the country, that he had reason for doing so to avoid a criminal charge, & that his relations have not seen him since he expressed his intention of going.

(2) It is not necessary, in the absence of the subscribing witness, to prove the handwriting of the party executing the deed; it is enough to prove the handwriting of the witness.—*KAY v. BROOKMAN* (1828), 3 C. & P. 555; *Mood. & M.* 286, N. P.

Annotation:—As to (2) *Refd.* *Whitlocke v. Musgrove* (1833), 1 Cr. & M. 511.

5302. ——[To account for not calling a subscribing witness, evidence cannot be given of his declarations as to where he lived, to let in proof that, in an answer to an inquiry there, it was stated that he was abroad; but some person should either be called from the house where the witness lived, or else some person who had seen him abroad.—*Doe d. BEARD v. POWELL* (1836), 7 C. & P. 617, N. P.

5303. — Statement of parents that witness abroad.—[Evidence, that, a week before the trial, the parents of an attesting witness to a deed were asked where he was, & stated, that he was in America, is reasonable evidence that he is without the jurisdiction of the ct., so as to let in proof of his handwriting to the attestation of the deed.—*AUSTIN v. RUMSEY* (1819), 2 Car. & Kir. 736, N. P.

iii. *Witness Unable to be Found.*

5304. General rule.—[If the attesting witness cannot be found to make affidavit of the execution of a warrant of attorney, the attesting witness must be accounted for by affidavit before the ct. will admit secondary evidence.—*WARING v. BOWLES* (1811), 4 Taunt. 132; 128 E. R. 279.

5305. ——[Where the attesting witness to a bond cannot be produced, proof of his signature is sufficient evidence of the execution by deft., the obligor, though deft. only signs by mark.—*MITCHELL v. JOHNSON* (1828), *Mood. & M.* 176, N. P.

5306. ——[*JAMES v. PARNELL* (1823), *Turn. & R.* 417; 37 E. R. 1162.

5307. ——[Where the attesting witness to a warrant of attorney had been transported for seven years, & not heard of since, an affidavit verifying his handwriting would suffice.—*EDWARDS v. PENNEY* (1842), 2 Dowl. N. S. 425; 7 Jur. 200.

5308. ——[The attesting witnesses to a will with an imperfect attestation clause could not be found & produced to make the affidavit of due execution. The facts led fairly to the inference,

that the signatures of the witnesses were genuine:—*Held*: the witnesses might be considered as *dead*.—*Refd.* *LUFFMAN* (1847), 5 Notes of Cases, 183; 8 L. T. O. S. 478; 11 Jur. 211.

5309. ——[Where a will proved to have existed has been lost or accidentally destroyed, & there is satisfactory evidence of the contents, & that the will appeared to be duly executed & attested, the ct. will pronounce for the will according to its tenor as given in evidence, notwithstanding that the attesting witnesses cannot be found or identified.—*In the Estate of PHIBBS*, [1917] P. 93; 86 L. J. P. 81; 116 L. T. 575; 33 T. L. R. 214.

5310 Necessity for diligent inquiry.—[Where in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligor & obligee, & that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him:—*Held*: sufficient to let in proof of the handwriting of the other subscribing witness, who had since become interested as administratrix to the obligee, & was plff. on the record.—*CUNLIFFE v. SEFTON* (1802), 2 East, 183; 102 E. R. 338.

Annotations:—*Conad.* *McKenire v. Fraser* (1803), 9 Ves. 5; *Wardell v. Fernor* (1809), 2 Camp. 282. *Apld.* *Morgan v. Morgan* (1832), 9 Bing. 359. *Refd.* *Crosby v. Percy* (1808), 1 Taunt. 364; *Parker v. Hoskins* (1810), 2 Taunt. 223.

5311. ——[The answer of the obligor of a bond to a bill filed for a discovery in which he admitted the bond to have been executed by him is only secondary evidence & cannot be received as evidence *per se* of the execution without showing that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown.—*CALL v. DUNNING* (1803), 4 East, 53; 5 Esp. 16; 102 E. R. 750.

Annotation:—*Refd.* *Whyman v. Garth* (1853), 8 Exch. 803.

5312. ——(1) If upon fair, serious, diligent inquiry without evasion, an attesting witness is not to be found, evidence of his handwriting is admissible to prove the attestation.

(2) If on inquiry for an attesting witness, it appears that he has absconded to avoid his creditors, the secondary evidence is admissible. *Semble*: circumstances corroborative of the genuineness of the transaction, may render a slighter search sufficient, than would be required under circumstances of suspicion. Evidence that the attesting witness to an intermediate assignment of a lease had absconded from his creditors:—*Held*: sufficient to let in proof of his handwriting, the possession having accompanied the

PART V. SECT. 10, SUB-SECT. 2.—
C. (a) iii.

5304 i. General rule.—[In order to prove the execution of a conveyance of real estate it is sufficient to prove the handwriting of the attesting witness to the deed, & to give evidence that twenty years ago he had disappeared from the place where he was residing at the time of the attestation, & had not since been heard of.—*LYONS v. BAKER, LYONS v. BAKER, LYONS v. CERRY* (1884), 5 N. S. W. L. R. 282; 1 N. S. W. N. 23.—*AUS.*

5304 ii. ——[A deed appeared to have been executed in the presence of two witnesses, one of whom, a justice of the peace, authorised to take acknowledgment of deeds, was dead: no account could be given of this other by persons who had the best means of obtaining knowledge of the inhabitants of the place where the deed was executed.—*Held*: it was properly received in evidence on proof of the

handwriting of deceased witness.—*Doe d. CHUBB v. HATHEWAY* (1850), 2 All. 69.—*CAN.*

5304 iii. ——[A will in testator's handwriting & signed by him was found in a place where testator was accustomed to keep his papers, it being so signed in the presence of two persons, who signed as witnesses, the handwriting being apparently that of two persons & distinct from that of testator, & who, though due search was made for them, could not be found:—*Held*: the will would be admitted to probate the ct. being satisfied as to the inability to procure proof of the witnesses.—*Re Young* (1896), 27 O. R. 698.—*CAN.*

5310 i. Necessity for diligent inquiry.—[Every reasonable inquiry must be made for the subscribing witness in the most likely place.—*TYLDEN v. BULLEN* (1846), 3 U. C. R. 10.—*CAN.*

5310 ii. ——[Where the attesting witness to a bond left plff.'s employ-

ment in the country fifteen years before the trial & went to St. John, & about two years afterwards told two persons of his acquaintance in the country that he was going to Australia, after which neither of them had ever seen him, though one of them had resided in St. John for three years afterwards, & the other was there frequently, & there was no proof that the witness had been in the province for thirteen years:—*Held*: sufficient presumptive proof of his absence to admit secondary evidence of his handwriting.—*CRANE v. AYRE* (1853), 2 All. 577.—*CAN.*

5310 iii. ——[It is not necessary to make inquiry after witnesses to a deed at every possible place where they might be found, in order to account for their non-production at the trial.—*PEPPER v. NEWENHAM* (1836), 4 Ir. L. Rec. N. S. 155.—*IR.*

5310 iv. ——[*BLAKENEY v. REGAN* (1852), 1 W. R. 21.—*IR.*

Sect. 10.—Attesting witnesses: Sub-sect. 2, C. (a) iii. & iv. & (b).]

subsequent assignment, & no slur being cast on the title.—*CHOSBY v. PERCY* (1808), 1 Taunt. 364; 127 E. R. 871; *previous proceedings*, 1 Camp. 303, N. P.

Annotations:—As to (1) Consd. Wardell v. Fermor (1809), 2 Camp. 282; *Burt v. Walker* (1821), 4 B. & Ald. 697. *Apld. Morgan v. Morgan* (1832), 9 Bing. 359. *Refd. Ward v. Wells* (1809), 1 Taunt. 461; *R. v. Saunders* (1899), 63 J. P. 150. *Generally, Mentd. Laythorpe v. Bryant* (1835), 1 Hodg. 19.

5313. —. —.]—If upon a fair & diligent inquiry an attesting witness to a deed cannot be found, evidence of his handwriting is admissible.—*DOE d. JOHNSON v. JOHNSON* (1818), 2 Chit. 196.

Annotation:—Refd. Pytt v. Griffith (1822), 6 Moore, C. P. 538.

5314. —. —.]—Where an attesting witness could not be found after sufficient inquiry:—*Held*: evidence of his handwriting was admissible, although a letter not disclosing his retreat, had been received from him a few days before the trial.—*MORGAN v. MORGAN* (1832), 9 Bing. 359; 2 Moo. & S. 490; 2 L. J. C. P. 27; 131 E. R. 650.

Annotation:—Refd. Spooner v. Payne (1847), 4 C. B. 328.

5315. —. —.]—(1) If a subscribing witness cannot be found after diligent inquiry, evidence of his handwriting is admissible the same as if he were dead, & it is not necessary to show that his absence is caused by collusion with the other party.

(2) If a witness, who is called to prove a person's handwriting, states that he has seen the person sign his name once, & believes the handwriting to be his, that is evidence, though slight, to go to the jury of the handwriting.—*WILLMAN v. WORRALL* (1838), 8 C. & P. 380.

5316. —. —.]—The agreement was attested by the landlord's steward, who, after having been apprehended for embezzlement, had absconded, & could not be found after search at his house, & at the inns he was in the habit of frequenting:—*Held*: evidence of his handwriting was properly received.—*FALMOUTH (EARL) v. ROBERTS* (1842), 9 M. & W. 409; 1 Dowl. N. S. 633; 11 L. J. Ex. 180; 152 E. R. 198.

Annotations:—Mentd. Davidson v. Cooper (1843), 11 M. & W. 778; *R. v. Mellor* (1858), 7 Cox, C. C. 354; *Wells v. Cooper* (1874), 30 L. T. 721; *Pattinson v. Luckley* (1875), L. R. 10 Exch. 330.

5317. —. —.]—Where it was sworn that a witness was not merely within the jurisdiction, but actually seen on the first day of the trial within convenient distance for service of the subpoena, the ct., on evidence that diligent but ineffectual search had been made to find him, admitted secondary evidence of his handwriting.—*HUMPHREYS v. JONES & PICKERING* (1850), 16 L. T. O. S. 88, N. P.

5318. —. —.]—In a suit for revocation of the probate of a will on the grounds of the testator's incapacity & undue execution, one of the attesting witnesses was called, who could not recollect very clearly what took place, but said that the testator did not put his mark to the will or acknowledge it in any way in his presence. Evidence was adduced to show that the other attesting witness had not been heard of since the year following the grant of probate of the will, & that notwithstanding every effort to trace him he had not been found. The ct. allowed the affidavit made by him about eight years before, for the purpose of obtaining probate of the will in the district registry to be read as evidence in support of the will.—*GORNALL v. MASON* (1887), 12 P. D. 142; 56 L. J. P. 86; 57 L. T. 601; 51 J. P. 663; 35 W. R. 672.

5319. —. —.]—On proof satisfactory to the ct. of the handwriting of the two attesting witnesses to a will containing a due attestation clause & executed in France by a testatrix domiciled in that country; & upon evidence that diligent search had been made, but without success, for the two attesting witnesses:—*Held*: sufficient proof had been given that the requisite formalities attending the due execution of the will had been complied with.—*BAXENDALE v. DE VALMER* (1887), 57 L. T. 556.

5320. —. —.]—In a suit for probate in solemn form, where it appeared that after every effort to trace the attesting witnesses neither of them could be found, the ct. admitted, as secondary evidence of execution, an affidavit of one of them, sworn to support an application for probate in common form.—*HAYES v. WILLIS* (1906), 75 L. J. P. 86.

5321. What is sufficient diligence.—]—In an action on a *post obit* bond, it appeared that the attesting witness was an attorney who formerly had an office in London & resided at Sydenham:—*Held*: it was not enough to let in evidence of his handwriting to prove the execution of the deed that he had disappeared from his office in London for a twelve-month before the trial, & had not been heard of during that period by persons who knew him, without showing that search had been made after him at the house he occupied at Sydenham.

But evidence of his handwriting was admitted, on proof that a twelve-month ago, a commission of bkpt. had been sued out against him, to which he had never appeared.—*WARDELL v. FERMORE* (1809), 2 Camp. 282, N. P.

Annotation:—Mentd. Murray v. Stair (1823), 2 B. & C. 82.

5322. —. —.]—The clerk of deft. was the subscribing witness to a bond, & when he was subpoenaed, said that he would not attend; & the trial had been put off twice in consequence of his absence. Search had also been made at deft.'s house, & in the neighbourhood; & upon receiving information at deft.'s that the witness was gone to Margate, inquiry was there made without success:—*Held*: under these circumstances, evidence of his handwriting was admissible.—*BURT v. WALKER* (1821), 4 B. & Ald. 697; 106 E. R. 1092.

Annotation:—Refd. Spooner v. Payne (1847), 4 C. B. 328.

5323. —. —.]—In *assumpsit* on a written agreement, where the attesting witness to the execution was not produced at the trial:—*Held*: sufficient, in order to let in evidence of his handwriting, to prove by a person who knew him, but had not seen him for eighteen months, that at the request of pltf.'s attorney, he had made inquiry for him at coffee-houses & other places, where he thought he might hear of him, but without success; & it was not necessary to show that inquiry had been made of both the parties who had executed the agreement.—*EVANS v. CURTIS* (1826), 2 C. & P. 296, N. P.

5324. —. —.]—To excuse the absence of an attesting witness to a lease executed twenty-three years before, proof was offered that inquiry had been made at several places where the witness, a female servant, had lived, but that no one could tell what had become of her:—*Held*: sufficient.—*BAMPTON v. PAULIN* (1827), 4 Bing. 264; 12 Moore, C. P. 497; 5 L. J. O. S. C. P. 168; 130 E. R. 769.

Annotation:—Mentd. Rounce v. Woodyard (1846), 8 L. T. O. S. 186.

5325. —. —.]—Upon a question of settlement by apprenticeship the indenture was produced, apparently executed by all parties; & the name of "George Jones" was affixed to the attestation, as

the attesting witness; but without any description. It was proved, that diligent search had been made in the place where the indenture was executed, but that no person of that name could be there found; & that inquiry had also been made of the parties to the indenture, but no information as to the witness could be obtained from them, but that between two & three miles from the place, there was a George Jones, who had been applied to, & who said he knew nothing at all about the matter. He was not produced. Upon this evidence, the sessions refused to receive the parties themselves to prove the execution of the indenture; being of opinion that enough had not been done to prove the handwriting of the attesting witness:—*Held*: the sessions had decided rightly.—*R. v. MUCCLESTONE (INHABITANTS)* (1829), 7 L. J. O. S. M. C. 96.

5326. —.]—In order to dispense with the production of an attesting witness to a will bearing the date May 15, 1806, it was proved that applications had been made by letter to the attorney in whose office the witness was at the time a clerk, in the first place for general information respecting the will & afterwards for information respecting the witnesses by whom it was attested, & that advertisements for their discovery had a week before the trial been inserted in three daily & one weekly newspaper, but without success:—*Held*: sufficient had been done to entitle the party to have the will read on proof of the handwritings of the witnesses, although the attorney of whom the inquiries had been made, stated that one of the witnesses was examined in a cause touching the property in 1815, a fact which he had forgotten to communicate at the time he was asked for information, but which, it was suggested, he could not have failed to remember had any strict inquiry been instituted.—*MILLER v. MILLER* (1835), 2 Bing. N. C. 76; 1 Hodg. 187; 2 Scott, 122; 4 L. J. C. P. 261; 132 E. R. 30.

Annotations:—*Refd.* Spooner v. Payne (1847), 4 C. B. 328. *Mentd.* Tolson v. Carlisle (Bp.) (1846), 3 C. B. 41.

5327. —.]—To dispense with calling the attesting witness to an indenture of submission, who was the son of deft., plff. proved that repeated attempts had been made to find him, in order to

serve him with a subpoena, by calling at his father's house & at several other places where he had resided, & also at a hospital at which he was, as a student, in the habit of attending lectures; & that, these attempts failing, a summons had been taken out, calling on deft. to admit the execution of the indenture, on which the judge indorsed, "No order; deft. refusing to give any information":—*Held*: enough had been done to justify the reception of the indenture, upon proof of the handwriting, of the subscribing witness.—*SPOONER v. PAYNE* (1847), 4 C. B. 328; 16 L. J. C. P. 225; 9 L. T. O. S. 52; 130 E. R. 533.

Annotation:—*Refd.* Blakeney v. Regan (1852), 1 W. R. 21

iv. Other Cases.

5328. Illness of witness.—*JONES v. BREWER*, No. 5339, *post*.

5329. Witness insane.—Where an attesting witness becomes insane, the instrument may be proved by evidence of his handwriting.—*CUNNIE v. CHILD* (1812), 3 Camp. 283, N. P.

Annotations:—*Mentd.* Bate v. Russell (1829), Mood. & M. 332; *R. v. Hill* (1851), 2 Den. 254.

5330. Service of subpoena hindered.—If the subscribing witness to the acceptance of a bill of exchange, being one of the acceptor's family, cannot be served with a subpoena in consequence of the conduct of that family, the bill may be read without his evidence.—*HILL v. PHILLIPS* (1832), 5 C. & P. 356, N. P.

5331. Refusal to give evidence.—Where the attesting witness to the signature of certain parties to an agreement for reference to arbitration was the clerk of their solr. & he refused to make an affidavit verifying the execution of the agreement by them, the ct. on an *ex p.* application to make the award a rule of ct., dispensed with proof of such execution.—*Re DIERDEN'S ARBITRATION* (1864), 4 New Rep. 394; 10 L. T. 690; 10 Jur. N. S. 673; 12 W. R. 978.

(b) Where Attesting Witness has become Blind.

5332. Whether attesting witness must be called — *Instrument proved by other attesting witness.*]

PART V. SECT. 10, SUB-SECT. 2.— C. (a) iv.

5331 i. Refusal to give evidence.—Secondary evidence of the execution of a deed admitted, when the attesting witness, in collusion with an adverse party, withheld his testimony.—*CLAN- (LORD) v. MULLEN* (1837), *Craw. & D. Abr. C. 8.*—*IR.*

5331 ii. —.]—The execution of a bond was attested by the signature of a witness. Proof having been given that such attesting witness was in collusion with one of the obligors, & absented himself for the purpose of withholding his testimony:—*Held*: sufficient to let in secondary evidence of the execution of the bond.—*JACKSON v. FULLETON* (1839), 1 *Craw. & D. 282.*—*IR.*

5331 iii. —.]—Each of two attesting witnesses to a will, the attestation clause of which was insufficient, refused to make an affidavit as to due execution. The two exors. named in the will made affidavits as to its due execution in their presence:—*Held*: the ct. had jurisdiction to disp. with the attesting witnesses' testimony, & would grant probate on the exors. affidavits.—*In the Goods of OVENS* (1892), 29 L. R. Ir. 451.—*IR.*

i. Whether attesting witness barred by interest.—Deft. pleaded that by deed of Aug. 21, 1837, the husband

conveyed the land to T., & that on Apr. 23, 1850, deft. by deed jointly executed with her husband, released her dower to T., who conveyed to deft. & on this issue was joined. The release of Apr. 23, was a deed poll of release of dower, for a nominal consideration, executed by defendant by mark. & the only subscribing witness being deft., it had been decided that it could not be proved by evidence of his handwriting. Deft. therefore proved the execution of the deed of Aug. 21, 1837, which was executed by defendant, though she was no party to it, & it contained no release of dower. A certificate of two justices was indorsed, dated Mar. 2, 1850, that defendant had appeared before them, & duly barred her dower; & one of them proved that she was examined, executed the deed, & received £10. T., the grantee proved that she agreed to bar her dower, & that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release Apr. 23, 1850, prepared, & sent it to her by deft., with a note for £10, which he held against her husband, to be kept if the release was executed, otherwise, returned; & that deft. brought back to him the release apparently executed, but not the note. The evidence was received (though objected to) as tending to strengthen the probability that the release was

really executed; it being also sworn in confirmation, that the defendant's name to the release was written by her husband; that in May following, defendant told witness that deft. had been to her to sign a paper for T., which she had signed; & that the next day she told deft. she had no right there. The jury found for deft.:—*Held*: deft. being obliged to resort in effect to secondary evidence, was bound to call defendant, who could have given the best, notwithstanding her adverse interest.—*CLARK v. STEVENSON* (1865), 21 U. C. R. 200.—*CAN.*

g. Proof by one of two attesting witnesses.—Where a mtge. bond, which was on the face of it attested by more than two witnesses, but was proved by only one of them, & its execution was not denied:—*Held*: the document might be taken as properly proved.—*NAND KISHORE LAL v. KANU RAM TEWARY* (1902), 1 L. R. 29 Cal. 355; 6 C. W. N. 395.—*IND.*

h. Residence at more than 200 miles from place of trial.—When an attesting witness to a deed of conveyance resides more than two hundred miles from the place of trial it is not necessary that he should be called, but his handwriting may be proved in the ordinary way.—*WHITE v. HOLDER*, 2 J. R. N. S. 53.—*N.Z.*

Sect. 10.—Attesting witnesses: Sub-sect. 2, C. (b), (c) & (d).]

WOOD v. DRURY (1699), 1 Ld. Raym. 734; 91 E. R. 1390.

Annotation:—Folld. Pedler v. Paige (1833), 1 Mood. & R. 258.

5333. ———. *Whether proof of handwriting sufficient.*—A deed attested by a witness become blind, may be read, on proof of the witness's writing, without calling him.—*PEDLER v. PAIGE* (1833), 1 Mood. & R. 258, N. P.

5334. ———. *—*—If, since the execution of a deed, the subscribing witness to it has become blind, a party suing on the deed must, if *non est factum* be pleaded, call the subscribing witness, & it is not enough to prove the handwriting of the parties executing the deed & of the subscribing witness.—*CRONK v. FRITH* (1839), 9 C. & P. 197; *subnom.* CRANK v. FRITH, 2 Mood. & R. 262, N. P.

5335. ———. *—*—An attesting witness to a deed had become blind:—*Held*: it was not sufficient to prove the handwriting of the signature but he must be also examined.—*REES v. WILLIAMS* (1847), 1 De G. & Sm. 314; 63 E. R. 1083.

Annotation:—Mentd. Robinson v. Robinson (1851), 1 De G. M. & G. 247.

(c) *Where Admission made in respect of Instrument.*

5336. General rule.—In an action on a bond or to prove a petitioning creditor's debt which arises by bond, proof of the acknowledgment of the obligor does not supersede the necessity of calling the subscribing witness.—*ABBOT v. PLUMBE* (1779), 1 Doug. K. B. 216; 99 E. R. 141.

Annotations:—Distd. Bowles v. Langworthy (1793), 5 Term Rep. 366. *Apld.* R. v. Harringworth (1815), 4 M. & S. 356. *Refd.* Pooley v. Millard (1831), 1 Tyr. 331; Fox v. Waters (1840), 12 Ad. & El. 43.

5337. ———. *—*—In an action on a bond, if deft.'s admission of the debt is proved, & the subscribing witness cannot be got, it will be sufficient to prove deft.'s handwriting.—*COGHILAN v. WILLIAMSON* (1779), 1 Doug. K. B. 93; 99 E. R. 64.

Annotations:—Apld. Holmes v. Pontin (1791), Peake, 135. *Refd.* Barnes v. Trompowsky (1797), 7 Term Rep. 265; Whitelock v. Musgrave (1833), 3 Tyr. 541.

5338. ———. *—*—When an instrument, executed in the presence of a subscribing witness, is offered in evidence, whether in chief in the cause against deft., or collaterally, it must be proved by the subscribing witness; nor shall the admission of the execution of it, by the party who executed it, be received.—*MANNERS v. POSTAN* (1802), 4 Esp. 239, N. P.

5339. ———. *—*—The ct. will not, upon motion, give leave to examine an attesting witness to a deed upon interrogatories, & to give such examination in evidence at the trial, on the ground that he is incapable, through illness, of attending in person, & that he is not likely to recover, so as to be able to attend, notwithstanding it also appears, by the affidavit, that deft. had at one time admitted the execution of the deed.—*JONES v. BREWER* (1811), 4 Taunt. 46; 128 E. R. 244.

5340. ———. *—*—*CALL v. DUNNING*, No. 5311, *ante*

5341. ———. *—*—The examination of a pauper enclosed the following settlement in appellant parish: "When I was fifteen years old, I was

bound apprentice to C. of P., until the age of twenty-one years, & I produce the indenture dated Aug. 30, 1821, executed by both parties & by my father; the consideration was £15. I served the whole time & resided in my master's house at P. during the said service." Appls. delivered the following notice of the grounds of their appeal against the order of removal, "that the said pauper did not acquire a settlement in the parish of P., by reason of his being bound an apprentice by indenture, dated Aug. 30, 1821, to C. & serving under the same indenture, because the premium of £15 paid to C. was paid by the parish officers of P. & not by the father of the said pauper, & that the requisites of the statute made for the regulation & binding of parish apprentices then in force had not been complied with." At the hearing of the appeal, appls. required resps. to prove the execution of the indenture of apprenticeship as a part of their case, & resps. not being prepared to do so, the ct. of quarter sessions quashed the order of removal without going into the merits, but granted a special case stating the above objection, & directing that if the opinion of the sessions was wrong in requiring the evidence, the case was to be sent back to be reheard:—*Held*: the decision of the sessions was wrong, because the grounds of appeal admitted the execution of the indenture of apprenticeship.—*R. v. ST. JOHN, MARGARET (INHABITANTS)* (1841), 1 Q. B. 252; 4 Per. & Dav. 653; 5 J. P. 79; 5 Jur. 839; 113 E. R. 1125.

5342. Sufficiency of admission.—An indorsement by the party to a deed, reciting one of the provisos in it, & expressly owning it to be his deed, is good evidence, on the absence of the subscribing witnesses, that it is his deed.—*DILLON v. CRAWLY* (1701), 12 Mod. Rep. 500; Holt, K. B. 299; 88 E. R. 1475.

5343. ———. *—*—In trover by the assignees of a bkpt. to recover goods taken by deft. under a fraudulent bill of sale given by the bkpt. to deft. deft.'s examination before the comrs., in which he admitted the execution of the deed, is sufficient evidence to prove the execution, & supercedes the necessity of calling the subscribing witness.—*BOWLES v. LANGWORTHY* (1793), 5 Term Rep. 366; 101 E. R. 201.

5344. ———. *Agreement to acknowledge old warrant.*—If A. agree to acknowledge an old warrant of attorney given by him "so as to enable B. to enter up judgment thereon," judgment may be entered up under a judge's order, without an affidavit of the subscribing witness.—*LAING v. KAINE* (1800), 2 Bos. & P. 85; 126 E. R. 1170.

5345. ———. *Payment of money into court on breach of covenant.*—In an action of covenant, if money be paid into ct. on any breach, it is unnecessary to prove the deed.—*RANDALL v. LYNCH* (1809), 2 Camp. 352, N. P.; *subsequent proceedings* (1810), 12 East, 179.

Annotations:—Mentd. Rodgers v. Forresters (1810), 2 Camp. 483; Edwards v. Vere (1833), 5 B. & Ad. 282; Wright v. Goddard (1838), 8 Ad. & El. 144; Brown v. Johnson (1842), 10 M. & W. 331; Ivens v. Elwes (1854), 3 Eq. Rep. 163; Parker v. Winlo (1857), 27 L. J. Q. B. 49; Ford v. Cotesworth (1868), 1 L. R. 4 Q. B. 197. *Subnom.* Cotesworth v. Dempsey (1876), 1 C. P. D. 624; Ims v. Byers (1870), 1 Q. B. D. 244; Porteus v. Watney (1878), 3 Q. B. D.

given on the part of deft. that C. had, previously to the execution of the deed, admitted the document produced to be the will of S., but the persons named as the attesting witnesses to the will were not called by deft., nor was any evidence given of the handwriting of the alleged testator:—*Held*: the will was properly received in evidence.—*NAGLE v. SHEA* (1875), 1 L. R. 9 C. L. 389.—*IR.*

PART V. SECT. 10, SUB-SECT. 2. C. (e).

5336 i. General rule.—Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document, attestation of which is required by law.—*ASHARI v. MUSAMMAB NAUHHI* (1921), 1 L. R. 44 All. 127.—*IND.*

5336 ii. ———. *—*—In ejectment, plff. claimed under a deed executed by C., since deceased, by which, reciting that C. was entitled in fee to the premises under the will of S., her deceased husband, the whole estate in the premises was conveyed to plff. At the trial, plff., at the instance of deft., produced a will of S., by which C. took an estate in the premises for her own life only; & evidence was

PART V.—WITNESSES.

531; *Davies v. McVeagh* (1879), 4 Ex. D. 265; *Postlethwaite v. Freeland* (1880), 5 App. Cas. 599; *Dahl v. Nelson*, *Donkin* (1881), 6 App. Cas. 38; *Gullischen v. Stewart* (1883), 11 Q. B. D. 186; *Budgett v. Blinnington*, [1891] 1 Q. B. 35; *Neptune Steam Navigation Co. v. Selater & Procter*, *The Delano* (1894), 71 L. T. 544; *Alexander v. Akt. Dampskibet Hansa*, [1920] A. C. 88.

5346. — Under agreement to admit facts.—*Notice of demise.*—Pltf., who was entitled to tithes arising on deft.'s land, served deft. with notice that he had, by a certain indenture of lease, demised those tithes for a term of years. Pltf. afterwards filed the bill for an account of the same tithes. The parties agreed to admit in the cause certain facts, in the same manner as if they had been proved by proper & legal evidence; & among others, that a certain exhibit was the notice, & a certain other exhibit was a true copy of the lease referred to in the notice:—*Held*: the notice was not evidence of the lease so as to relieve deft. from the necessity of calling the attesting witness. —*MOUNSEY v. BURNHAM* (1841), 1 Hare, 15; 60 E. R. 932.

Annotations:—*Mentd.* *Bower v. Cooper* (1843), 2 Hare, 408; *Major v. Auckland* (1843), 3 Hare, 77; *Finch v. Westrope* (1871), 19 W. R. 672.

5347. — Copy of document.—Where the attorneys on both sides entered into an agreement to admit a copy of a document, without any objections thereto:—*Held*: such admission obviated the necessity of proving the execution of the original document by the attesting witness, & it was not confined to the answer of objections to the stamp. —*HARTLEY v. BOSSOM* (1849), 14 L. T. O. S. 209, N. P.

5348. — Assignment of bond by sheriff.—In case against the sheriff for taking insufficient sureties in replevin, where the sheriff has taken & assigned the bond, he admits its due execution & validity, & no other proof thereof is necessary. —*PLUMER v. BRISCO* (1847), 11 Q. B. 46; 2 New Pract. Cas. 382; 17 L. J. Q. B. 158; 10 L. T. O. S. 185; 12 Jur. 351; 116 E. R. 392.

(d) After Notice to Produce Instrument.

5349. Document produced—Whether execution must be proved.—*PASSELL v. GODSALL* (1782), cited in 2 Term Rep. p. 44; 100 E. R. 25.

Annotation:—*Apld.* *Orr v. Morice* (1821), 6 Moore, C. P. 347.

5350. ——A deed, coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, & must be received in evidence without proof of the execution. —*R. v. MIDDLEZOY (INHABITANTS)* (1787), 2 Term Rep. 41; 100 E. R. 23.

Annotations:—*Apld.* *Bowles v. Langworthy* (1793), 5 Term Rep. 366. *Dbtd.* *Gordon v. Secretan* (1807), 8 East, 548. *N.F.* *Johnson v. Lewellin* (1807), 6 Esp. 101. *Consd.* *Orr v. Morice* (1821), 3 Brod. & Bing. 139. *Refd.* *Doe d. St. John v. Hore* (1799), 2 Esp. 724.

5351. — Document produced by former solicitor.—Where a deed or other instrument is in the hands of an attorney who was attorney for the party at the time it was executed, but is not his attorney, on record, or at the time of the trial, his production of it does not supersede the necessity of calling the subscribing witness; without calling whom it cannot be given in evidence. —*LEITH v. Post* (1794), 1 Esp. 195, N. P.

5352. ——Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other, which when produced appeared to have been executed by the party producing it & third persons, & to be

attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. —*GORDON v. SECRETAN* (1807), 8 East, 548; 103 E. R. 453.

Annotations:—*Consd.* *Pearce v. Hooper* (1810), 3 Taunt. 60; *Orr v. Morice* (1821), 3 Brod. & Bing. 139. *Refd.* *Reardon v. Minter* (1843), 12 L. J. C. P. 139.

5353. ——[Though an instrument comes out of the possession of the adverse party in consequence of a notice to produce it, if it has been executed in the presence of a subscribing witness, he must be called to prove the execution of it.] —*JOHNSON v. LEWELLIN* (1807), 6 Esp. 101, N. P.

5354. — Party producing document claiming interest thereunder.—If deft. calls on pltf. to produce at the trial a deed in his custody, to which pltf. is a party, & under which he claims a beneficial estate, it is not necessary that deft. should call the attesting witness to prove the due execution of the deed when produced. —*PEARCE v. HOOPER* (1810), 3 Taunt. 60; 128 E. R. 25.

Annotations:—*Apld.* *Orr v. Morice* (1821), 3 Brod. & Bing. 139; *Doe d. Tyndale v. Hemming* (1826), 9 Dow. & Ry. K. B. 15. *Distd.* *Vacher v. Cocks* (1830), 1 B. & Ad. 145; *Reardon v. Minter* (1843), 5 Man. & G. 201. *Refd.* *Collins v. Bayntun* (1811), 1 Q. B. 117.

5355. ——[*Seem*: where pltf. serves deft. with notice to produce an instrument in his possession under which both parties claim the same interest, it is not necessary for pltf. to prove the execution of the instrument by the testimony of the subscribing witness; *aliter* where their interests are adverse.] —*KIGHT v. MARTIN* (1818), Gow, 26; *subsequent proceedings* (1819), Gow, 103.

Annotation:—*Refd.* *Roe d. Wilkins v. Wilkins* (1835), 4 Ad. & El. 86.

5356. ——[Defts., assignees of a bkpt., produced under a notice from pltf., in an action for use & occupation, the deed of assignment of bkpt.'s effects:—*Held*: the deed was admissible in evidence, though not proved by the attesting witness, it having been shown that defts. occupied under the deed.] —*ORR v. MORICE* (1821), 3 Brod. & Bing. 139; 6 Moore, C. P. 347; 120 E. R. 1235.

Annotations:—*Apld.* *Doe d. Tyndale v. Hemming* (1826), 9 Dow. & Ry. K. B. 15. *Distd.* *Vacher v. Cocks* (1830), 8 L. J. O. S. K. B. 341.

5357. ——(1) Where a feoffment had indorsed upon it, a memorandum stating that livery of seisin had taken place, & this was subscribed by a person as an attesting witness:—*Held*: this person should have been called to prove the livery of seisin.

(2) Where deft. in ejectment produces a deed called for by the lessor of pltf., such production does not dispense with the necessity of proof of the execution, unless deft. claims some interest under the deed. —*DOE d. WILKINS v. CLEVELAND (MARQUIS)* (1829), 9 B. & C. 864; 4 Man. & Ry. K. B. 606; 8 L. J. O. S. K. B. 71; 109 E. R. 321.

Annotation:—*Generally.* *Mentd.* *Doe d. Lewis v. Davies* (1837), 2 M. & W. 503.

5358. ——[Where an instrument under which both parties claim title is produced, under a notice to produce, it may be read against the party producing it without regular proof of its execution.] —*ROE d. WILKINS v. WILKINS* (1835), 4 Ad. & El. 86; 111 E. R. 720; *sub nom.*

Sect. 10. — Attesting witnesses: Sub-sect. 2, C. (d) & (e); sub-sect. 3.]

DOE d. WILKINS v. WILKINS, 1 Har. & W. 574 ;
5 Nev. & M. K. B. 434.

Annotation :—**Mentd.** Baddeley v. Baddeley (1878), 9 Ch. D.
113.

5359. ————.]—Where debts. claimed title to certain goods under an assignment, & in pursuance of notice produced it at the trial when called for by plffs.:—*Held*: plffs. were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud.—*CARR v. BURDESS* (1835), 1 Cr. M. & R. 782; 5 Tyr. 309; 4 L. J. Ex. 60; 149 E. R. 1296.

Annotations: — **Reid.** Doe d. Frankis v. Frankis (1840), 4 Jur. 273. **Mentd.** Stanger v. Wilkins (1855), 19 Beav. 626.

5360. ————]—There was a subscribing witness to an agreement which was produced, on notice, by deft.: —*Held*: as deft. claimed an interest under the agreement, it was not necessary to call such subscribing witness. —*FULLER v. PATTRICK* (1849), 18 L. J. Q. B. 236; 13 L. T. O. S. 185; 13 Jur. 501.

5361. [-----].--In an action against a sheriff for taking insufficient sureties upon a replevin bond where deft. produces the bond in pursuance of notice, which purports to have been executed & attested, it seems to be unnecessary to prove the execution of the bond by means of the attesting witness. *SCOTT v. WATMAN* (1822), 3 Stark. 108. N. P.

Annotations: **Reld.** Plumer v. Brisco (1847), 11 Q. B. 46.
Mend. Hunt v. Round (1834), 2 Dowl. 558; Jeffery v.
Bastard (1836), 4 Ad. & El. 823.

5362. — — — — — Where in ejectment the attorney for the lessor of *pltf.* obtained from one of *defts.*, the tenant in possession, a lease of the premises granted to him for a term not then expired in order to prevent *defts.* from setting it up to defeat the action: *Held*: he thereby recognised it as a valid instrument, & when produced in pursuance of notice from *defts.* it might be read in evidence without calling the subscribing witness to prove the execution by the grantor of the lease. — *DOE* *v.* *TYNDALE* *v.* *HEMING* (1826), 6 B. & C. 28; 2 C. & P. 462; 9 Dow. & Ry. K. B. 15; 108 E. R. 363.

Annotation: **Refd.** Bell v. Chaytor (1813), 1 Car. & Kir.
162.

5363.] In *assumpsit* by vendee against vendor to recover back a deposit paid on the purchase of real property, & deft. at the trial produced, under a notice to produce, the agreement which had been signed at the foot of the conditions of sale: *Held*: it was not necessary to call the subscribing witness to prove the execution of this agreement. BRADSHAW v. BENNETT (1831), 5 C. & P. 48; 1 Mood. & R. 143. N. P.

5384. [---] In *assumpsit* by indorsee against acceptor of an English bill of exchange, to show that pltf. had received the bill when it was overdue ; a protest, which had been made of it by pltf.'s immediate indorser, being in the hands of pltf. was called for by deft. at the trial on notice to produce. On its production it appeared to be attested by a subscribing witness :—*Held*: the mere circumstances that the protest came out of the hands of pltf. as he did not claim title under it, was not sufficient to dispense with the necessity of calling the subscribing witness ; but it being proved that on two occasions the paper had been produced by pltf.'s attorney to deft.'s attorney, as the protest applying to the bill in question, it was admitted in evidence without proof of the attesta-

tion.—MARIN v. PALMER (1834), 6_C. & P. 466,
N. P.

5365. ———.]—Deft. in order to prove a partnership between himself & pltf. offered in evidence a written contract between pltf. & deft. as partners & a third party. This came from pltf.'s custody & was produced by him upon notice:—*Held*: it was not admissible without proof of execution by pltf.—*COLLINS v. BAYNTON* (1841), 1 Q. B. 117; *Arn. & H.* 313; 4 *Per. & Dav.* 544; 10 *L. J. Q. B.* 98; 5 *Jur.* 530; 113 *E. R.* 1074.

Annotation :—**Reid**. *Fuller v. Patrick* (1849), 13 Jur. 561.

5366. ———.]—*Assumpsit* by a servant against his master, for not employing him under a written agreement to serve for a year, which had not expired. The agreement was produced under notice:—*Held*: it was not necessary to call the subscribing witness to prove the execution.—*BELL v. CHAYTOR* (1843), 1 Car. & Kir. 102, N. P.

5367. — [1838.]—In an action for work & labour, in procuring an apprentice for deft., pltf. gave deft. notice to produce the deed of apprenticeship :—*Held* : the production of it did not dispense with the necessity of proving its execution by the subscribing witness.—*REARDEN v. MINTER* (1843), 5 Man. & G. 204 ; 6 Scott, N. R. 237 ; 12 L. J. C. P. 139 ; 134 B. R. 539.

5368. Document not produced.—Whether execution must be proved.]—The declaration in covenant on an indenture of apprenticeship averred that the deed was in the possession of deft., who pleaded *non est factum*. At the trial the deed was proved to be in the hands of deft. who had received notice to produce it, the notice stating the name of the subscribing witness. On non-production of the deed, pltf. gave parol evidence of its contents, without calling the subscribing witness, who was in ct.:—*Held*: the parol evidence was well received.—*COOKE v. TANSWELL* (1818), 8 Taunt. 450; 2 Moore, C. P. 513; 129 E. R. 458.

Annotation :—**Reid**, *Poole v. Warren* (1838), 8 Ad. & El. 582.

5369. ———.] --Where a party refuses to produce a deed, he cannot, after proof of notice, & after proof of his possession of the deed, & after proof also of an examined copy, by producing the deed, insist upon its proof by the attesting witness. —JACKSON v. ALLEN (1822). 3 Stark. 74. N. P.

Annotation :—**Reid**. *Edmonds v. Challis* (1849), 7 C. B. 413.

5370. Production of copy.]—In action for double value under 4 Geo. 2, c. 28, s. 1, deft. had notice to produce the original notice to quit, but refused. Pltf. then produced & proved a copy, by which it appeared that there was an attesting witness:—*Held*: the attesting witness need not be called.—*POOLE v. WARREN* (1838), 8 Ad. & El. 582; 3 Nev. & P. K. B. 693; 1 Will. Woll. & H. 518; 3 Jur. 23; 112 E. R. 959

Annotation :—**Reid**. *Edwards v. Camerons, etc.* Ry. (1850).
16 L. T. O. S. 197.

5371. — [] — Notice had been given to produce a deed, but it was not produced, & secondary evidence was given of its contents. There was an attesting witness:—*Held*: it was not necessary to call him.—EDWARDS v. CAMERONS, ETC. RY. Co. (1850), 16 L. T. O. S. 197; *subsequent proceedings* (1851), 6 Ex. 260.

(c) *Where Instrument Evidence against Public Officer.*

Sheriff—Production of replevin bond by.]—
See No. 5361, *ante*.

Taking & assigning replevin bond.]—See
No. 5348, *ante*.

Compare No. 5241, ante.

SUB-SECT. 3.—EVIDENCE OF ATTESTING WITNESS.

5372. How obtained—When affidavit of execution ordered.]—ANON. (1743), Barnes, 58; 94 E. R. 805.

5373. ———.]—Subscribing witness was ordered to make an affidavit of the execution of an instrument attested by her, or show cause to the ct. why she should not.—WESTON v. FAULKNER (1815), 1 Price, 308; 145 E. R. 1412.

5374. ———.]—The ct. will grant a rule nisi only, for the attesting witness to make an affidavit of the execution of a submission to arbit., in order that it may be made a rule of ct., though the witness's name was only discovered the day before, & though the term was nearly expired in which the party applying was bound to move to set aside the award.—*Ex p. TODD* (1837), Will. Woll. & Dav. 577.

5375. ———.]—An attesting witness to a warrant of attorney refused to make an affidavit of the execution to support a motion for judgment upon it, & it appeared that he was colluding with deft.:—*Held*: a rule absolute would be made with costs to compel him to do so.—*Ex p. MORRISON, CROFT v. PERCEVAL* (LORD) (1839), 8 Dowl. 94.

5376. ——— When examination ordered—Refusal to make affidavit of execution.]—A will informally executed & attested was carried into the registry to be proved, & was afterwards, on the ground of its informality, sought to be withdrawn, for the purpose of proving a will of earlier date. The registrar, in order to certify refusal of probate of the informal will, required affidavits from two witnesses, who, though they had subscribed it, had neither witnessed the signature of testator, nor signed in the presence of each other. One of the witnesses refused to make the necessary affidavit. Upon motion:—*Held*: an order would be granted under Ct. of Probate Act, 1857 (c. 77), s. 24, to enforce his attendance for oral examination in ct., & a day would be named for that purpose.—*Re PROSSER, Ex p. BOULTON* (1861), 3 New Rep. 611.

5377. ———.]—Where the parties whose names appeared as attesting witnesses on the face of a will which was disputed by the widow, declined to state the circumstances under which it was executed, the ct. refused to order their attendance for the purpose of examination, or to allow of interrogatories being put to them on the subject by the widow.—EVANS v. JONES (1867), 36 L. J. P. & M. 70; 16 L. T. 299; 15 W. R. 775.

5378. ———.]—*In the Goods of HAMER*, No. 4333, *ante*.

5379. ———.]—Two attesting witnesses to a codicil had refused, after proper application, to make a necessary affidavit as to the execution of the testamentary document:—*Held*: both must attend for examination unless they made the required affidavit within seven days, & must pay the costs caused by their previous refusal.—*Re BAYS* (1909), 54 Sol. Jo. 200.

5380. What must be proved—Attestation & execution.]—A witness to a deed must not only

prove his own attestation, but also the execution of the deed by the person executing the deed.—HILL v. UNETT, LOXLEY v. HILL (1818), 3 Madd. 370; 56 E. R. 541.

Annotation:—*Consd. Whitelock v. Musgrave* (1833), 3 Tyr. 541.

5381. ——— Handwriting of attesting witness.]—*Seemle*: where one of plffs. is an attesting witness to an instrument, the proof of the execution of which is essential to deft.'s case, it is enough for deft. to prove the handwriting of that plff.:—STRANGE v. DASHWOOD (1825), Coop. Pr. Cas. 497; 3 L. J. O. S. Ch. 194; 47 E. R. 617.

5382. Weight of evidence.]—A subscribing witness who contradicts his own act of attestation may be a good witness to support another subscribing witness in other circumstances.—BROOME v. ELLIS (1758), 2 Lee, 525; 161 E. R. 427.

5383. ———.]—DOE d. COUNSELL v. CAPERTON, No. 5299, *ante*.

5384. ———.]—A deed proved by the attesting witness *visâ voce* at the hearing is well proved for all purposes in the cause, unless it is impeached.—BOWSER v. COLBY (1841), 1 Hare, 109; 11 L. J. Ch. 132; 5 Jur. 1106; 66 E. R. 969.

Annotations:—*Mentd.* Howard v. Fanshawe, [1895] 2 Ch. 581; Dendy v. Evans, [1910] 1 K. B. 263.

5385. ———.]—Where a deed is impeached by deft.'s answer, although the evidence by affidavit of an attesting witness may not *per se* be sufficient proof of the instrument, the ct. will not at the hearing reject such evidence totally, but take it *valent quantum*.—JAMES v. GWYNNE (1853), 2 W. R. 122.

— *In will cases.*—*See WILLS.*

5386. Cross-examination of attesting witness—When allowed.]—A person devised real property to his widow for life, & after her death to his children equally, with a power to the widow to mortgage or sell, in case "the fund" arising from the real & personal estate of testator was not sufficient for the maintenance of the widow. The widow executed a mtge. of the property for £30 to her son T., & it was proved that four years before the mtge. T. advanced his mother a sum less than £1 to pay a poor rate, that she was unable to pay. The subscribing witness to the mtge. deed had acted as attorney both of the widow & T. respecting it. On the trial of an ejectment by the administratrix of T. to recover the property under the mtge. deed:—*Held*: the subscribing witness might be cross-examined to show that the sum of £30, mentioned in the mtge. deed, & in the receipt at the back of it, was never in fact advanced.—DOE d. SALT v. CARR (1841), Car. & M. 123, N. P.

5387. ——— Witness denying due execution of instrument.]—Where on the trial of an issue *devisavit vel non*, from the Ct. of Ch., plff., in obedience to the rule of that ct., calls the second attesting witness, who gives evidence adverse to plff., the counsel of plff. may put questions to him in the nature of a cross-examination.—BOWMAN v. BOWMAN (1843), 2 Mood. & R. 501, N. P.

5388. ———.]—JONES v. JONES, No. 4815, *ante*.

— *Sec. generally*, Sect. 6, sub-sect. 2; Sect. 8, sub-sect. 1, B.; Sect. 8, sub-sect. 2, B., *ante*.

PART V. SECT. 19, SUB-SECT. 3.

5380 l. What must be proved—Attestation & execution.]—Where a witness to a mtge. by two swears that he saw both execute, when in fact he only saw one, & the mtge. has been registered on such affidavit, it is sufficient.—DE FORREST v. HUNNELL (1858), 15 U. C. R. 370.—CAN.

k. ——— Signature by mark.]—Where three persons witnessed the execution of a will, two of them signed by their marks & were unable to identify the will produced, but the third did so & also proved the marks of the others:—*Held*: this proof was sufficient to entitle the will to probate.—*Re HANLON'S WILL* (1874), 2 Pug.

5382 l. Wright of evidence.]—An attesting witness to an instrument is not rendered incompetent to prove its execution, by subsequently making a contract by which he becomes interested in the result of a suit, where his testimony is necessary in support of the instrument.—DROUGHT v. DROUGHT (1835), 3 Ir. L. Rec. N. S. 242.—IR.

Sect. 10.—Attesting witnesses: Sub-sect. 4. Sects. 11 & 12. Part VI. Sects. 1 & 2: Sub-sect. 1.]

SUB-SECT. 4.—CONTRADICTION OF ATTESTING WITNESS.

5389. Witness denying attestation.]—*PRKE v. BADMERING* (1723), cited in 2 Stra. 1096; 93 E. R. 1055.

Annotation:—Refd. Ewer v. Ambrose (1825), 3 B. & C. 746.

5390. ———.]—A witness is not at liberty to contradict his attestation; & in such a case other evidence, from circumstances, is admissible, as where there is no witness or the person does not exist, sealing & delivery may be presumed from proof of the handwriting.—*BURKOWES v. LOCK* (1805), 10 Ves. 470; 32 E. R. 927.

Annotations:—Mentd. Gibson v. D'Este (1813), 2 Y. & C. Ch. Cas. 542; *Ingram v. Thorp* (1848), 7 Hare, 67; *Price v. Macaulay* (1852), 2 De G. M. & G. 339; *Pulsford v. Richards* (1853), 17 Beav. 87; *Lake v. Brutton* (1856), 8 De G. M. & G. 410; *Robson v. Devon* (1857), 5 W. R. 721; *Slinn v. Croucher* (1860), 1 De G. F. & J. 518; *Stephens v. Venables* (No. 2) (1862), 31 Beav. 124; *Re Ward* (1862), 31 Beav. 1; *Re Tichener* (1865), 35 Beav. 317; *Lloyd v. Banks* (1867), L. R. 4 Eq. 222; *Re Overend, Gurney, Ex p. Oakes & Peck* (1867), L. R. 3 Eq. 576; *Ramshire v. Bolton* (1869), L. R. 8 Eq. 294; *Hill v. Lane* (1870), L. R. 11 Eq. 215; *Peck v. Gurney* (1873), L. R. 6 H. L. 377; *Eaglesfield v. Londonderry* (1876), 4 Ch. D. 693; *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Mathias v. Yetts* (1882), 46 L. T. 479; *Re Dangar's Trusts* (1889), 58 L. J. Ch. 315; *Derry v. Peck* (1889), 14 App. Cas. 337; *L. & N. W. Ry. v. Boulton* (1890), 63 L. T. 727; *Low v. Bouverie*, [1891] 3 Ch. 82; *Thlson v. Tindall* (1891), 40 W. R. 141; *Balkis Consolidated Co. v. Tomkinson* (1893), 42 W. R. 204; *Williams v. Pinckney* (1897), 67 L. J. Ch. 31; *Whittington v. Seale-Hayne* (1900), 82 L. T. 49; *Exploring Land & Minerals Co. v. Kolekman* (1905), 94 L. T. 231; *Nocton v. Ashburton*, [1914] A. C. 932.

5391. Witness denying due execution—Of bond.]—Where the attesting witness to a bond, on being called to prove its execution denied having seen it executed: *Held*: it might be proved by evidence of the handwriting of the party.—*BOXER v. RABETH* (1810), Gow. 175, N. P.

5392. ——— Of deed.]—Where a deed is to be proved, the ct. will oblige the parties to produce the living witness, before they will admit any circumstantial evidence; & although in this case

the witness denied his being present at the execution, the circumstantial evidence given afterwards so prevailed, that the jury found for the deed (*PRATT, C.J.*).—*BODMIN v. PYKE* (1721), 11 Mod. Rep. 345; 88 E. R. 1079.

5393. ———.]—If a deed purports to be executed by A. in the presence of B., as attesting witness; & B. swears truly that it was not executed by A., in his presence, the deed cannot be proved by evidence of A.'s handwriting, or of an acknowledgment by A., that he had executed it.—*PHIPPS v. PARKER* (1808), 1 Camp. 412, N. P. *Annotations:—Consd. Talbot v. Hodson* (1816), 7 Taunt. 251. *Refd. Lemon v. Dean* (1810), 2 Camp. 636, n.

5394. ———.]—If the attesting witness to a deed swears that he did not see it executed, it may be proved by evidence of the handwriting of the party.—*FITZGERALD v. ELSEE* (1811), 2 Camp. 635, N. P.

Annotation:—Refd. Talbot v. Hodson (1816), 2 Marsh. 527.

5395. ———.]—If an attesting witness to a deed deny having seen the deed executed, other evidence of the execution is admissible.—*TALBOT v. HODSON* (1816), 7 Taunt. 251; 2 Marsh. 527; 129 E. R. 101.

Annotations:—Refd. Hall v. Bainbridge (1848), 12 Jur. 795. *Mentd. Butler v. Brown* (1819), 1 Brod. & Bing. 66.

5396. ——— Of promissory note.]—If the subscribing witness to a promissory note swears that he did not see it drawn, it may be proved by evidence of the handwriting of the maker.—*LEMON v. DEAN* (1810), 2 Camp. 636, n.

Annotation:—Consd. Talbot v. Hodson (1816), 7 Taunt. 251.

——— **Of will.]—**See EXECUTORS; WILLS.

SECT. 11.—EVIDENCE OF OPINION AND BELIEF.

See Part II., Sect. 7, *ante*.

SECT. 12.—WEIGHT OF EVIDENCE.

See Part III., Sect. 8, *ante*.

Part VI.—Expert Evidence.

SECT. 1.—IN GENERAL.

Opinion of non-expert witnesses, see Part II., Sect. 7, sub-sect. 3, *ante*.

5397. Whether admissible—General rule.]—The ct., when assisted by Trinity Masters, will not allow of any opinions on the nautical points involved in issue to be offered in evidence.

The opinions of nautical men on a question of seamanship, indeed of men of science on points of science generally, when a clear statement of the whole of the facts has been laid before them, is admissible evidence in this as well as other cts. (*per CUR.*).—*THE ANN & MARY* (1843), 2 Wm. Rob. 180; 2 L. T. O. S. 107; 7 Jur. 999; 106 E. R. 725. *Annotation:—Consd. The Sir Robert Peel* (1880), 43 L. T. 364.

5398. ——— Confined to matters of scientific knowledge.]—Plff. seeking to interfere on the ground of nuisance with a work carried on in a normal manner must, in order to sustain his suit, show that he has incurred actual & substantial or visible damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to

establish the fact of the damage, but only to explain the causes of it. The ct. will not in such cases send an expert to report where such course would in fact be giving a new trial on new evidence, & delegating the judgment of the ct. to that of the expert, nor will it direct an issue where the state of things may have been materially altered from lapse of time since the institution of the suit.—*SALVIN v. NORTH BRANCEPETH COAL CO.* (1871), 9 Ch. App. 705; 44 L. J. Ch. 149; 31 L. T. 154; 22 W. R. 904, L. J.J.

Annotations:—Mentd. Shotts Iron Co. v. Inglis (1882), 7 App. Cas. 518; *Fletcher v. Bealey* (1885), 28 Ch. D. 688; *Murray v. Cadwell* (1889), 6 T. L. R. 76; *A.-G. v. Manchester Corpn.*, [1893] 2 Ch. 87; *Wood v. Conway Corpn.* (1914), 110 L. T. 917; *Slack v. Leeds Industrial Co-op. Soc.*, [1923] 1 Ch. 431.

5399. ———.]—*R. v. CATERMOUL* (1894), 121 C. C. Ct. Cas. 151.

5400. ——— To construe modern Act of Parliament.]—Expert evidence as to the meaning of ordinary English words in a modern Act of Parliament of general application is not admissible.—*CAMDEN (MARQUIS) v. INLAND REVENUE COMRS.*, [1914] 1 K. B. 611; 83 L. J. K. B. 509; 110 L. T.

PART V. SECT. 10, SUB-SECT. 4.

1. Witness denying due execution—Of will.]—The ct. refused to set aside

a will on the unsupported testimony of one of the attesting witnesses to the effect that testator's signature had not

been adhabited or acknowledged in her presence.—*FOURSTERS v. LOW'S TRUSTEES*, [1907] S. C. 1240.—*SCOT.*

173; 30 T. L. R. 225; 58 Sol. Jo. 219, C. A.; on *appeal, sub nom.* INLAND REVENUE COMRS. v. CAMDEN (MARQUESS), [1915] A. C. 241, H. L.

Annotations:—**Mentd.** King v. Cadogan (1915), 113 L. T. 895; *Ecd.* Comrs. for England & I. R. Comrs., [1919] 2 K. B. 67.

5401. Expert evidence distinguished from surmise.—*Semble*: what was said by Lord Halsbury, in *Barnabas v. Bersham Colliery Co.* (103 L. T. 513), as to propositions being proved in a ct. of law by proof of evidence & that that was not satisfied by "surmise, conjecture, or guess,"

nature of a mere opinion.—LEWIS v. PORT OF LONDON AUTHORITY (1914), 111 L. T. 776; 58 Sol. Jo. 686; 7 B. W. C. 577, C. A.

Annotations:—**Refd.** Jones v. Guest, Keen & Nettlefolds (No. 1) (1915), 60 Sol. Jo. 75. **Mentd.** Earwicker v. London Graving Dock Co., [1916] 1 K. B. 970.

5402. Function of expert witness—To give opinion on particular facts.—Where scientific men are called as witnesses, they are not entitled to give their opinions as to the facts proved at the trial.—JAMESON v. DRINKALD (1826), 12 Moore, C. P. 148; 5 L. J. O. S. C. P. 30.

5403. ——— Not on facts which jury competent to decide.—RAMADGE v. RYAN, No. 5421, *post*.

— **Medical witness.**—*See* Sect. 2, sub-sect. 1, *post*.

Nautical witness.—*See* No. 5442, *post*.

5404. Extent of evidence—Whether opinion acted on.—Where a skilled witness says that in the course of his duty he formed a particular opinion on certain facts, he may further be asked in examination-in-chief how he went on to act upon that opinion.—STEPHENSON v. RIVER TYNE IMPROVEMENT COMRS. (1869), 17 W. R. 590.

PART VI. SECT. 1.

5402 i. Function of expert witness—To give opinion on particular facts.—It is not necessary to embody in a question put to an expert as a hypothetical question all the facts relating to the subject upon which the opinion of the witness is asked. It is sufficient that one fact which has been proven, or more than one, be stated to the witness, & he is told to assume the truth of the fact stated, & his opinion is asked upon it.—WILSON v. BELL (1918), 45 N. B. R. 442.—**CAN.**

5402 ii. ————The facts of the case under trial ought to be stated to a witness called to give his opinion as a person of skill.—CAIRNS v. KETTER (1820), 2 Murr. 250.—**SCOT.**

m. Limitation of number of expert witnesses.—By 2 Edw. VII., c. 8, s. 1, only five expert witnesses can be called by either side on the trial of a case.—DOUCE v. R. (1906), 27 C. L. T. 151; 38 S. C. R. 149.—**CAN.**

n. ————Where a county ct. judge had allowed six witnesses at a trial to give opinion evidence in spite of objections that proper application for additional experts had not been made pursuant to statute:—*Held*: the provisions of the statute had been violated & there should be a new trial.—RICE v. SOCKETT (1912), 23 O. W. R. 602; 4 O. W. N. 397; 27 O. L. R. 410; 49 C. L. J. N. S. 72; 8 D. L. R. 84.—**CAN.**

o. ————The exclusion of the testimony of ordinary witnesses, who may express an opinion in the course of testifying the facts, but it is not contemplated by Alberta Evidence Act, s. 14, puts a limit to what is known as expert testimony.—*Re* SCAMEN & CANADIAN NORTHERN RY. CO. (1912), 22 W. L. R. 105; 6 D. L. R. 142; 2 W. W. R. 1006; 5 Alta. L. R. 376.—**CAN.**

5405. ————*BIRRELL v. DRYER* (1884), 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. L. C. 207, H. L.

Expenses of expert witnesses.—*See* Part V., Sect. 3, sub-sect. 5, D. (b), *ante*.

Costs of action in which expert witnesses called.—*See* PRACTICE.

SECT. 2.—PARTICULAR CLASSES OF EVIDENCE.

SUB-SECT. 1.—MEDICAL EVIDENCE.

5406. What witnesses may be heard—Midwife—As to pregnancy.—THE GARDNER PEERAGE (1821), 1a Marchant's Report 169.

Annotations:—**Mentd.** Gurney v. Gurney (1863), 11 W. R. 659; Gaskill v. Gaskill, [1921] P. 425.

5407. ——— Attending confinement—To prove live birth.—Upon a question whether a child was, or was not born alive, the evidence in the affirmative of the accoucher who attended the mother in her confinement, & who was a person of competent skill & integrity, was taken to outweigh the contrary opinions of numerous medical men of eminence who were subsequently consulted upon the facts stated.—BROCK v. KELLOCK (1861), 30 L. J. Ch. 498; 4 L. T. 572; 25 J. P. 595; 7 Jur. N. S. 789; 9 W. R. 939, L. J.

5408. What evidence may be given—Whether confined to matters within personal experience.—STURGE v. HALDIMANT, No. 5437, *post*.

5409. ——— Whether confined to personal knowledge—Opinions based on evidence of other witnesses—Cause of death.—R. v. NEWTON (1850), cited in Wills' Circumstantial Evidence 6th ed. at p. 158.

5410. ——— Whether wound self-inflicted.—On a trial for murder the evidence of

p. *Report of experts—Whether bar to other evidence.*—SCOTT v. PAYETTE (1879), 24 L. C. J. 141.—**CAN.**

q. ——— *When rejected.*—The ets. ought, as far as possible, to accept favourably the reports of experts, & to reject them only so far as there are irregularities or illegalities of such a nature as to prejudice the parties.—CANNANAN v. BRYSON (1884), M. L. R. 1 S. C. 221; 8 L. N. 134.—**CAN.**

r. ————If an injunction has been granted restraining a person from interrupting the access of light & air to certain windows, & the ct. considers that the injunction has been infringed, an attachment will issue, even though deft. has proceeded according to the advice of his surveyor & legal adviser in constructing the building complained of as a breach of the injunction. The ct. in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment.—PRANJIVANDAS HAJIVANDAS v. MAYARAM SAMALDAS (1892), 1 Bom. 148.—**IND.**

s. *Conflict of opinion as to value.*—It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses in toto & to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, & that truth lies somewhere between the extremes.—MUNSHI v. LINDSAY (1886), 11 O. R. 520.—**CAN.**

PART VI. SECT. 2, SUB-SECT. 1.

5408 i. What evidence may be given—Whether confined to matters within personal experience.—A further question was reserved as to the competency of a witness, a medical man, to give evidence as to the distance at which the gun with which the wound causing death was inflicted, was held from the body of the deceased.

The witness in question had given evidence as follows: "There are *indicia* in medical science from which it can be said at what distance small shot are fired at the body. I have studied this not from personal experience, but from books. I base my opinion as to the distance not so much upon the absence of burning as from the size of the wound, & the jagged nature of the edge."—*Held*: the witness having been shown, *prima facie*, to be an expert, the question was regular & the answer properly received.—PROBERT v. R. (1888), 15 S. C. R. 401.—**CAN.**

5409 i. ——— Whether confined to personal knowledge—Opinions based on evidence of other witnesses—Cause of prolapsus uteri.—Where a practising physician was allowed to give his opinion of the manner in which *prolapsus uteri* would be caused, & the degree of violence that would produce it, & of the symptoms of the disease & other matters relative to it, without having made a personal examination of the patient in regard to it, or having heard the other witnesses:—*Held*: as his opinion did not in any way depend upon the circumstances detailed by the other witnesses, but entirely upon his knowledge acquired as a medical practitioner by his study & practice in other cases, the evidence was properly received.—NAPIER v. FERGUSON (1878), 2 P. & B. 415.—**CAN.**

t. ——— *Age of child.*—Upon a charge of having carnally known & abused a female child under the age of 10 years scientific evidence of the evidence of experts can be adduced & is receivable as some evidence of the age of the child.—*It. v.* CAMM (1883), 1 Q. L. J. 136.—**AUS.**

u. ——— *Mental state & capacity of alleged lunatic.*—The Supreme Ct.

Sect. 2.—Particular classes of evidence: Sub-sects. 1 & 2.]

an expert medical witness as to whether in his opinion a wound was self inflicted is admissible if the state in which the body & wound were found is described to him, as being his opinion on assumed facts, although he has not himself seen the body & the wound.—*R. v. MASON* (1911), 76 J. P. 184; 28 T. L. R. 120; 7 Cr. App. Rep. 67, C. C. A.

5411. ——— *Opinion as to fact of pregnancy.*—*THE GARDNER PEKAGE* (1824), *Le Marchant's Report* 169.

Annotations:—Mentd. *Gurney v. Gurney* (1863), 11 W. R. 659; *Gaskill v. Gaskill*, [1921] P. 425.

5412. ——— *Proof of voluntary residence in lunatic asylum.*—The question being as to the sanity of the testator, evidence of surviving medical attendant on a lunatic asylum in which she resided at the time of the making of the will, received, to show that she was sane, & that her continuance in the asylum was voluntary.—*MARTIN v. JOHNSTON* (1858), 1 P. & F. 122.

5413. ——— *Competency of deaf & dumb witness.*—At the trial of a prisoner for assaulting with intent to ravish, it appeared that prosecutrix was deaf & dumb, & her father, who had been sworn to interpret in the case, having stated that he believed her not to be aware of the nature of an oath, the judge summoned an expert for his assistance who, before being sworn to interpret, endeavoured to ascertain the extent of her intelligence, & reported thereon to the ct.; the judge thereupon allowed the expert to be sworn to interpret, & the prosecutrix, through him, to be sworn. The examination proceeded some way, & amongst her replies was one that she had consented to what had been done to her by prisoner; & as she answered yes to almost every question, the expert informed the ct. that he was satisfied that he had been mistaken, & that she was unable to understand him, & the ct. thereupon decided that any further examination of her would be unsatisfactory.—*R. v. WHITEHEAD* (1866), L. R. 1 C. C. R. 33; 35 L. J. M. C. 186; 14 L. T. 489; 30 J. P. 391; 14 W. R. 677; 10 Cox, C. C. 234, C. C. R.

5414. ——— *Materiality of facts not disclosed by assured.*—The evidence of medical men as to the materiality of facts not disclosed by an assured, is admissible in an action on a policy of life insurance.—*YORKE v. YORKSHIRE INSURANCE CO.*, [1918] 1 K. B. 662; 87 L. J. K. B. 881; 119 L. T. 27; 34 T. L. R. 353; 62 Sol. Jo. 605.

5415. *Function of witness—Not to weigh evidence—Sanity.*—*FERRERS (EARL) CASE* (1760), Post. 138; 19 State Tr. 885, 946, H. L. *Annotation:—Mentd.* *It. v. Bourdon* (1847), 2 Car. & Kir. 366.

5416. ——— *On a trial where the defence is insanity, a witness of medical skill may be asked whether such & such appearances, proved*

by other witnesses, are, in his judgment, symptoms of insanity. But *quaere*, whether, he can be asked, whether, from the other testimony given, the act with which prisoner is charged, is in his opinion, an act of insanity, which is the very point to be decided by the jury.—*R. v. WRIGHT* (1821), Russ. & Ry. 456, C. C. R.

Annotation:—Foldl. *R. v. Searle* (1831), 1 Mood. & R. 75.

5417. ——— *On an issue as to the state of mind of a testator, a medical man conversant with cases of insanity cannot be asked his opinion as to the insanity of the testator, founded upon the evidence given at the trial in his hearing.*—*DOE d. BAINBRIDGE v. BAINBRIDGE* (1850), 16 L. T. O. S. 245; 4 Cox, C. C. 456, N. P.

5418. ——— *SHARPE v. MACAULAY* (1856), cited *Powell on Evidence*, 4th ed. 81.

5419. ——— *Question for jury.*—On a plea of insanity at the time of making a contract, the opinion of the medical men who gave certificates on which deft. was confined as insane, at or about the time, is only evidence for the jury, who must judge of the grounds on which it was formed.—*LOVATT v. TRIBE* (1862), 3 F. & F. 9.

5420. ——— *Question for court.*—The question of mental capacity is one for the ct. before which the matter comes, & not for the doctors, & the ct. cannot be relieved by medical testimony of obligation to form an independent opinion on the technical aspect.—*RICHMOND v. RICHMOND* (1914), 111 L. T. 273; 58 Sol. Jo. 784.

State of mind at time of particular act, *see, also*, *CRIMINAL LAW*, Vol. XIV., p. 63, Nos. 282–285.

5421. ——— *Negligent medical treatment.*—Deft. had pleaded truth in justification of a libel, part of which alleged that a physician in refusing to act with plff., also a physician, had “honourably & faithfully discharged his duty to his medical brethren.”—*Held*: it was not competent to deft. to offer in evidence the opinion of a medical witness on this head.

Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted (*TINDAL, C.J.*).—*RAMADGE v. RYAN* (1832), 9 Bing. 333; 2 Moo. & S. 421; 2 L. J. C. P. 7; 131 E. R. 640.

5422. ——— *RICH v. PIERPONT* (1862), 3 F. & F. 35.

5423. ——— *Cause of death.*—*R. v. NEWTON* (1850), cited in *Wills' Circumstantial Evidence*, 6th ed. at p. 158.

5424. ——— *R. v. PALMER* (1856), *Phillipps on Evidence*, 6th ed. 308.

Annotation:—Mentd. *R. v. Barrett* (1870), 18 W. R. 671.

5425. ——— *To Interpret particular facts—Whether symptoms symptoms of insanity.*—

has jurisdiction, under the Charter of Justice, to make an order that medical experts should examine an alleged lunatic & report to the ct. on his mental state & capacity.—*Re W. M.* (1903), 3 S. R. N. S. W. 552; 20 N. S. W. N. L. 121.—**AUS.**

b. ——— *Rebutting evidence—Cause of death.*—The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions.—*Held*: a medical witness, previously examined for the Crown, was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned.—*R. v. JONES* (1869), 28 U. C. R. 416.—**CAN.**

c. ——— *Testamentary capacity.*—**A**

medical witness may state the conclusions he has arrived at as to the capacity of testatrix to transact business, & to make an intelligent disposition of her property, from the circumstances known to him, without first stating the facts upon which he bases his conclusions.—*DOE d. HAZEN v. ST. JAMES' CHURCH* (1879), 18 N. B. R. 479.—**CAN.**

d. ——— *Opinion that woman incapable of child-bearing.*—The evidence of a physician who had made a medical examination of petitioner, showed that senile atrophy of the uterus & ovaries had proceeded so far that it would be an impossibility for pregnancy to take place.—*Held*: the master should have accepted the evidence as sufficient

proof that petitioner was physically incapable of child-bearing.—*Re G.* (1891), 21 O. R. 109.—**CAN.**

e. ——— *Question of diagnosis.*—In an action for damages for malpractice, physicians of a school different from that of deft. are competent to testify on a question of diagnosis.—*GRIBBON v. HARRIS*, [1924] 1 D. L. R. 923; 1 W. W. R. 674.—**CAN.**

5425 i. *Function of witness—To interpret particular facts—Whether symptoms, symptoms of insanity.*—Where the defence of insanity is set up, a medical man, who has been present in ct. & heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing

FERRERS (EARL) CASE (1700), Post. 138; 19 State Tr. 885, 946, H. L.

Annotation:—Mentd. R. v. Bourdon (1847), 2 Car. & Kir. 366.

5426. ———. ———. ———.]—**R. v. WRIGHT, No. 5416, ante.**

5427. ———. ———. ———.]—When a prisoner's defence is insanity, a medical man, who has heard the trial, may be asked whether the facts proved show symptoms of insanity.—**R. v. SEARLE (1831), 1 Mood. & R. 75, N. P.**

5428. ———. ———. ———.]—**SHARPE v. MACAULAY (1850),** cited Powell on Evidence, 4th ed. 81.

State of mind at time of particular act, *see* CRIMINAL LAW, Vol. XIV., p. 63, Nos. 282-285.

5429. ———. ———. ———.]—**Whether symptoms symptoms of poisoning.**—**R. v. PALMER (1850),** Philipps on Evidence, 6th ed. 398.

Annotation:—Mentd. R. v. Barrett (1870), 18 W. R. 671.

5430. ———. ———. ———.]—**Whether evidence of negligent medical treatment.**—**RICH v. PIERPONT (1862), 3 F. & F. 35.**

5431. ———. ———. ———.]—**Not to give opinion as to truth of evidence—Allegation of cruelty.**—**EVERITT v. EVERITT, EVERITT v. EVERITT & WHATLEY (1919), Times, Nov. 1.**

SUB-SECT. 2.—NAUTICAL EVIDENCE.

5432. Whether admissible—When court assisted by Trinity Masters.—**THE ANN & MARY, No. 5397, ante.**

5433. ———. ———. ———.]—In Admlty. actions, where stated b.

Masters], evidence as to matters of nautical skill & knowledge is not admissible, & hence, where in a damage to cargo action the judge found on the advice of his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the Ct. of Appeal, being assisted by assessors, refused to allow applts., the shipowners, at the hearing of the appeal, to call evidence to show that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill about which evidence could not be given.—**THE ASSYRIAN (1890), 63 L. T. 91; 6 Asp. M. L. C. 525, C. A.**

5434. ———. ———. ———.]—**On appeals under Shipping Casualties Investigations Act, 1879 (c. 72).**—In appeals under above Act, the Ct. of Appeal will not permit witnesses to be called to give evidence on questions of nautical knowledge & skill.—**THE KESTREL (1881), 6 P. D. 182; 45 L. T. 111; 30 W. R. 182; 4 Asp. M. L. C. 433.**

5435. ———. ———. ———.]—**Evidence by affidavit.**—The ct. will not receive as evidence the affidavits of persons, professing to be skilled in nautical affairs, as to their opinion upon any case.—**THE NO (1853), 1 Ecc. & Ad. 184; 164 E. R. 107.**

them to be true, show a state of mind incapable of distinguishing right from wrong. Where the opinion sought is that of a medical expert who has had no previous acquaintance with the prisoner, & has merely read the depositions without hearing the witnesses, the question must be put to him in the form of a suppositious case, relating all the facts proved & asking if, assuming all such facts to be true, they will indicate in the accused any, & what, form of insanity.—**R. v. DUBOIS (1890), 17 Q. L. R. 203.—CAN.**

5431 i. ———. ———. ———.]—**Not to give opinion as to truth of evidence—Or as to meaning of words used by other witnesses.**—A witness, skilled in diseases of the eye, who had heard the testimony of deft.

& the other witnesses, in an action against a surgeon for malpractice in operating upon pltf.'s eyes, was asked the following question: "Is the statement of the medical case, as given by deft. in evidence, reconcilable with the facts, assuming them to be true, as given by the other witnesses?"—*Held:* the question was improper, as the answer to it would involve an opinion by the witness, not only as to the truth of what the other witnesses had sworn to, but also the meaning of the words they had used.—**DUFFIN v. DOW (1882), 22 N. B. R. 107.—CAN.**

PART VI. SECT. 2, SUB-SECT. 2.

1. Whether admissible—When court assisted by nautical assessor.—Where

5436. ———. ———. ———.]—**Confined to matters of skill—After accident.**—In an action on a marine policy witnesses were asked what, in their opinion, would have been the proper course for pltf. to pursue after the ship's arrival at S., where she was abandoned, with regard to the abandonment of the ship, or the attempting to repair her:—*Held:* the question was improper, as asking an opinion not on any matter of skill, but on the prudence of pltf.'s conduct after the accident; which was the real question for the jury.—**BOYD v. ROYAL EXCHANGE INSURANCE CO. (1847), 10 L. T. O. S. 129.**

5437. What witnesses may be heard—Whether personal experience necessary.—It is competent to the witness to give us his judgment, if he can speak to the practice of a long series of years. He may prove what is the proper way of dealing with ships; & it is not necessary that he should have been personally engaged in the trade to form an opinion as a matter of judgment. A medical man may give an opinion on a professional point, though the case may never have occurred within his own experience. It is a scientific opinion, & he may give it just as a man in particular trade may give evidence of the usage of the trade, though he may never have been there.—**STURGE v. HALDIMANT (1848), 11 L. T. O. S. 28, N. P.**

5438. ———. ———. ———.]—**Shipbuilder.**—A shipbuilder may be called as a witness to give his opinion as to the seaworthiness of a ship, on the facts stated by others.—**THORNTON v. ROYAL EXCHANGE ASSURANCE CO. (1790), Peake, 37, N. P.**

5439. ———. ———. ———.]—**Lamp maker.**—The evidence of the maker of a ship's lamp was admitted to the effect that it was of a similar construction with a great number of others which he had supplied to ships for many years with great success as evidence that if properly trimmed it would answer every purpose of a ship's lamp in conformity with the regulations.—**THE SAMPHIRE v. THE FANNY BARK (1860), Holt, Adm. 193.**

5440. On what matters admissible—Seaworthiness of ship.—**THORNTON v. ROYAL EXCHANGE ASSURANCE CO., No. 5138, ante.**

5441. ———. ———. ———.]—**Matters of personal experience of seaman.**—The words "perils of the seas" in a policy of insurance are terms of general import, upon which the ct. is to put a construction. In a case where it is suggested on the one side that the loss of a quantity of liquid was occasioned by the "perils of the sea," & on the other side that it was leakage, for which the underwriters were not answerable, witnesses cannot be called, & asked, "Whether, where the cargo has not been shifted, nor the casks damaged, the running out of the liquid is in practice considered as leakage, or as a loss by the perils of the seas." But this question may be put to persons skilled in navigation, "Suppose the casks have not been shifted nor damaged, but the liquid escapes, to what do you

the ct. at the trial of a collision action has the assistance of a nautical assessor to advise on all matters requiring nautical or other professional knowledge, the evidence of experts as to the management of the ships shortly previous to the collision is inadmissible.—**MONTREAL HARBOUR COMBS. v. THE UNIVERSK (1906), 10 Exch. C. R. 395.—CAN.**

g. ———. ———. ———.]—**Evidence by depositions.**—The ct. in maritime cases will not receive as evidence the depositions of persons professing to be skilled in nautical affairs as to their opinions upon any case.—**THE ATTILA (1879), 5 Q. L. R. 340.—CAN.**

h. What witnesses may be heard—

Sect. 2.—Particular classes of evidence: Sub-sects.
2, 3, 4, 5, 6, 7, 8 & 9.]

attribute it?—*CROFTS v. MARSHALL* (1836), 7 C. & P. 597, N. P.

5442. — *Duty of captain in particular circumstances.*—A nautical witness cannot be asked whether he thinks, having heard the evidence in the cause, that the conduct of the captain was correct or not.

[The opinion of the witness was obtained by his being asked what was the duty of a captain under certain specified circumstances.]—*SILLS v. BROWN* (1840), 9 C. & P. 601, N. P.

Annotation:—Mentd. *The Margaret* (1881), 29 W. R. 533.

5443. — *Question of seamanship.*—*THE ANN & MARY*, No. 5397, *ante*.

5444. — *Whether collision avoidable.*—Nautical witnesses may be asked opinion as to collision being avoidable by care, the truth of the facts being admitted.—*DUNFORD v. TRATTLES* (1844), 12 M. & W. 529; 1 Dow. & L. 554; 13 L. J. Ex. 124; 152 E. R. 1308; *sub nom.* *DURNFORD v. TRATTLES*, 5 L. T. 61; 8 Jur. 780.

Annotations:—Refd. *Card v. Case* (1848), 5 C. B. 622. *Annotations:—Mentd.* *Perren v. Monmouthshire Ry. & Canal Co.* (1853), 17 Jur. 532.

5445. — — — — —.]—In case for running down pltf.'s ship, a nautical witness may be asked, whether, having heard the evidence, & admitting the facts proved by pltf. to be true, he is of opinion that the collision could have been avoided by proper care on the part of deft.'s servants—on the ground that it is a question having reference to a matter of science & opinion.—*FENWICK v. BELL* (1844), 1 Car. & Kir. 312, N. P.

5446. — *Proper conduct of sealing voyage.*—*STURGE v. HALDIMANT* (1818), 11 L. T. O. S. 28, N. P.

5447. — *Value of ship at time of loss.*—In estimating the value of a vessel at the time of a collision, whereby she was lost, the best evidence is the opinion of competent persons who knew the vessel shortly before the time of loss; next, the opinion of persons well conversant with shipping generally.—*THE IRON-MASTER* (1859), Sw. 441; 166 E. R. 1206.

Annotations:—Apprvd. & Foll'd. *The Harmondles*, [1903] P. 1. *Mentd.* *The Philadelphia*, [1917] P. 101.

5448. — *Efficacy of ship's lamp.*—*THE SAMPHIRE v. THE FANNY BARK*, No. 5439, *ante*.

5449. *Functions of witness—Not construction of insurance policy.*—*CROFTS v. MARSHALL*, No. 5441, *ante*.

5450. — *Not to weigh evidence.*—*SILLS v. BROWN*, No. 5442, *ante*.

See, generally, Nos. 5402, 5421, *ante*.

Pilot.—In collision cases where negligence in the management of a ship causing injury is alleged, the pilot is a competent witness for such ship.—*THE COVNER* (1862), Stuart, Adm. N. S. 91.—*CAN.*

5443 i. *On what matters admissible—Question of seamanship.*—*TAYLOR v. MORAN* (1885), 24 N. B. R. 39; 11 S. C. R. 347.—*CAN.*

5443 ii. — — — — —.]—A witness cannot be asked, for the purpose of proving negligence, whether it was good or bad management for deft. to have three screws fastened to the ship at the same time, the question not being a matter of science, art or trade.—*MCAIR v. STEWART* (1885), 24 N. B. R. 471.—*CAN.*

5443 iii. — — — — —.]—The log-book showed that the ship got into the ice on May 7, & an expert examined at the trial swore that from the entries

of May 6, 7, 8, 9, the captain was attempting to enter the Gulf of St. L.:—*Held*: there was evidence to go to the jury that the captain was attempting to enter the gulf.—*TAYLOR v. MORAN* (1885), 11 S. C. R. 347.—*CAN.*

PART VI. SECT. 2, SUB-SECT. 3.

5451 i. *What witnesses may be heard—Commercial men—Grocer.*—Where a deficit appeared on the accounts of a grocer's assistant, another grocer having had eleven years' experience in a shop in a similar district is admissible as an expert to show how the deficit might have arisen from losses incidental to the trade of a retail grocer, notwithstanding that his course of dealing was in some respects dissimilar from that pursued in the shop in question.

He may state what is, as a general rule, a fair percentage of loss, but he cannot be heard to say what is a fair

SUB-SECT. 3.—IN COMMERCIAL CASES.

5451. What witnesses may be heard—Commercial men.—Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject.—*CHAURAND v. ANGERSTEIN* (1791), Peake, 61, N. P.

5452. — *Underwriters & insurance brokers.*—*Deft.*, a broker, having effected policies of insurance on goods for R., putting into his hands a letter from the supercargo of the ship conveying the goods, told deft. the policies were to be altered, & he must do the needful. In an action against deft. for negligence in this matter:—*Held*: brokers might be called to say, looking at the policies, the invoices of the goods, & the letter, what alterations in the policies a skilful broker ought to have made.—*CHAPMAN v. WALTON* (1833), 10 Bing. 57; 3 Moo. & S. 389; 2 L. J. C. P. 210; 131 E. R. 826.

Annotation:—Refd. *The Lancastrian* (1916), 32 T. L. R. 655.

5453. — — — — —.]—*ECCLES v. HARVEY* (OR *HARPER*) (1845), 4 L. T. O. S. 99, 398.

— — — — —.]—*See, generally*, *INSURANCE*.

5454. — *Accountant.*—The ct. refused to receive at the hearing of a cause the deposition of an accountant containing a statement of the result of his examination of partnership account books, where the books on which he made his statement were not in evidence; but *semble*, if the books had been in evidence, the deposition of the accountant of the result of his examination of them would be receivable as the evidence of a person of skill.—*JOHNSON v. KERSHAW* (1847), 1 De G. & Sm. 260; 9 L. T. O. S. 216; 11 Jur. 553, 705; 63 E. R. 1059.

Annotation:—Mentd. *Watson v. Knight* (1854), 19 Beav. 369.

5455. — — — — —.]—At the trial of an action under Fatal Accidents Act, 1846 (c. 93), brought for the benefit of the mother, widow & children of R., claiming damages from defts. for having by their negligence caused the death of R., it was proved that the deceased was under a covenant to pay his mother an annuity of £200 during their joint lives. A witness was then called for pltf. who stated that he was an accountant, & that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother & son respectively, & as to the price for which an annuity for the mother's life could be bought. The admissibility of this

percentage in the particular case unless the details of it are presented to his mind. He may state the losses in his own shop to illustrate his opinion.—*McFADDEN v. MURDOCK* (1867), 15 W. R. 1079.—*IR.*

5452 i. — *Underwriters & insurance-brokers.*—The evidence of a witness testifying in regard to estimates based on mortality tables in use by cos. engaged in the business of annuity insurance is admissible, *quantum val'd*, notwithstanding that he may not be capable of explaining the basis upon which the tables had been prepared.—*CANADIAN PACIFIC RY. CO. v. JACKSON* (1915), 52 S. C. R. 281.—*CAN.*

k. — *Ship-owners & ship-masters.*—Evidence of usage, & of the meaning in a commercial sense of certain expressions in a policy of marine insurance may be given by ship-owners & ship-masters.—*GEROW*

evidence was objected to by defts., & was ruled to be admissible.—**ROWLEY v. LONDON & NORTH WESTERN RY. CO.** (1873), L. R. 8 Exch. 221; 42 L. J. Ex. 153; 29 L. T. 180; 21 W. R. 869, Ex. Ch.

Annotations.—**Mentd.** *Phillips v. L. & S. W. Ry.* (1879), 5 C. P. D. 280; *Phillips v. L. & S. W. Ry.* (1879), 5 Q. B. D. 78; *Johnston v. G. W. Ry.*, [1904] 2 K. B. 250.

5456. — **London stockbroker.**—(1) A London stockbroker is a competent witness as to the course of business of London bankers.

(2) Evidence of the course of business & custom of London bankers is admissible, to explain the authority meant to be given to a London banker by a power of attorney to sell stock, sent through a country banker.—**ADAMS v. PETERS** (1819), 2 Car. & Kir. 723, N. P.

5457. — **Medical man.**—**YORKE v. YORKSHIRE INSURANCE CO.**, No. 5414, *ante*.

5458. **As to what matters admissible—Explanation of particular term in letter.**—**CHAURAND v. ANGERSTEIN**, No. 5451, *ante*.

5459. — **Alterations proper to be made in insurance policy.**—**CHAPMAN v. WALTON**, No. 5452, *ante*.

5460. — **Proper amount of insurance premium.**—**ECCLES v. HARVEY (OR HARPER)** (1845), 4 L. T. O. S. 99.

— **Materiality of facts for purposes of insurance.**—*See INSURANCE.*

5461. — **Course of business & custom of London bankers.**—**ADAMS v. PETERS**, No. 5450, *ante*.

5462. — **Expediency of sale of shares.**—The opinion of a stockbroker will not influence the *ct.* as to the expediency of a sale [of shares].—**HARRIMAN v. HARRIMAN** (1853), 21 L. T. O. S. 98.

5463. — **Price of annuity.**—**ROWLEY v. LONDON & NORTH WESTERN RY. CO.**, No. 5455, *ante*.

5464. — **Construction of agreement—Whether company gold mining company.**—**GROVE v. BULWYAY CO.** (1898), *Times*, Mar. 30, C. A.

5465. — **Whether company has earned profits available for distribution.**—The question whether a co. has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company, & the evidence of competent witnesses.—**BOND v. BARROW HEMATITE STEEL CO.**, [1902] 1 Ch. 353; 71 L. J. Ch. 246; 86 L. T. 10; 50 W. R. 295; 18 T. L. R. 249; 46 Sol. Jo. 280; 9 Mans. 69.

Annotations.—**Mentd.** *Re Accrington Corp'n. Steam Tram. Co.*, [1909] 2 Ch. 49; *Re Spanish Prospecting Co.*, [1911]

v. PROVIDENCE WASHINGTON INSURANCE CO. (1889), 28 N. B. R. 435.—**CAN.**

5458 i. **As to what matters admissible—Explanation of particular term.**—

The meaning of the words "fair market value in the usual & ordinary commercial acceptance of the term" within Customs Act, s. 154, can only be decided by expert evidence, & is not a matter of law.—**GOLDRING v. LOCKYER** (1904), 4 S. L. N. S. W. 276; 21 N. S. W. N. 94.—**AUS.**

PART VI. SECT. 2, SUB-SECT. 8.

5466 i. **Opinion of counsel.**—Counsel's opinion was admitted as evidence that a disentailing deed was executed for the purpose of a mtge., the lender's counsel having required the mtge. deed to be enrolled, but the disentailing deed having been executed in lieu of the enrolment.—**POWER v. POWER** (1858), 7 L. Ch. R. 354.—**IR.**

5466 ii. —.—The import of an opinion of counsel, forming the ground of conduct followed by certain parties, cannot be given in evidence, nor minutes containing it read.—**DONALD-**

SON v. MANCHESTER ASSURANCE CO. (1833), 11 Sh. (Ct. of Sess.) 570.—**SCOT.**

5466 iii. —.—In a question as to the interpretation of an English will, a joint case had been laid before English counsel, who returned an opinion thereon. It being proposed by one of the parties to put certain additional queries to the counsel as to the principles of construction upon which he had interpreted the will, *etc.*:—**Held**: the parties were not entitled to go back upon, or endeavour to open up the opinion, which now fell only to be applied.—**CRANSTOUN (LORD) v. CUNNINGHAM** (1839), 1 Duml. (Ct. of Sess.) 521; 14 Fac. Coll. 595.—**SCOT.**

5466 iv. —.—(1) Where an action is pending in this *ct.* which involves questions of English law & a remit has been made to two English counsel for their opinion & they differ in opinion:—**Held**: the proper course to be adopted for extricating the case is to remit to other English counsel; (2) where a remit is made to two

1 Ch. 92; *Ammonia Soda Co. v. Chamberlain*, [1918] 1 Ch. 266; *Eyling v. Israel & Oppenheimer*, [1918] 1 Ch. 101.
Sec, generally, COMPANIES, Vol. IX., pp. 588, 589.

SUB-SECT. 4.—AS TO HANDWRITING.

See Part IV.; Sect. 2, sub-sect. 10, *ante*.

SUB-SECT. 5.—AS TO INSURANCE.

See INSURANCE.

SUB-SECT. 6.—AS TO PATENTS.

See PATENTS.

SUB-SECT. 7.—AS TO TRADE MARKS.

See TRADE MARKS.

SUB-SECT. 8.—LEGAL EVIDENCE.

5466. **Opinion of counsel.**—**BROWN v. YERROWAY** (1762), 1 Dick. 353; 21 B. R. 305.

5467. **Opinion of solicitors—As to propriety of action brought.**—In an action by an attorney for the costs of an action to recover a chattel, the subject of a specific bequest, but claimed by the possessor as a gift from the testator, the defence being that the action, which had failed, was only brought under the advice of the attorney, & that it was wholly useless; the proper course being to take out an administration summons in Chancery, the course it was ultimately found necessary to adopt:—**Held**: it was nevertheless for the jury on the whole case, not whether the course was proper, but whether it was so wholly useless as that *deft.* had derived no benefit from it, but attorneys might be called & examined as skilled witnesses on that question.—**FLETCHER v. WINTER** (1862), 3 F. & F. 138, N. P.

Proof of foreign law.—*See* Part XI., *post*.

SUB-SECT. 9.—ENGINEERS, SURVEYORS, ETC.

5468. **Engineer—As to cause of choking harbour.**—In an action of trespass for cutting a bank,

English counsel & opinions are returned by three counsel:—**Held**: the opinion of the third counsel cannot be regarded by the *ct.* in respect that no remit had been made to him.—**FYFFE v. FYFFE** (1849), 2 Duml. (Ct. of Sess.) 1001.—**SCOT.**

PART VI. SECT. 2, SUB-SECT. 9.

1. **Engineer—Who is an expert.**—The evidence of a person who was a member of the Mining Engineers' Institute of America, & had been a contractor for various works, but had never practised as a civil engineer, & was not a professional man, is not admissible as that of an expert upon a question what an engineer would understand by an agreement in reference to the preparation of plans & specifications for harbour-works, or upon questions as to professional rules or professional practice in regard to plans & specifications.—**REYNOLDS v. NELSON HARBOUR BOARD** (1904), 23 N. Z. L. R. 620.—**N.Z.**

m. **Land-valuer.**—In an action for compensation for city land on which

Sect. 2.—Particular classes of evidence: Sub-sects. 9 & 10. Sects. 3 & 4.]

where the question is, whether the bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men [engineers], as to the effect of such an embankment, upon the harbour, are admissible evidence.—*FOLKES v. CHADD* (1782), 3 Doug. K. B. 157; 90 E. R. 589; *subsequent proceedings* (1783), 3 Doug. K. B. 340.

*Annotations:—***Consd.** *McFadden v. Murdock* (1867), 15 W. R. 1079; *Metropolitan Asylum District v. Hill* (1882), 47 L. T. 29. **Refd.** *Goodlittle d. Revett v. Braham* (1792), 4 Term Rep. 497.

5469. Forestry expert.]—WELD-BLUNDELL v. WOLSELEY, [1903] 2 Ch. 664; 73 L. J. Ch. 45; 80 L. T. 50; 51 W. R. 635; 47 Sol. Jo. 653.

SUB-SECT. 10. — OTHER CASES.

5470. In criminal proceedings—On what matters admissible—Circumstances of fire amounting to felony.]—R. v. CATTERMOUL (1891), 121 C. C. Ct. Cas. 151.

Sanity of prisoner.]—See Nos. 5415–5418, ante.

plffs. proposed to erect a building an expert stated his opinion of the value of the land: *Held*: the evidence was admissible.—**SCOTTISH HALLS, LTD. v. THE MINISTER** (1915), 15 S. R. N. S. W. 81; 32 N. S. W. W. N. 25.—**AUS.**

n. —.—Evidence of persons who, having seen & inspected property, give their opinion as to its value is opinion evidence within Alberta Evidence Act, s. 10.—**CANADIAN NORTHERN WESTERN RY. Co. v. MOORE** (1915), 30 W. L. R. 676; 7 W. W. R. 327; 8 Alta. L. R. 379; *afid.* 53 S. C. R. 519.—**CAN.**

o. Surveyor.]—C. S. U. C., o. 93, s. 6, authorising the county council to apply to the governor to cause a concession line to the surveyed, applies only where such line was not run in the original survey or has been obliterated. Where, therefore, it appeared that there were in fact two lines clearly traceable, the question being which was the original line, & the surveyor decided this upon conflicting evidence: *Held*: such survey was not binding or conclusive, & a bye-law of the township adopting it must be quashed.—**RE FAIRHAIN & SANDWICH EAST CORPN.** (1872), 32 U. C. R. 573.—**CAN.**

p. —.—On the trial of an indictment for obstructing a street, C., a surveyor, stated, subject to objection, that he measured certain distances from a post which he said was pointed out to him by B. as the G. line, & that he ran a course from that, & tested his line from four points given him by B. & found them correct, & also stated what the result of that measurement would be in regard to doft.'s house. B. was not called: *Held*: the evidence was improperly received.—**R. v. BUDOK** (1881), 20 N. B. R. 531.—**CAN.**

q. —.—An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ, & that such survey was to be final: *Held*: proof of such survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to plff.'s right to recover the price of the logs, & the trial judge was in error in rejecting the evidence of such surveyor on the ground that he was not proved to have been a duly sworn surveyor, appointed by the muni-

cipality & under bonds.—**PATTERSON v. LARSEN** (1902), 30 N. B. R. 4.—**CAN.**

r. —.—In an action for a declaration as to the width of a street in the city, the expert testimony of surveyors to show that there was no boundary to the street, on the river side except the river itself, & testimony to show the instructions given to the surveyors who laid out the street, were inadmissible.—**SASKATOON v. TEMPERANCE COLONIZATION SOCIETY** (1912), 22 W. L. R. 897; 8 D. L. R. 875.—**CAN.**

s. Professional draughtsmen.]—The evidence of professional draughtmen was properly admitted to show what, according to the general practice & usage of draughtsmen in preparing plans, certain shadings & marks on drawings were intended to indicate.—**ATTRILL v. PRATT** (1884), 10 S. C. R. 425.—**CAN.**

t. Mill-builder.]—At the trial of a claim for trespass by the overflow of water on plff.'s land caused by a dam erected by deft., evidence was rejected which had been offered by deft. to prove the respective levels of water at the point where the dam was erected, & at the meadow alleged to have been overflowed in consequence of the erection. The witness whose evidence was rejected testified that he was a practical mill-builder, that he had erected water power mills, & that in doing such work he had to take levels to get a height, but that he did not know how to use a theodolite: *Held*: the evidence should have been received.—**CARR v. CHILMAN** (1887), 20 N. S. R. (8 R. & G.) 148; 8 C. L. T. 373.—**CAN.**

u. Valuator.]—A farm was let by a proprietor to his nephew as tenant, at a rent which was fixed in the lease: *Held* the opinion of a valuator appointed by the valuation committee is not sufficient evidence that the stipulated rent was inadequate.—**ALEXANDER v. KIRKCUDBRIGHT STEWARTRY (ASSESSOR OF)** (1890), 17 R. (Ct. of Sess.) 835; 27 Sc. L. R. 630.—**SCOT.**

PART VI. SECT. 2, SUB-SECT. 10.

b. On what matters admissible—Genuineness of bank-notes—Opinion of bank-official.]—To prove that the documents purporting to be Dominion of Canada notes deposited with the prothonotary by the petitioner for

5471. In ecclesiastical causes—Evidence of doctrine of Church of England.]—Opinions of eminent theologians are not to be received as evidence of the doctrine of the Church of England, but are permissible in self-defence to the person accused.—**SALISBURY (BP.) v. WILLIAMS** (1862), 1 New Rep. 196; 7 L. T. 472; 27 J. P. 375; 11 W. R. 211; *reusd.* on other grounds, *sub nom.* **WILLIAMS v. SALISBURY (BP.)** (1863), 2 Moo. P. C. C. N. S. 375, P. C.

*Annotations:—***Mentd.** *Pusey v. Jowett* (1863), 1 New Rep. 488; *Sheppard v. Bennett* (First Appeal) (1870), L. R. 4 P. C. 350; *Sheppard v. Bennett* (Second Appeal) (1871), L. R. 4 P. C. 371; *Voysey v. Noble*, *Noble v. Voysey* (1871), L. R. 3 P. C. 357; *Jenkins v. Cook* (1875), 1 P. D. 80; *Combe v. Edwards* (1878), 3 P. D. 103; *Martin v. Mackonochie* (1879), 4 Q. B. D. 697; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424; *Merriman v. Williams* (1882), 7 App. Cas. 484; *Merriman v. Williams* (1883), 47 L. T. 51.

See, generally, ECCLESIASTICAL LAW, Vol. XIX., pp. 223 et seq.

SECT. 3.—REFERENCE TO EXPERT BY JUDGE.

5472. By way of advice—In court—Advice of Master of Trinity House.]—PICKERING v. BARKLEY (1648), Sty. 132; 82 E. R. 587.

*Annotations:—***Refd.** *Russell v. Niemann* (1864), 17 C. B. N. S.

the necessary accuracy were genuine, he produced at the hearing of the preliminary objections the identical notes so deposited, showed that the prothonotary had received them as genuine & had given a receipt describing them, & called a bank official with an experience of ten years who testified that the notes were genuine & that he knew them by the paper, the scroll on them, & by their general appearance. The prothonotary also swore that the deposit had been made in Dominion notes: *Held*: sufficient, although the bank official did not know by whom Dominion notes should be signed or the genuineness of the signatures appearing on them.—*RE MORRIS PROVINCIAL ELECTION* (1907), 6 W. L. R. 742.—**CAN.**

c. —. Buying & selling of hotel properties.]—Upon a reference to assess plffs.' damages for breach by deft. of an agreement to erect an hotel & lease it to plffs. for a term of years at a rental agreed upon: *Held*: the referee improperly excluded as too remote the testimony of persons whose experience in buying & selling hotel properties made them competent to show what plffs. had lost by reason of not obtaining the lease of the hotel.—**BEATTIE v. BAUER** (1913), 24 W. L. R. 830; 18 B. C. R. 16; 13 D. L. R. 357.—**CAN.**

d. —. Local custom.]—According to the local custom in B. C. or usage of the building trade, when rock is unexpectedly struck in making an excavation, the additional cost of excavating, is treated as an extra, a new contract is made to cover the costs, & time for completion set by original contract is extended. The custom was well proved by the evidence of two architects.—**WRIGHT v. WESTERN CANADA ACCIDENT & GUARANTEE INSURANCE CO.** (1914), 29 W. L. R. 153; 6 W. W. R. 1409; 20 D. L. R. 478; 20 B. C. R. 321.—**CAN.**

e. —. Fruit growers.]—As the evidence of fruit growers called by resp. was admitted, that of fruit growers called by applt. was admissible in answer to it.—**EDILSON v. JOYCE**, [1917] N. Z. L. R. 648.—**N.Z.**

PART VI. SECT. 3.

5472 i. By way of advice—In court.]—On a conflict between two sets of engineers, the evidence being equally

183; *Pandorf v. Hamilton* (1886), 17 Q. B. D. 670.
Mentd. Emery v. Bartlett (1729), 2 Stra. 827; *Cullen v. Butler* (1815), 1 Stark. 138.

See, generally, ADMIRALTY, Vol. I., pp. 201, 202.

5473. — **Advice out of court—Question of local knowledge.**—Where a question arose in a salvage case as to the nature of the ship's anchorage, the ct., in order to aid its judgment, made private inquiry of persons intimately acquainted with the spot & having nautical experience.—*THE HARBINGER* (1852), 8 L. T. 612; 16 Jur. 729.

Annotation :—*Mentd. The Strathnaver* (1875), 1 App. Cas. 58.

5474. — **Reference by arbitrator to accountant.**—An arbitrator may, without the knowledge of either party, submit matters of account, referred to him, to an accountant, in order to obtain the benefit of his advice as an expert.—*EASTERN COUNTIES RY. Co. v. EASTERN UNION RY. Co.* (1863), 2 New Rep. 441; *on appeal*, 3 De G. J. & Sm. 610, L. J.J.

5475. — **Delegation of functions not included.**—An arbitrator, to whom a question of account was referred "to be determined on the principle adopted in certain accounts prepared by C. & Co. (accountants)," submitted the statements & accounts furnished to him by the parties to C. & Co., & made his award, founded on the report of C. & Co., without communicating such report to the parties:—*Held*: (1) he had unduly delegated his functions; (2) the report of C. & Co. was evidence, upon which each party had a right to be heard.

The delegation by the arbitrator had been too great, the decision of the whole matter having been virtually left to the accountants (*TURNER, L. J.*).—*EASTERN COUNTIES RY. Co. v. EASTERN UNION RY. Co.* (1863), 3 De G. J. & Sm. 610; 2 New Rep. 538; 46 E. R. 773, L. J.J.; *previous proceedings*, 2 New Rep. 441.

5476. — **Advice of sculptor on family resemblance.**—*SLINGSBY v. A.-G.* (1916), 33 T. L. R. 120, H. L.

Annotations :—*Mentd. A.-G. v. Cory, Kennard v. Cory* (1919), 88 L. J. Ch. 410; *Re Stahlwerk Becker Akt.* (1919), 36 R. P. C. 211; *Rutter v. Rutter*, [1921] P. 136; *Compania Martiartu v. Royal Exchange Assee. Corp'n.* (1922), 92 L. J. K. B. 546.

5477. By way of reference.]—*SALVIN v. NORTH BRANCEPETH COAL CO., No. 5398, ante.*

5478. — **Under Judicature Act, 1873 (c. 66), s. 56.**—*ENDERWICK v. ALDEN* (1889), 88 L. T. Jo. 12; 6 T. L. R. 8.

See, generally, ARBITRATION, Vol. II., pp. 613 *et seq.*

In admiralty.—See ADMIRALTY, Vol. I., pp. 215 *et seq.*

divided, the ct. called in the assistance of the Govt. Director of Surveys & another civil engineer to make an independent survey; & upon their evidence, gave judgment accordingly as to the correctness of the survey.—*BARNES v. YUKON GOLD CO.* (1911), 18 W. L. R. 542.—CAN.

5477 i. By way of reference.—In the course of a reference to make a partition of lands, a master appointed two skilled persons to examine the property & prepare a scheme of partition, & on their evidence he adopted the scheme prepared.—*Held*: the course adopted by the master was a reasonable one. He had the power to take such course.—*MCKAY v. KEEFER* (1887), 12 P. R. 256.—CAN.

PART VI. SECT. 4.

5480 i. Medical books.—It is not admissible to ask medical witnesses

on cross-examination what books they consider the best upon the subject in question, & then to read such books to the jury, but they may be asked whether such books have influenced their opinion.—*BROWN v. SHI* (1856), 13 U. C. R. 178.—CAN.

5480 ii. — **—** A physician may strengthen his memory by referring to works which he considers of authority, & counsel may read extracts therefrom to him & obtain his judgment thereon.—*BROWNELL v. BLACK* (1892), 31 N. B. R. 594.—CAN.

5480 iii. — **—** *R. v. ANDERSON* (1914), 26 W. L. R. 783.—CAN.

5480 iv. — **—** A well known treatise, such as Taylor's medical Jurisprudence, may be referred to in the course of trial on a point obscurely & unsatisfactorily determined by the medical evidence.—

SECT. 4.—REFERENCE TO TEXT BOOKS AND AUTHORITIES.

5479. General rule.—A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence.

A skilful & scientific man must state what the law is, but may refer to books & statutes to assist him in doing so (*LORD DENMAN, C.J.*).—*SUSSEX PEERAGE CASE* (1844), 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 8 Jur. 793; 8 E. R. 1034, H. L.

Annotations :—*Consd. R. v. Naguib*, [1917] 1 K. B. 359. *Reld. Vander Donck v. Thellusson* (1849), 8 C. B. 812; *R. v. Povey* (1852), 6 Cox, C. C. 83; *Bright v. Legerton* (No. 1) (1860), 29 Beav. 60; *Di Sora v. Phillips* (1863), 10 H. L. Cas. 624; *Rowley v. L. & N. W. Ry.* (1873), 29 L. T. 180; *Re Lambert* (1886), 56 L. J. Ch. 122. *Mentd. Davis v. Lloyd* (1844), 1 Car. & Kir. 275; *Leroux v. Brown* (1852), 12 C. B. 801; *Stapylton v. Clough* (1853), 2 E. & B. 933; *Papendick v. Bridgewater* (1855), 5 E. & B. 166; *Grey v. Pearson* (1857), 6 H. L. Cas. 61; *Fenton v. Livingstone, Livingstone v. Livingstone* (1859), 5 Jur. N. S. 1183; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *A.-G. v. Sillem* (1863), 2 H. & C. 431; *Re Coppin* (1866), 2 Ch. App. 47; *Smith v. Blakey* (1867), L. R. 2 Q. B. 326; *Whaley v. Carlisle* (1867), 15 W. R. 1183; *Gaudet v. Brown, Gelpel v. Cornforth, Argos (Cargo Ex), The Hewsons* (1873), L. R. 5 P. C. 134; *River Wear Comrs. v. Adamson* (1877), 2 App. Cas. 743; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Income Tax Comrs. for Special Purposes v. Pemsel*, [1891] A. C. 531; *E. v. City of London Court Judge*, [1892] 1 Q. B. 273; *R. v. Brixton Prison, Re Breckin* (1907), 76 L. J. K. B. 619; *R. v. Didden*, [1910] P. 57; *Tucker v. Oldbury U. C.* (1912) 2 K. B. 317; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130; *Re Boaler, Re Vexatious Actions Act, 1896*, [1915] 1 K. B. 21; *G. W. Ry. & Mid. Ry. v. Bristol Corp'n.* (1918), 87 L. J. Ch. 414; *Bourne v. Keane*, [1919] A. C. 815; *Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

5480. Medical books.—The words imputed the prescribing of medicines in improper doses, & deft. justified:—*Held*: medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in to show that such doses were sanctioned; but, the medical witnesses might be asked their judgment, & the grounds of it, which might in some degree be founded on these books as a part of their general knowledge.—*COLLIER v. SIMPSON* (1831), 5 O. & P. 73, N. P.

Annotation :—*Reld. Nelson v. Bridport* (1845), 8 Beav. 527.

5481. Legal text books.—*R. v. ATKINSON* (1837), 7 C. & P. 660.

5482. Foreign code of law.—*SUSSEX PEERAGE CASE*, No. 5479, *ante*.

5483. Specification of patents.—In the case of a patent for improvements prior specifications relating to similar machines are admissible in evidence to show the state of the manufacture at the time when the patent was granted, but not to show that the language of the specification is to be

HURRY CHURN CHUCKERBUTTY v. R. (1883), 1 L. R. 10 Cal. 140.—IND.

5480 v. — **—** Under Evidence Act, s. 60, a ct. can consider & act upon the opinions of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non-access.—*Howe v. Howe* (1913), 1 L. R. 38 Mad. 466.—IND.

5482 i. Foreign code of law.—A holograph will executed in India by a person whose domicile is Scotch is a valid testamentary document. On such a document being propounded the High Ct. declined to treat as evidence of the law applicable thereto a treatise on Scotch law, but accepted the opinion, attested before a notary public, of a writer to the signet of Edinburgh.—*In the Goods of McINRYE* (1918), 1 L. R. 41 All. 248.—IND.

Sect. 4.—Reference to text books and authorities.
Part VII. Sects. 1 & 2: Sub-sect. 1.]

taken in other than its natural meaning.—*CLARK v. ADIE* (No. 2) (1877), 2 App. Cas. 423; 46 L. J. Ch. 598; 37 L. T. 1; 26 W. R. 45, H. L.; *affg. S. C. sub nom. ADIE v. CLARK* (1876), 3 Ch. D. 134, L. J.J.

Annotations:— *Folld. Jandus Arc Lamp & Electric Co. v.*

Johnson (1900), 17 R. P. C. 361. *Refd. Crosthwaite v. Steel* (1889), 6 R. P. C. 190; *Gold Ore Treatment Co. of Western Australia, in Liquidation v. Golden Horseshoe Estates Co.* (1919), 36 R. P. C. 95. *Mentd. Gossnell v. Bishop* (1888), 4 T. L. R. 397; *Ashworth v. Law* (1890), 7 R. P. C. 231; *Elliot v. Bristol Corpn.* (1894), 71 L. T. 659; *Van Berkel v. Booth*, [1906] 23 R. P. C. 573.

Scientific works & treatises as evidence generally.]
—See Part IV., Sect. 18, sub-sect. 2, ante.

Part VII.—Evidence by Affidavit.

SECT. 1.—IN GENERAL.

5484. Time for swearing.—Rule to show cause.—Before cause shown.]—Affidavits on showing cause are in time, if sworn at any time before cause is shown.—*BRAINE v. HUNT* (1834), 2 Cr. & M. 418; 2 Dowl. 391; 4 Tyr. 243; 3 L. J. Ex. 85; 149 E. R. 823.

Annotations:— *Refd. Graham v. Beaumont* (1836), 5 Dowl. 49. *Mentd. Lea v. Ross* (1855), 11 Exch. 13; *R. v. St. Michael*, Southampton (1856), 27 L. T. O. S. 236; *Moore v. Hawkins*, Moore, Chalmant (1894), 43 W. R. 235.

5485. ———.]—It is no objection to an affidavit used in opposing a motion, that it has been sworn after the day upon which the rule was due, if it be sworn before cause actually shown.—*GRAHAM v. BEAUMONT* (1836), 5 Dowl. 49; 3 Scott, 287; 5 L. J. C. P. 270.

Annotation:— *Mentd. Gilbert v. Crosier* (1857), 1 C. B. N. S. 632.

5486. Before issue of writ.]—Upon an undertaking by pltf. to have the affidavit resworn & filed an interim injunction extending over next motion day was granted in an action where the affidavit in support of the application had been sworn two days before the issue of the writ.—*GREEN v. PRIOR*, [1886] W. N. 50.

5487. ———.]—In this case the question arose as to the value of an affidavit sworn before the writ in an action was issued:—*Held*: there was no proceeding pending before the ct. when the affidavit was sworn, & in such a case the practice was to treat it as a nullity. *SILBER v. LEWIN* (1889), 33 Sol. Jo. 757.

5488. ———. Originating motion.]—On the hearing of an originating motion:—*Held*: proceedings originated by notice of motion must be deemed to commence on the date when the notice is marked with the name of a particular judge & certain

affidavits which had been sworn before such date directed to be resworn.—*Re ABBOTT'S TRADE-MARK* No. 8656 (1904), 48 Sol. Jo. 351.

5489. Whether affirmation permitted.—No conscientious scruple alleged.]—The exemption from taking an oath in C. L. P. Act, 1854 (c. 125), s. 20, is in favour of scruples of conscience only. The ct. therefore declined to receive an affirmation, which did not allege a conscientious scruple, in lieu of an affidavit from a natural-born subject of the Emperor of Germany, although by the laws of Germany voluntary oaths are forbidden, & he was domiciled in Germany & was actually residing there at the time he was required to make such affidavit.—*In the Goods of PRINCE HENRY THE SIXTY-NINTH OF REUSS-KÖSTRITZ* (1880), 49 L. J. P. 67; 41 L. T. 803; 28 W. R. 398.

See, note, Oaths Acts, 1888 (c. 46), 1900 (c. 39).

5490. Whether statutory declaration accepted in lieu of.]—A question arose on a petition whether under Statutory Declaration Act, 1835 (c. 62), a statutory declaration made in Fiji before a notary public was receivable in evidence in a petition. The deponent was alive:—*Held*: there was no reason why he should depart from the regular practice & not require an affidavit from the person who had made the statutory declaration.—*Re VAUGHAN'S TRUST* (1881), 26 Sol. Jo. 76.

5491. Right of party to read opponent's evidence.]—Affidavits, when once filed, may be made use of by the opposite party, though the party filing them may decline to use them.—*PRICE v. HAYMAN* (1838), 4 M. & W. 8; 7 Dowl. 47; 1 Horn & H. 191; 7 L. J. Ex. 297; 150 E. R. 1321.

5492. ———.]—An appet. is at liberty to read resp.'s affidavits notwithstanding the objection that on his own affidavits no case is made requiring

PART VII. SECT. 1.

f. Time for swearing.]—An affidavit sworn before the bill was filed cannot be used on a motion for an injunction.—*BOWEN v. BOWEN* (1873), 7 L. R. Eq. 251.—*IR.*

5490 f. Whether statutory declaration accepted in lieu of.]—A statutory declaration expressed to be made under Canada Evidence Act, 1893, & stated in the *jurat* to be "sworn" is not an "affidavit" within (same Act), R. C., 1914, c. 33, s. 56.—*R. v. MARSHALL* (1915), 31 W. L. R. 702.—*CAN.*

g. What is an affidavit.]—An affidavit is not a pleading, but a statement of facts for the information of the judicial tribunal.—*Re THOM* (1918), 18 S. R. N. S. W. 70; 35 N. S. W. W. N. 9.—*AUS.*

h. Affidavits of possible witnesses.]—*Scruble*: affidavits of persons who might have been called as witnesses on the trial of the cause are inadmissible.—*ANDERSON v. ANDERSON* (1851), 1 C. P. 344.—*CAN.*

k. Affidavit as proof of return as Member of Parliament.]—*R. v. GAMBLE* (1851), 9 U. C. R. 546.—*CAN.*

l. Affidavit of agent.—Proof.]—Where the action is against the agent of pltf. in the suit, it is not sufficient to produce an affidavit purporting to be made by him; it must be proved to have been made by him, & that he was pltf.'s agent.—*McLAREN v. BLACKLOCK* (1866), 14 U. C. R. 24.—*CAN.*

m. As proof of loss under insurance policy.]—One of the conditions of a policy of insurance required that all persons sustaining loss should give notice to the agent through whom insured, & if required, make proof of the same by their oath or affirmation, & by the production of a certificate under the hands of three of the nearest householders, etc. Pltf. having sustained a loss, furnished an affidavit & certificate in the terms of the condition, without being required to do so. In an action on the policy:—*Held*: the affidavit & certificate were admissible as part of the preliminary proof.—*PERKINS v. EQUITABLE INSURANCE CO.* (1860), 4 All. 562.—*CAN.*

n. Affidavit referred to in declarations by underwriter.]—In an action against the secretary of the Society of Underwriters the declarations of an underwriter on the policy relative to the

subject-matter, are evidence against deff.; & if such declarations refer to facts stated in an affidavit obtained by pltf. respecting the loss, such affidavit is also admissible.—*DUFFY v. STYMEST* (1861), 5 All. 197.—*CAN.*

o. In arbitration proceedings.]—Where the umpire chosen upon a reference to arbn. had allowed an affidavit to be used in evidence; but remarked, when it was read, that he would not attach any weight to it, & swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside.—*McEDWARD v. GORDON* (1866), 12 Gr. 333.—*CAN.*

p. Affidavit by party inadmissible where independent evidence available.]—Every material fact which is capable of being proved by independent evidence, ought to be proved thus, an affidavit by petitioner himself of search for missing deeds is insufficient.—*Ex p. CHAMBERLAIN* (1869), 2 Ch. Ch. 332.—*CAN.*

q. Affidavit in proof of title.—Explanation necessary if not made by

an answer.—*Re MARGETSON & JONES*, [1897] 2 Ch. 314; 66 L. J. Ch. 619; 76 L. T. 805; 45 W. R. 615; 41 Sol. Jo. 625.

Annotations.—*Mentl. Re Simmons' Contract*, [1908] 1 Ch. 452; *Yonge v. Toynbee*, [1910] 1 K. B. 212.

5493. — *In bankruptcy proceedings.*—The practice in Bkpey. Ct. differing in this respect from the practice in the Ch. Div. was that where an affidavit had been filed by a resp. to an application appct. was only entitled to refer to the contents thereof after resp. on opening his case had elected to read it.—*Re COHEN, Ex p. TRUSTEE*, [1924] 2 Ch. 515; [1924] B. & C. R. 143; *sub nom. Re COHEN, Ex p. TRUSTEE v. SNOW* (W. R.) & Co., 69 Sol. Jo. 35, C. A.

Right of withdrawal.—*See Sect. 7, post.*

5494. *Evidence may be taken after notice of trial.—Under judge's order.*—Evidence taken by affidavit after a notice of trial, if taken under a judge's order, may be used at the trial.—*WARING v. LACEY* (1876), 24 W. R. 318; 3 Char. Pr. Cas.

SECT. 2.—INTERLOCUTORY PROCEEDINGS.

SUB-SECT. 1.—IN GENERAL.

See, now, R. S. C. Ord. 38, r. 1.

5495. *Evidence in one motion cannot be used in another.*—Affidavit in one motion cannot be read in another.—*R. v. THETFORD CORPN.* (1707), 11 Mod. Rep. 141; 88 E. R. 952.

5496. *Privilege of affidavits.*—An affidavit in an interlocutory proceeding is privileged, & cannot form the subject of a civil action.

Where it was alleged that deft. had libelled pltf. in such an affidavit:—*Held*: no action would lie against deft.—*GOMPAS v. WHITE* (1880), 54 J. P. 22; 6 T. L. R. 20, D. C.

5497. *Notice of intention to read affidavit.—Necessity for.*—Where affidavits are intended to be read in support of a motion made on notice, the general rule of the ct. requires that notice that such affidavits are filed & are intended to be read, be given in the notice of motion; & unless this be done, the affidavits cannot be read.

The rule does not apply to affidavits of service of notices of motion.—*ROCK v. UNETT* (1831), You. 268; 159 E. R. 992.

petitioner.—Although it is not imperative that the affidavit in proof of title should be made by petitioner, some valid reason should be given why it is not so made when such is the case.—*Re RUNDEL* (1872), 4 Ch. Ch. 71.—**CAN.**

r. Proof of foreign judgment.—Effect of Ord. 14.—Deft. appeared to the action by D., a solr., & then went to reside outside the jurisdiction. D. being elevated to the bench, pltf. afterwards obtained a summons for judgment under Ord. 14, & served it upon H., the former partner of D. H. refused to accept or acknowledge the service. Pltf. left the summons at the office of H., who returned it, the judge, upon the return day mentioned in the summons, treated the above as good service thereof, & no one appearing for deft., made an order giving pltf. leave to sign judgment for the amount claimed. Deft. appointed L., partner of H., solr. *ad hoc*, & appeared to the Div. Ct. from the order:—*Held*: Ord. 14, though allowing affidavit evidence instead of the oral evidence usually adduced at a trial, does not supersede the rules of evidence, & it was necessary that the foreign judgment should on should be strictly proved.—*DENNY v. SAYWARD* (1895), 4 B. C. R. 212.—**CAN.**

a. Application for leave to read.—Time for making.—An application for leave to read an affidavit as evidence should be made before the trial; but on this appeal in an undefended action for divorce, an affidavit as to domicile was considered although it did not appear that leave to use it had been obtained.—*RAE v. RAE*, [1924] 4 D. L. R. 793; 3 W. W. R. 416.—**CAN.**

t. Affidavit of opposite party.—Whether extracts may be used.—Petitioner may read as his evidence a portion of a resp.'s affidavit, without making the whole his evidence.—*ARCHBOLD v. SCULLY* (1858), 9 I. Ch. R. 152.—**IR.**

a. ——Though petitioner may read a portion of the affidavit by way of answer without making the whole his own evidence, he cannot read any other affidavit filed on behalf of resp. without making the whole his own evidence.—*FARRER v. MERCEK* (1860), 10 I. Ch. R. 502.—

VII. SECT. 2.

5495 i. *Evidence in one motion cannot be used in another.*—It is settled as the general rule that upon an application for time, an affidavit upon which a former order was granted cannot be

5498. — *Should specify affidavits relied on.*—We can look at any proceedings in the action such as these affidavits to see whether they suggest the existence of documents, the production of which may be serviceable. But general notice to read them should not have been given. Pltf. should have called attention to those affidavits on which they meant to rely & have given notice of reading them only (COTTON, L.J.).—*DOWNING v. FAIRMOUTH UNITED SEWERAGE BOARD* (1887), 37 Ch. D. 234; 57 L. J. Ch. 234; 58 L. T. 206; 36 W. R. 437; 4 T. L. R. 190, C. A.

5499. — *Right of opponent to read.*—If pltf. gives notice of his intention to read an affidavit on the hearing of a motion, but declines to do so, deft. is nevertheless entitled to read it.—*CAUTY v. HOULDITCH* (1844), 14 Sim. 75; 60 E. R. 285.

See, now, R. S. C. Ord. 38, r. 21.

5500. *Appeal from chambers to judge in court.—Whether same affidavit may be used.*—Affidavits sworn at chambers, & used before the judge, may be used in ct. on moving to set aside the order.—*PICKFORD v. EWINGTON* (1835), 4 Dowl. 453; 1 Gale, 357; Tyr. & Gr. 29.

5501. — *—*—An affidavit sworn in order to resist an application to a judge at chambers may be used on showing cause before the ct., against the same application, if it has been referred by the judge to the ct.—*WORTHINGTON v. PRICE* (1835), 5 Tyr. 1029; 4 L. J. Ex. 292.

5502. — *Whether further affidavits may be filed.*—Where a judge declined to make an order to give pltf. his costs under County Courts Act, 1850 (c. 61), s. 13, & an application is made to the ct., fresh affidavits may be used in addition to those made use of before the judge.—*SANDERSON v. PROCTER* (1854), 10 Exch. 189; 23 L. J. Ex. 320; 156 E. R. 409; *sub nom. SAUNDERSON v. PROCTOR*, 2 C. L. R. 1283; 18 Jur. 702.

5503. — *—*—Every appeal is now a re-hearing & consequently, fresh affidavits may be used.—*ANON.* (1875), Bitt. Prac. Cas. 67; 1 Char. Cham. Cas. 129.

5504. — *—*—After a summons has been heard by the judge personally in chambers, & he has given his decision upon it, further evidence, which was not before him in chambers, will not be received upon a motion in ct. to discharge the

used.—*CARLETER v. POE* (1820), 2 Mol. 338.—**IR.**

b. Use of affidavits in subsequent stages.—An affidavit made by a witness for either party on an interlocutory application in an action cannot be used by the other party on the hearing of the action as an admission by the former, unless, perhaps, where it is known that he knew its contents before it was used on the interlocutory application.—*JOHNSTON v. MATTHEWS* (1893), 19 V. L. R. 638.—**AUS.**

c. Application for injunction.—Effect of suppression of facts in affidavit.—The affidavits on which an *ex p.* injunction is applied for must, to guard against abuse of that process, present a candid statement of the whole case, & must set forth not only the facts which pltf. thinks to be, but such as are in truth material to the determination of the application. An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits.—*LEY v. McDONALD* (1851), 2 Gr. 398.—**CAN.**

d. — Whether corroboration of affidavit necessary.—There is no technical rule requiring, pltf.'s affidavit in support of a motion for an injunction to be corroborated

Sect. 2.—Interlocutory proceedings: Sub-sects. 1

order made in chambers.—*Re MUNNS & LONGDEN* (1884), 50 L. T. 356; 32 W. R. 675.

5505. ———.]—*Re MARSDEN'S ESTATE, WITHERTON v. NEUMANN* (1889), 40 Ch. D. 475; 58 L. J. Ch. 260; 60 L. T. 696; 37 W. R. 525.

Use of affidavits in subsequent stages.]—See Nos. 5615-5627, *post*.

5506. Effect of subsequent order to hear with witnesses.]—CHESTER (DEAN & CHAPTER) v. SMELTING CORPN. (1902), 46 Sol. Jo. 196.

Habeas corpus.]—See CROWN PRACTICE, Vol. XVI., pp. 257, 258, Nos. 595-610.

Prohibition.]—See CROWN PRACTICE, Vol. XVI., pp. 392, 393, Nos. 2352-2368.

Certiorari.]—See CROWN PRACTICE, Vol. XVI., pp. 464-466, Nos. 3394-3434.

SUB-SECT. 2.—CROSS-EXAMINATION.

5507. Discretion of court to order—General rule.]—The ct. or judge has a discretion, in making an order under R. S. C., Ord. 38, r. 1, for the attendance for cross-examination of a person who has made an affidavit, & is not bound to make such an order.—*LA TRINIDAD, LTD. v. BROWNE* (1887), 36 W. R. 138.

5508. ——— Affidavit showing cause against garnishee order nisi.]—(1) A garnishee who disputes his liability to the judgment debtor is not a person who can properly be ordered to attend for examination under R. S. C., Ord. 42, r. 32. If the power to order such examination is given by the rule, it is a discretionary power & ought only to be exercised with great caution.

(2) An affidavit showing cause against a garnishee order *nisi* is not an affidavit upon which cross-examination can be ordered under R. S. C., Ord. 38, r. 1.—*JEFFRIES v. TOMLINSON* (1886), 3 T. L. R. 193.

5509. ——— Where productive of no result.]—The ct. will prevent the process of the ct. from being abused for the purpose of oppression.

Ptff. in an administration action having without

other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered.—*TREADWELL v. MORRIS* (1868), 15 Gr. 165.—**CAN.**

• Where proceedings interlocutory in form only.]—Although the application to amend a registered plan is by petition, & is therefore interlocutory in form, the order to be made finally & conclusively settles the rights of the parties concerned; & the evidence upon the application, if the facts are in dispute should, in the absence of agreement, be given *res recte*. The judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition.—*Re McDONALD & LISTOWEL* (1903), 6 O. L. R. 556; 2 O. W. R. 1009.—**CAN.**

1. Unanswered affidavits taken as true.]—Upon an application to dismiss an action as frivolous & vexatious, affidavits of defts. were allowed to be read, & not being answered, were taken as true, & the action dismissed by the full ct. on appeal from an order refusing the application.—*HOPKINS v. LIGNOR MOUNT SICKER COPPER MINING CO.* (1907), 7 W. L. R. 156; 13 B. C. R. 226.—**CAN.**

PART VII. SECT. 2, SUB-SECT. 2.

5507 i. Discretion of court to order—General rule.]—The rule in force in England that a party who has made an affidavit must submit to cross-examina-

tion upon it, if required on notice to his solr., before taking any further steps in the cause, being founded on a special English order, has no application in this province.—*GRANT v. WINCHESTER* (1873), 6 P. R. 44.—**CAN.**

5507 ii. ———.]—As a general rule an order under Rule 401 will not be made for the attendance for cross-examination of ptff. who has made an affidavit leading to an *interim* injunction before deft. files an affidavit of merits.—*LEAVOCK v. WEST* (1897), 6 B. C. R. 404.—**CAN.**

5507 iii. ———.]—Rules 385 & 429, taken together, compel the production for cross-examination of deponent on his affidavit if required by the opposite party, before such affidavit can be used.—*WESTHALEN v. EDMONDS* (1899), 7 B. C. R. 175.—**CAN.**

5507 iv. ———.]—On an application at chambers to set aside as false, frivolous, & vexatious the pleas pleaded by deft. to an action brought against him as acceptor of a bill of exchange, discounted by ptff. bank, deft. applied for leave to cross-examine the manager of the bank on the affidavit upon which the motion was founded.—*Held*: the matter was one within the discretion of the chambers judge, & there was no appeal from his refusal to permit the cross-examination applied for.—*BANK OF MONTREAL v. BENT* (1900), 31 N. S. R. 489.—**CAN.**

5507 v. ———.]—On a summons for judgment under Ord. 14, it is only in

any necessity made an affidavit for the purpose of an application in chambers for accounts, defts. proposed to cross-examine her on her affidavit, & on her refusing to appear, applied for an order on her to attend.—*Held*: the affidavit having been immaterial to the relief sought, & no reason having been suggested for supposing that the cross-examination could be productive of any result, the application was an abuse of the process of the ct. for the purpose of oppression & must be refused.—*Re MUNDELL, FENTON v. CUMBERLEGE* (1883), 52 L. J. Ch. 756; 48 L. T. 776.

5510. ——— In case of foreigner.]—Application to cross-examine a foreigner on an affidavit made by him in an action in this country refused as a matter of discretion in this case, but the cts. will make such an order where necessary.—*STRAUSS v. GOLDSCHMIDT* (1892), 8 T. L. R. 239, D. C.

5511. ——— Long delay in application.]—Re JONES, JONES v. JONES (1893), 95 L. T. Jo. 36.

5512. ——— On hearing of appeal.]—(1) The S. Corpn., being the owners of several letters patent relating to the manufacture of saccharin, commenced an action for infringement of the same against D. Co., & moved for an interlocutory injunction. The motion was dismissed on the ground that the validity of the patent was in dispute. Ptffs. appealed, & in the course of arguments on the appeal, applied for leave to cross-examine one of the secretaries of deft. co., who had made an affidavit, on the ground that it was evasive. Cross-examination was allowed (as an exceptional case) before the ct., by its leave.

(2) Affidavits made on information & belief must show what the sources of information are.—*SACCHARIN CORPN., LTD. v. CHEMICAL & DRUGS CO., LTD.* (1898), 15 R. P. C. 53, C. A.

5513. ——— Affidavit verifying names of partners in plaintiff firm.]—Where an action is brought by partners in the name of their firm, & the names of the persons constituting the firm are disclosed under R. S. C., Ord. 48a, rr. 1, 2, there is no jurisdiction to direct a cross-examination on an affidavit disclosing the names, or to order a separate issue to determine the question whether a person whose

exceptional cases that deft. will be permitted to cross-examine ptff. on his affidavit, & then only after deft. has filed an affidavit of merits.—*WARD v. DOMINION STEAMBOAT LINE CO.* (1902), 9 B. C. R. 231.—**CAN.**

5507 vi. ———.]—Upon an application by deft. for security for the costs of the action, upon the ground, that ptff. resided out of the jurisdiction, as appeared by deft.'s affidavit & by the indorsement on the writ of summons, deft.'s affidavit further stated, as required by Rule 528, that he had a good defence upon the merits. Ptff. made no answer by affidavit, but, on the return of the summons, asked that deft. be cross-examined on his affidavit.—*Held*: ptff. was entitled under r. 292, to cross-examination on the affidavit.—*MURDOCK v. PATTON* (1910), 15 W. L. R. 283.—**CAN.**

5507 vii. ———.]—Although it is within the discretion of the judge, whether or not he will allow a cross-examination upon an affidavit in support of a motion, petition or summons, under Rule 293, that where the discretion is exercised upon a wrong principle, the appellate ct. may set the matter right.—*Ewing v. McGILL* (1915), 30 W. L. R. 452; 7 W. W. R. 1147; 8 Alta. L. R. 104.—**CAN.**

• In winding-up proceedings.]—Re MANITOBA COMMISSION CO. (1911), 7 W. L. R. 893.—**CAN.**

h. ——— On taxation of costs.]—

name has been disclosed was a partner at the time of the accruing of the cause of action.—**ABRAHAM & Co. v. DUNLOP PNEUMATIC TYRE Co.**, [1905] 1 K. B. 40; 74 L. J. K. B. 14; 91 L. T. 11, C. A.

5514. —[—]**Re NEWCASTLE & GATESHEAD THEATRES, LTD.** (1920), 150 L. T. Jo. 73.

5515. Affidavit contradicting previous affidavit of same person—Duty to produce deponent for examination.—On contradictory affidavits of same person, personal examination required.

The general rule is that whoever produces the affidavit of a person to contradict a former made by that person, should produce him in ct., a personal examination being required (**LORD HARDWICKE, C.**).—*Ex p. LORD* (1750), 2 Ves. Sen. 26; 28 E. R. 18, L. C.

5516. Before whom examination conducted—Examiner.—The ct., under Court of Chancery Acts, 1852 (cc. 80 & 86), directed that a party to a suit, a witness by affidavit on his own behalf in support of his own state of facts before the master, should be cross-examined before the examiner instead of the master; & that all the parties should be examined on interrogatories before the examiner, as the master should direct.—**HEXTALL v. CHEATLE** (1852), 1 Sm. & G. 78; 9 Hare, App. xx., n.; 20 L. T. O. S. 139; 17 Jur. 128; 1 W. R. 91; 65 E. R. 35.

5517. —[—]—(1) A witness who has made an affidavit may be cross-examined either before one of the examiners of the ct. or a special examiner, & in the case of a witness abroad the proper course is to apply for a special examiner.

(2) Time will not be enlarged to allow of affidavits in reply being filed after cross-examination of a witness on the other side.—**EDWARDS v. SPAIGHT** (1862), 2 John. & H. 617; 70 E. R. 1205.

5518. —[—]—A chief clerk is bound on the application of a suitor to issue a summons directing the cross-examination of witnesses to take place before one of the examiners of the ct.—**M'ALISTER v. WALTERS** (1890), 7 T. L. R. 105.

5519. —[—]—Examinations of witnesses should be taken before the examiners of the ct., but where the amount at stake is trifling they may be taken before the chief clerks.—**LUXMORE v. GORDON** (1890), 7 T. L. R. 150.

5520. —[—]**Witness abroad—Special examiner.**—**EDWARDS v. SPAIGHT**, No. 5517, *ante*.

5521. —[—]**Amount trifling—Chief clerk.**—**LUXMORE v. GORDON**, No. 5519, *ante*.

5522. —[—]**Registrar of county court.**—**LUMB v. OSBURN** [1884] W. N. 218.

5523. Time for examination—Till time for hearing.—Where a cause is set down for hearing in the ordinary course, a deft. cannot be compelled to come in & be cross-examined after the expiration of a month from the time fixed for closing the evidence; but this rule does not apply to the case of a cause being set down upon motion for decree, in which case a party can be cross-examined, & affidavits may be filed up to the actual time of hearing.—**BEDWELL v. PRUDENCE** (1860), 1 Drew. & Sm. 221; 8 W. R. 702; 62 E. R. 363.

5524. Who may be examined—Creditor in administration suit.—A creditor's affidavit filed in support of his claim for a debt, under a decree in an administration suit, is one upon which, under 15 & 16 Vict. c. 86, s. 40, he can be cross-examined.

—**CAST v. POYSER** (1856), 3 Sm. & G. 360; 26 L. J. Ch. 93, 353; 28 L. T. O. S. 118, 197; 3 Jur. N. S. 38; 65 E. R. 698, C. A.

5525. —[—]**Parties.**—Order made for the attendance of defts., for the purpose of being examined, *visà voce*, upon a motion for an injunction.—**NICHOLS v. IBBETSON** (1859), 7 W. R. 430.

5526. —[—]**Though affidavit read by opponent.**—A notice of motion for decree in the ordinary terms gave a list of the affidavits intended to be read, & further gave notice that plff. would read deft.'s answer. Plff. gave notice of intention to cross-examine deft. on the answer, but it was objected, before the examiner, that plff. had made deft. his witness, & the examiner allowed the objection:—*Held*: plff. was entitled to cross-examine deft. on his answer.—**BRUMFIT v. HAIR** (1862), 7 L. T. 310; 9 Jur. N. S. 12; 11 W. R. 53.

5527. —[—]**Solicitor—Under order for taxation.**—A solr. may be cross-examined on an affidavit made by him in support of a bill of costs under a common order for taxation, & it is the duty of the examiners to take such examination.—*Re FLUX, ARGLES & RAWLINS* (1874), 44 L. J. Ch. 375.

5528. —[—]**Garnishee showing cause against order nisi.**—**JEFFRIES v. TOMLINSON**, No. 5508, *ante*.

5529. Motion ordered to stand till hearing—No examination on affidavits filed on motion.—Where a motion is ordered to stand on certain terms till the hearing of the cause, no new evidence can be filed by the parties on the motion, which must be dealt with at the hearing in the manner in which it was originally brought on; & if the motion stands over in consequence of an affidavit of deft., the motion is not "a matter depending in" or "a proceeding before" the ct., which entitles plff. to cross-examine deft. on his affidavit; even although plff. may have given notice that he is going to use it at the hearing of the cause.—**SINGER v. AUDSLEY** (1872), L. R. 13 Eq. 401; 41 L. J. Ch. 229; 26 L. T. 238; 20 W. R. 438.

5530. Absence of witness—Whether motion allowed to stand over.—**BRIGHT v. SPRATT**, [1874] W. N. 72.

5531. —[—]—**Collie v. Bloxham** (1893), 37 Sol. Jo. 740.

5532. —[—]**Refusal of court to act on affidavit.**—The ct. refused to act upon an affidavit of a deponent who could not be cross-examined.—**SHEA v. GREEN** (1886), 2 T. L. R. 533, D. C.

5533. Where examination not concluded—Power of court to make interim order.—The general rule in actions for specific performance against a purchaser who is in possession, that he must either pay the price agreed upon or give up possession, does not apply to the case of a mining lease where the intended lessee is working the mine & taking away the mineral. In such a case the lessor is entitled to an interim order for payment into ct. of a sum equal to the estimated amount of the royalties, & the ct. will not stay its hand upon the ground that plffs. put an affidavit in evidence upon which the cross-examination is not concluded.—**LEWIS v. JAMES** (1886), 32 Ch. D. 326; 56 L. J. Ch. 163; 54 L. T. 260; 50 J. P. 423; 34 W. R. 619, C. A.

Annotations.—**Mentd.** **Greenwood v. Turner**, [1891] 2 Ch. 144; **Cook v. Andrews** (1896), 66 L. J. Ch. 137.

Upon taxation of costs between party & party, the taxing officer has jurisdiction to order the cross-examination of a party upon his affidavit of disbursements.—**JOHNSON v. MOORE** (1912), 21 W. L. R. 569; 1 W. W. R. 1102; 4 D. L. R. 399; 17 B. C. R. 219.—**CAN.**

k. On affidavit on production.—An affidavit on production is not within Ord. 268, & therefore the party making it does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under Ord.

138.—**PAXTON v. JONES** (1873), 1 P. R. 135.—**CAN.**

1. *Effect of R. S. C.* (1890), Ord. 37, rr. 21 & 29.—**RUSSELL v. SAUNDERS** (1900), 7 B. C. R. 173.—**CAN.**

m. *On affidavits verifying accounts.*

5548. ———.]—**LAWSON v. QUARE** (1887), 32 Sol. Jo. 24.

5549. Who may consent—Trustee.]—PATTERSON v. WOOLER, No. 5546, *ante*.

5550. ———.]—**LAWSON v. QUARE** (1887), 32 Sol. Jo. 24.

5551. Guardian ad litem—Of infant.]—The guardian *ad litem* of an infant deft. is competent to give the consent requisite for taking evidence by affidavit under R. S. C., Ord. 38, r. 1.—**KNATCHBULL v. FOWLE** (1876), 1 Ch. D. 604; 24 W. R. 629; 3 Char. Pr. Cas. 332.

Annotation:—Folld. Piggott v. Toogood (1904), 48 Sol. Jo. 573.

5552. ———.]—Under the new practice a guardian *ad litem* may consent on behalf of infants, without the leave of the ct., to evidence being taken by affidavit instead of *visà voce*.—**FRYER v. WISEMAN** (1876), 45 L. J. Ch. 199; 33 L. T. 779; 24 W. R. 205; 3 Char. Pr. Cas. 330.

Annotation:—Folld. Piggott v. Toogood (1904), 48 Sol. Jo. 573.

5553. ———.]—**Of person of unsound mind.]—**The ct. would not give any sanction to the guardian *ad litem* consenting to the taking of evidence by affidavit as such sanction was quite unnecessary.—**PIGGOTT v. TOOGOOD** (1904), 48 Sol. Jo. 573.

5554. Effect of consent—Whether witness may give further evidence *visà voce*.]—Where an agreement has been come to between the parties to an action, that the evidence at the trial shall be taken by affidavit, the agreement not stating that the evidence shall be taken by affidavit only, a witness, who is present in ct. for the purpose of being cross-examined on his affidavit, may be called by the party on whose behalf he has made the affidavit, & give fresh evidence *visà voce*.—**GLOSSOP v. HESTON & ISLEWORTH LOCAL BOARD** (1878), 47 L. J. Ch. 536; 26 W. R. 433.

5555. ———.]—**Agreement to try without jury.]—**Where the parties to an action agreed that evidence should be taken by affidavit:—*Held*: this was equivalent to an agreement that the action should be tried before a judge without a jury, since affidavits could not otherwise be used except under special circumstances; & the ct. refused to direct a trial before a judge & jury, even in a case peculiarly adapted to be tried before a jury, where the parties had under such an agreement taken affidavit evidence for two years, & had at great expense prepared the action for trial before a judge alone.—**BROOKE v. WIGG** (1878), 8 Ch. D. 510; 47 L. J. Ch. 749; 38 L. T. 732; 26 W. R. 729, C. A.

Annotation:—Consd. Ruston v. Tobin (1879), 10 Ch. D. 558.

SECT. 4.—BY ORDER OF COURT.

SUB-SECT. 1.—IN GENERAL.

See, now, R. S. C., Ord. 30, r. 7, Ord. 37, r. 1 Administration of Justice Act, 1920 (c. 81), s. 6.

PART VII. SECT. 4, SUB-SECT. 1.

n. Whether proof by affidavit allowed—Matters of fact.]—The ct. will not try matters of fact upon affidavits.—**SMITH v. ASK** (1848), 5 U. C. R. 497.—**CAN.**

o. ——— Action of debt.]—Under the old law neither the existence of the debt, nor the circumstances under which it was contracted, nor the conduct of deft., could be tried affidavits for the purpose of permitting an arrest. If the affidavit of debt & intention to leave the country was a positive one.—**FREAR v. FERGUSON** (1852), 2 C. L. Ch. 144.—**CAN.**

p. ——— Intestacy of mortgagor.]—It being doubtful when the mtgor. died, his widow & children joined in a suit to redeem, in order that all questions under the Act abolishing the law of primogeniture might be avoided. At the hearing, the ct. allowed proof of intestacy by affidavit, with a view to making the decree as asked.—**CONSTABLE v. GUEST** (1879), 6 Ch. 510.

q. ——— Deponent required for cross-examination.]—The ct. has no power to permit one party to prove facts by affidavit in the purpose of the

5556. Order not made on summons for direction.]—RAINBOW v. KITTOE (1916), 140 L. T. Jo. 413.

5557. Application to court—Must state specific facts to be proved.]—When the evidence in a cause is taken orally, a general application under 15 & 16 Vict. c. 86, s. 38, to be at liberty to use at the hearing affidavits already filed is irregular. The particular facts or circumstances proposed to be proved by affidavits should be specified both in the notice of motion & in the order.—**IVISON v. GRASSIOT** (1853), 17 Beav. 321; 51 E. R. 1058.

5558. Whether proof by affidavit allowed—Inquiry pending before master.]—The ct. will not try by affidavits a fact, respecting which an inquiry is pending before the master.—**STAG v. GREY (EARL)** (1840), 4 Jur. 1007.

5559. ——— Execution of deed.]—BALL v. CARTER (1852), 20 L. T. O. S. 106.

5560. ——— On motion for judgment.]—On motion for judgment the ct. has no power under R. S. C. to order that the evidence shall be taken by affidavit. Accordingly where a consent action in which an infant & a married woman were defts. & in which the evidence had been taken by affidavit was set down on motion for judgment the ct. gave judgment but directed that notice of trial should be given to the infant & married woman, & that the action should be placed in the paper again *pro forma*.—**ELLIS v. ROBBINS** (1881), 50 L. J. Ch. 512.

Annotation:—Consd. Re Fitzwater, Fitzwater v. Waterhouse (1882), 52 L. J. Ch. 83.

5561. ——— Assessment of damage by master—Witnesses abroad.]—MACDONALD v. ANTELME PATTERSON & Co., [1884] W. N. 72; Bitt. Rep. in Ch. 60.

5562. What facts may be proved—Execution of deed—Execution not in issue on pleadings.]—Proof admitted on behalf of pltf., of the execution of a deed by affidavit at the hearing, where the answer had not been replied to, but did not deny the execution.—**CHALK v. RAINE** (1849), 7 Hare, 393; 18 L. J. Ch. 472; 13 Jur. 981; 63 E. R. 671.

SUB-SECT. 2.—FURTHER CONSIDERATION.

5563. Whether fresh evidence admissible.]—Where proceedings in an action had been carried on under an order made in pursuance of R. S. C., Ord. 15, 1883, & there had been no trial of the action, the ct., on further consideration of the action, allowed an affidavit to be read which had not been before the chief clerk, & therefore was not mentioned in the certificate.—**Re MICHAEL, DESSAU v. LEWIN** (1885), 52 L. T. 609.

5564. ——— Administration action.]—Under R. S. C., Ord. 36, r. 1, the ct. may, in an administration action, & after the chief clerk has made his certificate, receive, if it thinks fit, fresh affidavit evidence on further consideration.—**MAY v. NEWTON** (1886), 34 Ch. D. 347; 56 L. J. Ch. 313; 56 L. T. 140; 35 W. R. 363.

r. ——— Deed of assignment.]—Where the defence was that the deed of assignment under which pltf. claimed was executed after bill filed, & was in trust for assignor against whom deft. filed a cross-bill:—*Held*: the assignment could not be proved by affidavit at the hearing.—**JOLY v. SWIFT** (1845), 9 L. Eq. R. 195.—**IR.**

Sect. 4.—By order of court: Sub-sects. 2, 3, 4, 5, 6, 7 & 8. Sects. 5 & 6.]

5565. ——— **Conduct of party since judgment.]**—An action was brought by the beneficiaries under the will of a testator against the trustees thereof to administer the estate of the testator. The action was heard as a short cause, when the usual judgment was made directing accounts & inquiries, & the further consideration was adjourned. The judgment contained no special reservation as to costs. When the action came on upon further consideration *ptfss.* desired to read an affidavit which contained charges against *defts.* The charges related for the most part, to the conduct of the *defts.* between judgment & further consideration, & partly also to the conduct of *defts.* before action brought. The object of the affidavit was to make *defts.* liable to pay the costs of the action or some part thereof, occasioned by reason of the acts complained of in such affidavit, & otherwise appearing by the evidence in the action. *Defts.* objected to this affidavit being read contending that the *ct.* had no jurisdiction to allow any such affidavit to be read:—*Held:* (1) as to the conduct of *defts.* between judgment & further consideration, *ptfss.* were entitled to read an affidavit; (2) as to the conduct of *defts.* before action no affidavit could be read by *ptfss.*

Seem: if persons who had been served with the judgment desired to read on the further consideration an affidavit as to conduct of *defts.* before action, they would be entitled to do so.—*Re REVILL, LEIGH v. RUMNEY* (1886), 55 L. T. 542.

5566. ——— **Conduct of party before judgment.]**—*Re REVILL, LEIGH v. RUMNEY*, No. 5565, *ante.*

5567. ———.] —*Re WATSON* (1904), 49 Sol. Jo. 51.

SUB-SECT. 3. —ADMIRALTY

See ADMIRALTY, Vol. I., pp. 193, 216, Nos. 1079, 1081, 1402.

SUB-SECT. 4.—BANKRUPTCY PROCEEDINGS.

See BANKRUPTCY, Vol. IV., pp. 512-515, Nos. 4639-4670.

SUB-SECT. 5.—COMMERCIAL LIST.

5568. Practice in commercial court.]—With reference to the admission of evidence without having the witnesses presented for cross-examination, as is now common in the Commercial Ct., the practice goes of course upon the basis that all the witnesses are to be assumed to be honest witnesses. It would, however, be dangerous to extend by implication what the witnesses have actually said, except in the clearest cases (*RIGBY, L.J.*).—*ISIS S.S. Co. v. BAHR & Co.*, [1899] 2 Q. B. 364; 68 L. J. Q. B. 930; 81 L. T. 241; 15 T. L. R. 465; 8 Asp. M. L. C. 569; 4 Com. Cas. 307, C. A.; *affd.*, [1900] A. C. 340, H. L.

SUB-SECT. 6.—DIVORCE PROCEEDINGS. e HUSBAND & WIFE.

PART VII. SECT. 5.

s. In claim for attachment of debts.]—It was agreed that the

should be determined in a summary way upon affidavits:—*Held:* claimant, being really *ptf.* in an issue, was entitled to file affidavits in reply to

those filed by *ptf.* in the action.—*BRYSON v. ROSSER MUNICIPALITY* (1909), 10 W. L. R. 317; 18 Man. L. R. 658.—*CAN.*

SUB-SECT. 7.—PROBATE PROCEEDINGS.

See, generally, WILLS.

5569. Execution of will.]—In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared. The *ct.* declined to order the execution & attestation of the will to be proved by affidavit under R. S. C., Ord. 37, r. 1.—*COOK v. TOMLINSON* (1876), 24 W. R. 851; 3 Char. Pr. Cas. 326.

5570. ———.]—In a suit for revocation of probate on the grounds of undue execution, & incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success; the *ct.* allowed the affidavit made by him eight years before, at the time of proving the will at the district registry to be admitted as evidence of execution & capacity.—*GORNALL v. MASON* (1887), 12 P. D. 142; 56 L. J. P. 86; 57 L. T. 601; 51 J. P. 663; 35 W. R. 672.

5571. ———.]—In a suit for probate in solemn form, where it appeared that after every effort to trace the attesting witnesses neither of them could be found, the *ct.* admitted, as secondary evidence of execution, an affidavit of one of them, sworn to support an application for probate in common form.—*HAYES v. WILLS* (1906), 75 L. J. P. 86.

5572. When affidavit may be read—Witness giving evidence in another court.]—In a probate suit, out of nine *defts.* on the record eight had been cited & had not appeared. The remaining one, who was resident in New Zealand, had not been served. The *ct.*, at the hearing, allowed him to be struck off the record, & the case to proceed against the other eight *defts.* The *ct.* also allowed an affidavit used on a motion formerly made in the suit, & sworn by a witness who had been subpoenaed but was unable to attend, owing to his being, at the time of the hearing, engaged as a witness elsewhere, to be put in evidence, & treated the application as made before the trial under R. S. C., Ord. 37, r. 1.—*DREWITT v. DREWITT* (1888), 58 L. T. 681; 52 J. P. 232.

SUB-SECT. 8.—TRADE MARKS.

5573. Use of statutory declarations.]—On an application to register a trade mark the practice of taking evidence by statutory declaration without cross-examination must not be abused.—*Re BAGOTS, HUTTON & Co.'s TRADE MARK*, [1916] 2 Ch. 103; 84 L. J. Ch. 918; 113 L. T. 67; 31 T. L. R. 373; 32 R. P. C. 333, C. A.; *affd. sub nom. BOORD & SON (INCORPORATED) v. BAGOTS, & Co., LTD.*, [1916] 2 A. C. 382, H. L.

Mentd. *Re British Cycle & Motor Cycle Manufacturers' & Traders' Union Appln. for Trade Mk.* (1923), 40 R. P. C. 226.

SECT. 5.—AFFIDAVITS IN REPLY.

See, note R. S. C., Ord. 38, rr. 25-27.

5574. Function of.]—(1) Where *ptf.* had filed affidavits in reply introducing a new state of facts in the nature of a new assignment, *defts.* were allowed at the hearing to read affidavits in reply without having given notice of them, the cause being allowed to stand over in order to give the *ptf.* time to answer them.

(2) The proper function of evidence given in reply is, to explain away, if possible, the effect of evidence already given.—*HEATH v. WALLINGFORD* (1865), 12 L. T. 631.

Annotation:—Generally, Mentd. A.-G. v. Colney Hatch Lunatic Asylum (1868), 4 Ch. App. 146.

5575. Time for leave to file—in opposition to supplemental affidavit.]—(1) The proper time for applying to file a supplemental affidavit in answer to an affidavit shown by the courtesy of counsel before the argument of a rule to the counsel on the other side, is when that affidavit has been filed.

(2) *Semble*: an affidavit in answer to such a supplemental affidavit may be allowed if an application be made as soon as that supplemental affidavit is read.—*SWINFEN v. SWINFEN* (1857), 1 C. B. N. S. 364; 26 L. J. C. P. 97; 28 L. T. O. S. 233; 3 Jur. N. S. 85; 140 E. R. 150; *sub nom.* *SWYNFEN v. SWYNFEN*, 5 W. R. 203.

Annotations:—Generally, Mentd. Chambers v. Mason (1858), 5 C. B. N. S. 59; Thomas v. Harris (1858), 27 L. J. Ex. 353; Thomas v. Rawlings (1859), 28 L. J. Ex. 347; Swinfen v. Bacon, Swinfen v. Lewis (1861), 5 L. T. 83; Brown v. Kennedy (1863), 9 Jur. N. S. 1163; Prestwich v. Poley (1865), 18 C. B. N. S. 806; Strauss v. Francis (1866), L. R. 1 Q. B. 379; Matthews v. Munster (1887), 41 J. P. 615; Neale v. Gordon Lennox, [1902] 1 K. R. 838.

5576. Whether time extended—Till after cross-examination of opponent's witness.]—EDWARDS v. SPAIGHT, No. 5517, *ante*.

5577. Where not confined to matters of reply—Leave to defendant to read affidavit in answer.]—*HEATH v. WALLINGFORD*, No. 5574, *ante*.

5578. — Leave to amend claim & file further evidence.]—In a suit to set aside a settlement on the ground of fraud & surprise on plff., evidence was filed in reply tending to show that plff., at the time of executing the settlement, was of infirm mind. Upon the hearing of a motion for leave to use this evidence, which had been objected to as not being properly evidence in reply, plff. asked for leave to amend the bill, & go into fresh evidence. The cause was at issue before Nov. 1, 1875; & the hearing had been fixed & only accidentally postponed:—*Held*: leave should be given to plff. to amend the bill, & go into further evidence, & an order asked for by deft., that the evidence should be taken *riâd rocc*, should be refused.—*ROE v. DAVIES* (1876), 2 Ch. D. 729; 24 W. R. 606; 3 Char. Tr. Cas. 126.

5579. — Defendant's evidence raising wider issue than pleadings.]—Action claiming an injunction against the master of a ship in which a set of pumps, alleged to be an infringement, was used, as well as against the makers. Plff. brought evidence at the trial in support of the case raised by his pleadings & particulars of infringement, & to meet the case raised by defts. on their pleadings & particulars of objections. Defts. went into evidence on a much wider issue than that raised by the pleadings, etc. Plff. applied to adduce evidence in reply by adducing instances of infringement other than those mentioned in the particulars of infringement, & which he had obtained during the course of the trial:—*Held*: he was entitled to bring in this evidence.—*ADAIR v. YOUNG* (1879), 40 L. T. 61; *subsequent proceedings*, 11 Ch. D. 136, C. A.; 12 Ch. D. 13, C. A.

Annotations:—Mentd. Upmann v. Forester (1883), 24 Ch. D. 231; Proctor v. Bayley (1889), 42 Ch. D. 393, n.; Belvedere Fish Guano Co. v. Rainham Chemical Works, Feldman & Partridge, Ind. Coope v. Rainham Chemical Works, Feldman & Partridge, [1920] 2 K. B. 487.

5580. — May be disregarded by court—Or leave given to answer.]—Affidavits filed by a plff. in reply will not upon interlocutory motion be

ordered to be taken off the file upon an allegation by deft. that they are not confined to matters strictly in reply; though at the hearing, if it should turn out to be so, the ct. will not regard them, or may give leave to deft. to answer them.—*GILBERT v. COMEDY OPERA CO.* (1880), 16 Ch. D. 594; 43 L. T. 665; 29 W. R. 169.

5581. — Not taken off file on interlocutory application.]—*GILBERT v. COMEDY OPERA CO.*, No. 5580, *ante*.

5582. May be confirmatory of evidence in chief.]—Where evidence is taken by affidavit under R. S. C., Ord. 38, r. 1, plff.'s affidavits in reply need not be restricted to cutting down deft.'s evidence, but may be confirmatory of plff.'s evidence in chief, & the practice to this effect in the Ch. Div. has not been altered by R. S. C., Ord. 38, r. 3.—*PEACOCK v. HARPER* (1877), 7 Ch. D. 648; 47 L. J. Ch. 238; 38 L. T. 143; 26 W. R. 109.

SECT. 6.—CROSS-EXAMINATIONS.

See, now, R. S. C., Ord. 37, r. 20, Ord. 38, r. 28.

5583. Notice to produce for cross-examination—Duty of party cross-examining to make appointment.]—A party who intends to cross-examine a witness must, himself, make an appointment for that purpose with the examiner, & give notice of the time appointed to the witness & the solr. of the opposite party.—*KEYMER v. PERING* (1839), 10 Sim. 179; 8 L. J. Ch. 355; 59 E. R. 581.

5584. — Must state time, place & occasion.]—On the prosecution of an inquiry added to a decree one party filed an affidavit by a person resident in South America, & gave notice to read it, whereupon the opposite party gave notice that he required to cross-examine the deponent, not saying when, where, or before whom:—*Held*: (1) R. S. C., Ord. 38, r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination, even supposing that Ord. 37, rr. 21, 22, make that rule applicable to evidence on an inquiry, & supposing that Ord. 38, r. 28, applies to a witness resident out of the jurisdiction, did not exclude the present affidavit, as the notice for cross-examination did not follow the terms of Ord. 38, r. 28; (2) the order of the Ct. of Appeal admitting the affidavit as evidence, without prejudice to any application by the opposite party within fourteen days for the cross-examination of the deponent in any place in South America before some proper person to be appointed for that purpose, was right under all the circumstances.

(3) It will be observed that the notice was a notice simply that defts. required to cross-examine all the witnesses on whose affidavits the other side placed reliance, & specifying certain affidavits. There was no mention of time, or place, or occasion, & I cannot think that this notice was such a notice as is contemplated by the rules to which attention has been called (*LORD HERSCHEL, C.*):—*CONCHA v. CONCHA* (1886), 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477, H. L.; *affg.* S. C. *sub nom.* *DE MORA v. CONCHA*, 32 Ch. D. 133, C. A.

Annotations:—As to (2) Held. The Parisian (1887), 13 P. D. 16; Strauss v. Goldschmidt (1892), 8 T. L. R. 239. *Generally, Mentd.* *Re Allport & Joy's Contract* (1889), 61 L. T. 213; *Worman v. Worman* (1889), 43 Ch. D. 397; *Re Larard, Ex p. Yeomans & Heap* (1896), 4 Mans. 310; *Re De Nicola, De Nicola v. Currier* (1898), 46 W. R. 532; *Mirza Kuratullah Bahadur v. Parna Sahab* (1905), 21 T. L. R. 650; *Ord v. Ord*, [1923] 2 K. B. 432.

Sect. 6. Cross-examination. Sects. 7 & 8.]

5585. Time for cross-examination.—Of party filing affidavit.]—(1) A party to a cause, filing or giving notice to read an affidavit before the evidence is closed, may be cross-examined upon such affidavit at once, without waiting until the evidence is closed.

(2) A party having filed or given notice to read an affidavit is not at liberty to withdraw it.—*CLARKE v. LAW* (1855), 2 K. & J. 28; 2 Jur. N. S. 228; 1 W. R. 35; 69 E. R. 680.

Annotations:—As to (1) Refd. Stehling v. Alice (1856), 2 Jur. N. S. 1161. *As to (2) Refd. Pike v. Dickinson* (1873), 21 W. R. 862. *Apld. Re Quartz Hill, etc. Co., Ex p. Young* (1882), 21 Ch. D. 642. *Refd. National Insce. & Investment Assn. v. Christlars* (1863), 2 New Rep. 255.

5586. — Not till evidence closed.]—As a general rule a party should file his affidavits before cross-examining a party on the other side. Consequently an affidavit filed in a creditor's administration suit by deft. exors. subsequently to their cross-examination of pltf. upon his affidavit in support of his claim is not generally admissible in proceedings in chambers for adjudication of pltf.'s claim, but it was allowed to be used upon leave given to the deponent to reply.—*LANCEFIELD v. INGOLDEN* (1872), 41 L. J. Ch. 473; 26 L. T. 687; 20 W. R. 621.

5587. — — —.]—*Muir v. Kirby* (1887), 32 Sol. Jo. 130.

5588. — — —.]—In an administration action inquiries were directed & pltf. was ordered to furnish certain accounts. After pltf. had filed his accounts & affidavits in the matter defts. obtained an order for his cross-examination. By direction of the judge the general practice in his chambers, of which defts. were aware, was not to make an order for cross-examination until the evidence was closed. After pltf. had been cross-examined defts. applied for leave to file further evidence generally:—*Held*: there being no rule of ct. expressly referring to the point, the judge had a discretion, provided he made no hard & fast rule, to adopt a general practice in such matters, & defts. were not entitled to the leave asked as a matter of right, but only on showing special circumstances.—*Re DAVIES, ISSARD v. LAMBERT* (1890), 41 Ch. D. 253; 59 L. J. Ch. 516; 62 L. T. 715; 38 W. R. 584, C. A.

5589. — Discretion of court to extend.]—The fourteen days from the filing of an affidavit in support of a petition having been allowed to expire without notice having been given to cross-examine on the affidavit as provided by Ord. Feb. 5, 1861, r. 19:—*Held*: the ct. was not thereby precluded from exercising its discretionary power under Chancery Improvement Act, 1852 (c. 86), s. 40, & leave to cross-examine should be granted.—*Re SADLER'S WELLS THEATRE* (1873), 42 L. J. Ch. 737.

5590. Place of cross-examination.]—A witness who has made an affidavit, has no right to insist upon having his cross-examination taken at

the place where the affidavit has been made, it being in the discretion of the ct. to excuse his attendance for cross-examination in London.

Such witness should communicate with the party on whose behalf the affidavit has been made, throwing upon him the duty of applying for a special examiner.—*TOWNSEND v. WILLIAMS* (1858), 6 W. R. 734.

5591. Failure of deponent to appear.—Affidavit not received.]—Where a deft. has given notice of his intention to cross-examine a witness on an affidavit of his, & such witness does not appear at the hearing, deft. has a right either to have his affidavit withdrawn, or the cause ordered to stand over till he can be cross-examined on it. The ct. will not go on with the examination of other witnesses in the interim.—*NASON v. CLAMP* (1861), 10 L. T. 682; 12 W. R. 973.

5592. — — —.]—Motion to take off the file the affidavits of a deponent who, after an order to attend before the examiner at his own expense, had not been produced for cross-examination:—*Held*: irregular, as the affidavits could not be used as evidence except by special leave.—*MEYRICK v. JAMES* (1877), 46 L. J. Ch. 579.

5593. — Affidavit not taken off file.]—*MEYRICK v. JAMES*, No. 5592, *ante*.

5594. — Witness outside jurisdiction.]—*CONCHA v. CONCHA*, No. 5584, *ante*.

Admiralty proceedings.]—*See ADMIRALTY*, Vol. I., p. 216, No. 1402.

5595. Expenses of witness.—Party to cause.]—A party to a cause, upon being cross-examined on his affidavit, is entitled to be paid his reasonable expenses by the party cross-examining him, in the same way as a witness under 15 & 16 Vict. c. 86, s. 38.—*DAVEY v. DURRANT* (1858), 24 Beav. 493; 31 L. T. O. S. 21; 4 Jur. N. S. 230; 6 W. R. 405; 53 E. R. 448; *sub nom.* *DAVEY v. DURRANT, SMITH v. DURRANT*, 27 L. J. Ch. 503; *subsequent proceedings*, 2 De G. & J. 506, L. J.

5596. — Whether borne by party producing witness.]—The provision in R. S. C., Ord. 38, r. 4, that the party producing deponents for cross-examination upon their affidavits shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, is confined to a cross-examination of the deponents before the ct. at the trial of the action, & does not apply to a cross-examination on an affidavit filed after decree for the purpose of proceedings in chambers.—*Re KNIGHT, KNIGHT v. GARDNER* (1883), 25 Ch. D. 297; 53 L. J. Ch. 183; 49 L. T. 545; 32 W. R. 409, C. A.

Annotations:—Consd. Backhouse v. Alcock (1885), 28 Ch. D. 669; *Mansel v. Clanricarde* (1885), 54 L. J. Ch. 982.

5597. — — —.]—Pltf. after judgment in an administration action having obtained an order for cross-examination of deft., the exor., upon his affidavit in answer to inquiries directed by the judgment denying possession of any part of testator's estate, deft. declined to attend before the examiner until pltf. had paid his expenses. Pltf.

PART VII. SECT. 6.

5595 i. Time for cross-examination.—Of party filing affidavit.]—After the trial of a *quo warranto* proceeding has commenced, it is discretionary with the judge to allow a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had.—*IVISON v. IRWIN* (1902), 22 C. L. T. 299; 4 O. L. R. 193; 1 O. W. R. 371.—**CAN.**

t. Failure to cross-examine after permission given.]—In a suit by a prior against a mesne incumbrancer, on the argument of the cause, by con-

sent an affidavit was read which stated agreement on the part of the prior incumbrancer to be postponed to the latter; when the ct. gave liberty to pltf. to cross-examine deponent upon statements contained in his affidavit, which permission not being acted upon by pltf., his bill was dismissed.—*MILLER v. START* (1863), 10 Gr. 23.—**CAN.**

a. Cross-examination on affidavits in reply.]—*Re FOSTER* (1873), 9 C. L. J. N. S. 313; 6 P. R. 9.—**CAN.**

b. Right to production of deponent for cross-examination.]—Rules 385 & 429 taken together compel production

for cross-examination on affidavit of deponent if required by opposite party before such affidavit can be used.—*RUSSELL v. SAUNDERS* (1900), 7 B. C. R. 173.—**CAN.**

c. Affidavit in suit in foreign court.—Power to order attendance of deponent for cross-examination.]—*Manitoba Evidence Act*, R. S. M. 1902, c. 57, s. 57, as re-enacted by 4 & 5 Edw. VII., c. 11, s. 1, does not empower the ct. to make an order commanding the attendance of a person making an affidavit in a suit or proceeding pending in a ct. outside Manitoba for the purpose of being cross-examined upon it within

having subsequently served deft. with a subpoena moved that he be ordered to attend at his own expense:—*Held*: it was open to pltf. to combine the two methods of procedure & deft. was bound to produce himself at his own expense for cross-examination & further, regarding deft. as a deponent whose attendance was required for cross-examination the penalty imposed by R. S. C., Ord. 38, r. 28, of having his affidavit rejected did not relieve him from the obligation to attend at his own expense.—*Re BAKER, CONNELL v. BAKER* (1885), 29 Ch. D. 711; 54 L. J. Ch. 844; 52 L. T. 421.

5598. ———.]—The direction in R. S. C., Ord. 38, r. 28, that the party producing a deponent for cross-examination shall not be entitled to demand the expenses therein in the first instance from the party requiring such production, taken in conjunction with Ord. 37, r. 21, of the same rules, which provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial, is not confined to the cross-examination of the deponent before the ct. at the trial of the action, but applies also to a cross-examination before the chief clerk in chambers or before an examiner.—*BACKHOUSE v. ALCOCK* (1885), 28 Ch. D. 669; 54 L. J. Ch. 842; 52 L. T. 342; 33 W. R. 407.

Annotations:—*Consd.* *Mansel v. Clanricarde* (1885), 54 L. J. Ch. 982. *Refd.* *Re Baker, Connell v. Baker* (1885), 29 Ch. D. 711.

5599. ———.]—The effect of R. S. C., Ord. 38, r. 28, which provides that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Ord. 37, r. 22, which provides that the practice with reference to the examination, cross-examination & re-examination of witnesses at a trial shall extend & be applicable to evidence taken in any cause or matter at any stage, is that the expenses of production of a witness for cross-examination upon affidavit before a trial must be borne in the first instance by the party producing such witness.—*MANSEL v. CLANRICARDE* (1885), 54 L. J. Ch. 982; *sub nom.* *MANSEL v. CLANRICARDE, MANSEL v. NORTON*, 53 L. T. 496.

5600. Notice of one defendant to read affidavit of co-defendant.—*Necessity for notice of cross-examination by plaintiff of co-defendant.*—Where one deft. has given notice of his intention to read on his own behalf the evidence of another deft. a cross-examination of the latter by pltf. without notice to the former is void.—*PENNEL v. DAVISON* (1865), 13 L. T. 533; 14 W. R. 174.

SECT. 7.—WITHDRAWAL OF AFFIDAVIT.

5601. Withdrawal to avoid cross-examination.—*Affidavit of party.*—An affidavit, after being filed, cannot be withdrawn, so as to prevent the other side from making use of it, on the hearing of the petition.—*Re WILKS, Ex p. LABREY* (1833), 3 Deac. & Ch. 232, Ct. of R.

5602. ———.]—*CLARKE v. LAW*, No. 5585, *ante*.

5603. ———.]—*Affidavit filed unnecessarily.*—Although the ct. will not allow a party to a suit to withdraw an affidavit relating to the merits of

the case in order to escape cross-examination, this rule does not extend to an affidavit filed unnecessarily, merely to prove some proceeding in the suit.—*NATIONAL INSURANCE & INVESTMENT ASSOCN. v. CARSTAIRS* (1863), 2 New Rep. 255; 9 Jur. N. S. 955; *sub nom.* *NATIONAL PROVIDENT & INVESTMENT ASSOCN. v. CARSTAIRS*, 8 L. T. 717; 11 W. R. 860.

Annotations:—*Refd.* *Pike v. Dickinson* (1873), 21 W. R. 862. *Mentd.* *Foley v. Maillardet* (1864), 9 L. T. 700.

5604. ———.]—A party will not be allowed to withdraw an affidavit in order to escape cross-examination.—*PIKE v. DICKINSON* (1873), 21 W. R. 862.

Annotation:—*Refd.* *Re Quartz Hill, etc., Co., Ex p. Young* (1882), 21 Ch. D. 642.

5605. ———.]—*Affidavit of witness.*—The non-production of a witness for cross-examination is no ground for a postponement of the hearing if the affidavit of the witness is withdrawn.—*Re SYKES' TRUSTS* (1862), 2 John. & H. 415; 6 L. T. 350; 70 E. R. 1120.

Annotations:—*Refd.* *Re Quartz Hill, etc., Co., Ex p. Young* (1882), 21 Ch. D. 642, C. A. *Mentd.* *Re Ellis' Trusts* (1874), 13 L. R. 17 Eq. 499; *Roberts v. Watkins & Howells* (1877), 46 L. J. Q. B. 552; *Re Croughton's Trusts* (1878), 8 Ch. D. 460; *Pike v. Fitzgibbon, Martin v. Fitzgibbon* (1881), 17 Ch. D. 454; *De Bown, O'Halloran v. King* (1884), 27 Ch. D. 441.

5606. ———.]—Where a person has made & filed an affidavit for the purpose of being used in a matter pending before the ct., he cannot be exempted from cross-examination by the withdrawal of the affidavit.—*Re QUARTZ HILL, ETC.*, 21 Ch. D. 642; 51 L. J. Ch. 940; 47 L. T. 644; 31 W. R. 173, C. A.

In bankruptcy proceedings:—*See* BANKRUPTCY, Vol. IV., p. 514, Nos. 4670, 4671.

SECT. 8.—ADMISSIBILITY WHEN NO CROSS-EXAMINATION.

5607. Death of witness.—*Before affidavit filed.*—An affidavit was made in favour of pltf., who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. A motion to take it off the file was refused, though the ct. intimated that it would have less weight.—*ABADOM v. ABADOM* (1857), 24 Beav. 213; 53 E. R. 351.

5608. ———.]—A witness made an affidavit & died four days afterwards & before she could be cross-examined:—*Held*: her evidence should be admitted at the hearing.—*DAVIES v. OTTY* (1865), 35 Beav. 208; 5 New Rep. 391; 34 L. J. Ch. 252; 12 L. T. 789; 13 W. R. 484; 55 E. R. 875.

Annotations:—*Mentd.* *Hugh v. Kaye* (1872), 7 Ch. App. 469; *Booth v. Turle* (1873), 13 L. R. 16 Eq. 182; *Rochevicauld v. Boustead*, [1897] 1 Ch. 196; *Gascoigne v. Gascoigne*, [1918] 1 K. B. 223.

5609. ———.]—*After affidavit filed—No notice given to opponent.*—Pltf. in a suit, whose evidence was of great importance to the issue in it, made an affidavit which was duly sworn & filed. He then died. No notice of the affidavit was given to defts., & they had not cross-examined pltf. upon it. The ct. allowed the affidavit to be received at the hearing of the cause on motion for decree.—*TANSWELL v. SCURRAH* (1865), 11 L. T. 761.

5610. Affidavit made abroad.—*No application for special examiner.*—An affidavit was made by pltf., who was residing at Boulogne, & he received notice to appear in London to be cross-examined

the province.—*BANK OF NOVA SCOTIA v. BOOTH* (1910), 19 Man. L. R. 394.—*CAN.*

d. *Affidavit under Manitoba Wind-*

ing-up Act.—Deponent who makes an affidavit in connection with proceedings under the above Act is subject to cross-examination thereon & may be com-

pelled to attend & submit to such cross-examination.—*Re MANITOBA COMMISSION CO.* (1911), 21 Man. L. R. 795.—*CAN.*

Sect. 8.—Admissibility when no cross-examination.
Sects. 9 & 10: Sub-sect. 1.]

thereupon, but refused. An objection to the affidavit being read, was overruled, on the ground that deft.'s solr. should have applied for the appointment of a special examiner.—**RAWLINS v. WICKHAM, WICKHAM v. RAWLINS** (1858), 1 Giff. 355; 32 L. T. O. S. 85; 4 Jur. N. S. 990; 65 E. R. 954; on appeal, 3 De G. & J. 304, L. J.J.

Annotations:—Mentd. Scholefield v. Templer (1859), John. 165; Conybeare v. New Brunswick & Canada Ry. (1860), 1 Giff. 339; Gorsuch v. Cree (1860), 8 C. B. N. S. 574; Davies v. Marshall (1861), 10 C. B. N. S. 697; Evans v. Robins (1863), 11 L. T. 211; Graham v. Wickham (1865), 2 De G. J. & Sm. 497; Hallows v. Ferrie (1867), L. R. 3 Eq. 520; *Re* Overend, Gurney, *Ex p.* Oakes & Peck (1867), L. R. 3 Eq. 576; *Re* Reese River Silver Mining Co., Smith's Case (1867), 2 Ch. App. 604; Overend, Gurney v. Gurney (1869), 17 W. R. 719; Peck v. Gurney (1873), L. R. 6 H. L. 377; A.-G. v. Ray (1874), 9 Ch. App. 402, n.; *Re* Royal Victoria Palace Theatre Syndicate, Moore & De La Torre's Case (1874), L. R. 18 Eq. 661; Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha, & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Lacey v. Hill, Lacey v. Hill (1876), 4 Ch. D. 537; Hart v. Swaine (1877), 7 Ch. D. 42; Edwick v. Hawkes (1881), 18 Ch. D. 199; Rodgrave v. Hurd (1881), 20 Ch. D. 1; Mathias v. Yelke (1882), 46 L. T. 497; Jolliffe v. Baker (1883), 11 Q. B. D. 255; *Re* Mount Morgan (West) Gold Mine, *Ex p.* West (1887), 50 L. T. 622; Adam v. Newbigging (1888), 13 App. Cas. 308; Betjemann v. Betjemann, [1895] 2 Ch. 474; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Hindle v. Brown (1907), 98 L. T. 44.

5611. — Notice to attend for cross-examination defective.]—CONCHA v. CONCHA, No. 5584, ante.

5612. — Witness in England for cross-examination but obliged to return.—Insufficient notice of intention to return.]—At the hearing of a cause in replication, plff. proposed to read the affidavit of a witness occupying an official position in the United States. Notice to cross-examine this witness had been given, & he had come over to this country for the purpose of being cross-examined, but had been obliged to return before the cause came on to be heard. Plff. had given the deft. only one day's notice before the witness left the country:—*Held*: the affidavit could not be read. **DUNNE v. ENGLISH (1874), L. R. 18 Eq. 524.**

Annotations:—Mentd. Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.; Guy v. Churchill & Sim (1889), 60 L. T. 740; Battison v. Hobson, [1896] 2 Ch. 403; Lagunas Nitrate Co. v. Lagunas Syndicate, [1899] 2 Ch. 392; Costa Rica Ry. v. Forwood, [1901] 1 Ch. 746; Stubbs v. Slater, [1910] 1 Ch. 195.

5613. Witness leaving jurisdiction after affidavit sworn.]—Where a deponent had left the country, & plff. could not produce him to be cross-examined, the affidavit which he had made for plff. in the cause was not allowed to be read by plff. on the hearing. —BINGLEY v. MARSHALL** (1862), 6 L. T. 682.**

5614. Illness of witness.]—Liberty given to read the affidavit of a witness, who had been prevented, by illness, from being cross-examined, but the ct. intimated that little attention would be paid to such an affidavit.—BRAITHWAITE v. KEARNS** (1865), 34 Beav. 202; 55 E. R. 612.**

Sect. 9.—USE OF AFFIDAVITS SWORN IN PREVIOUS STAGE.

5615. Filed in interlocutory proceedings.]—An affidavit filed in ct., on a motion, may be read in evidence at the sittings, without proof of its being sworn.—CAMERON v. LIGHTFOOT** (1778), 2 Wm. Bl. 1190; 90 E. R. 701.**

Annotations:—*Re*ld. Crook v. Dowling (1782), 3 Doug. K. B. 73; Hennell v. Lyon (1817), 1 B. & Ald. 182. **Mentd.**

Tarleton v. Fisher (1781), 2 Doug. K. B. 671; Nixon v. Burt (1817), 1 Moore, C. P. 413; *Re* Helsby (1832), 1 L. J. Bcy. 5; Aga Kurboole Mahomed v. R. (1843), 4 Moo. P. C. C. 239; Magnay v. Burt (1843), 5 Q. B. 381; Andrews v. Martin (1862), 12 C. B. N. S. 371; Cronmire v. MacColla (1893), 9 T. L. R. 549.

5616. —.]—*Semble*: affidavits, filed upon interlocutory proceedings, are to be considered as matters of record, & the facts disclosed by affidavits so filed may be viewed by the ct. in deciding upon the validity of a plea.—**WOOD v. ROWE** (1820), 2 Bli. 595; 4 E. R. 459, H. L.

Annotation:—Mentd. Askew v. Millington (1851), 9 Hare, 65.

5617. —.]—An affidavit which is upon the file of the ct. may be used afterwards in the same cause, though for a different purpose.—CHAMBERS v. BRYANT** (1843), 12 L. J. Q. B. 139; 7 Jur. 442.**

5618. —.]—Where one of several trustees admitted a distinct balance, but the other trustees admitted a large balance, without stating any specific sum, it was held not to be a sufficient admission to authorise the ct. to order a transfer of the fund into the name of the Accountant-General, & such an interlocutory order would not be made except upon the personal admission of each party liable to the payment, made on answer or examination:—*Held*: affidavits in which such admission was made, used in the master's office for another purpose, would not be received to help the application.—BOSCHETTI v. POWELL** (1845), 5 L. T. O. S. 301, L. C.**

Annotations:—*Re*ld. Freeman v. Cox (1878), 8 Ch. D. 148; Hollis v. Burton, [1892] 3 Ch. 226; Neville v. Matthewman (1894), 63 L. J. Ch. 734.

5619. —.]—Affidavits sworn in a previous stage of the cause may be used upon a subsequent application in the same cause.—HILMAN v. CHITTY** (1846), 7 L. T. O. S. 138.**

5620. —.]—Certain evidence was given by affidavit before the master, which he referred to by its date in his report. On the cause coming on upon the report for further directions, this affidavit was tendered to the ct., but its reception was objected to:—*Held*: the parties were at liberty to inform the ct. what were the materials used before the master; & the affidavit was allowed to be read.—NEDBY v. NEDBY** (1852), 5 De G. & Sm. 377; 21 L. J. Ch. 446; 19 L. T. O. S. 294; 61 E. R. 1161.**

Annotations:—Mentd. Barron v. Willis, [1899] 2 Ch. 578; Bischoff's Trustee v. Frank (1903), 89 L. T. 188; Howes v. Bishop, [1909] 2 K. B. 390; Bank of Montreal v. Stuart, [1911] A. C. 120.

5621. —.]—Affidavits filed in a cause may be used as evidence in a subsequent petition in the same cause.—JONES v. TURNBULL, *Re* TURNBULL** (1853), 22 L. J. Ch. 1055; 17 Jur. 851.**

5622. —.]—Plffs. gave notice to defts. four days after the time for closing the evidence, of their intention to read, at the hearing of the cause, certain affidavits used on an interlocutory application, & proceeded at the hearing to read the same. At the hearing defts. objected to their being read. That objection was allowed. Plffs. thereupon moved that the cause might stand over until the following day, & that the ct. would give special leave to them to read the affidavits, or to allow them to examine orally witnesses who were then in ct., under 15 & 16 Vict. c. 86, s. 38:—*Held*: as plffs. neglected to make an application within due time for special leave to read the affidavits at the hearing, & as there were no special circumstances in the case, the ct. could not accede to the application.

15 & 16 Vict. c. 86, s. 38, does not give the ct. a discretion in such a case as the present.—**EVANS v. COVENTRY** (1850), 27 L. T. O. S. 39.

5623. —.]—In the absence of arrangement,

affidavits used on a motion cannot be used at the hearing of the cause except by agreement between the parties.—*PERKINS v. SLATER* (1875), 1 Ch. D. 83; 45 L. J. Ch. 224; 24 W. R. 39.

5624. — For use by opponent.]—Affidavits made by third persons on behalf of pltf. upon an interlocutory application are admissible as evidence against him at the trial.—*CAMPBELL v. ROTHWELL* (1877), 47 L. J. Q. B. 144; 38 L. T. 33.

5625. — Witness dead & not cross-examined.]—At the trial of a cause with *vivâ voce* evidence, the ct. admitted in evidence an affidavit filed upon an interlocutory motion which had been ordered to stand over to the hearing, although the deponent was since deceased, & had not been cross-examined.—*ELIAS v. GRIFFITH* (1877), as reported in 46 L. J. Ch. 806; 38 L. T. 871; *subsequent proceedings* (1878), 8 Ch. D. 521, C. A.; *sub nom. ELIAS v. SNOWDON SLATE QUARRIES CO.* (1879), 4 App. Cas. 451, H. L.

Annotations:—Mentd. *Dashwood v. Magniac*, [1891] 3 Ch. 306; *Re Maynard's S.E.*, [1899] 2 Ch. 347; *Chaytor v. Trotter* (1902), 87 L. T. 33.

5626. — Witness required for cross-examination.]—Where one party desires the production of a witness for cross-examination the ct. has no power to order an affidavit used on a previous application to be read at the trial.—*BLACKBURN UNION v. BROOKS* (1877), 7 Ch. D. 68; 47 L. J. Ch. 156; 37 L. T. 427; 26 W. R. 57.

5627. —]The term "further evidence" in R. S. C., Ord. 58, r. 5, simply means evidence not used on the trial of the action in the ct. below, whether such evidence has already been used in the same or any other cause between the same parties, or is altogether new in itself. Where, therefore, on the hearing of an action on further consideration the judge refused to allow pltf. to read affidavits which had been used on an inquiry in chambers, & were mentioned in the chief clerk's certificate, on the ground that notice to read them had not been given:—*Held*: (1) the evidence ought not to have been rejected, but the judge should have adjourned the hearing, with liberty to deft. to adduce evidence in reply; (2) the rejection of the evidence was under the circumstances a "special ground" for admitting it on the appeal, & in the particular case a preliminary motion before the appeal came on was not necessary.—*Re CHENNEL, JONES v. CHENNEL* (1878), 8 Ch. D. 492; 47 L. J. Ch. 583; 26 W. R. 595; *sub nom. Re CHANELL, JONES v. CHANELL*, 38 L. T. 494, C. A.

Annotations:—Generally, Mentd. *Butcher v. Pooler* (1883), 52 L. J. Ch. 930; *Re Beddoe, Downes v. Cottam*, [1893] 1 Ch. 547; *Pain v. Bowden*, [1896] 2 Q. B. 301; *Bew v. Bew*, [1899] 2 Ch. 467.

SECT. 10.—AFFIDAVITS IN DIFFERENT CAUSES.

SUB-SECT. 1.—ADMISSIBILITY.

See R. S. C., Ord. 37, rr. 1, 24.

5628. Where made in another cause.]—A criminal information having been granted against deft., he before the trial at *nisi prius*, distributed hand-bills in the assize town, vindicating his own conduct, & reflecting on the prosecutor's; this matter being disclosed to the judge at *nisi prius* by an affidavit, was held a sufficient ground to put

off the trial. That affidavit being returned to this ct., they granted another information on it against deft.; considering the affidavit, taken at *nisi prius*, as taken under the authority of this ct.—*R. v. JOLIFFE* (1791), 4 Term Rep. 285; 110 E. R. 1022.

Annotations:—Reid. *R. v. Willett* (1795), 6 Term Rep. 294; *Re Fernandes* (1861), 6 H. & N. 717. *Mentd.* *Spenceley v. De Willett* (1806), 3 Smith, K. B. 321; *Ex p. Fernandez* (1861), 10 C. B. N. S. 3; *Dixon v. Farrer* (1886), 35 W. R. 95; *R. v. Tibbits*, [1902] 1 K. B. 77.

5629. —]The office copy of an affidavit made in another cause, is good evidence in that which is before the ct.—*WIGHTWICK v. BANKS* (1801), For. 153; 145 E. R. 1143.

Annotations:—Mentd. *Isaacs v. Silver* (1826), 11 Moore, C. P. 348; *Merceron v. Merceron* (1836), 2 Har. & W. 380.

5630. — Where possibility of perjury.]—Affidavits sworn in support of or in answer to one rule, will not be allowed to be used on another, though substantially embracing one of the objects of the former rule, where any doubt exists as to the practicability of assigning perjury thereon in reference to the rule upon which it is sought to use them.—*QUELLY v. BOUCHER* (1831), 3 Dowl 107; 1 Scott, 283.

Annotations:—Distd. *Worthington v. —* (1835), 2 Cr. M. & R. 315. *Fold.* *R. v. Missen* (1842), 11 L. J. Q. B. 189.

5631. — Motion for two rules.—Under similar circumstances.]—Where two rules are moved for under precisely similar circumstances, they should be founded on distinct affidavits; & it is not enough to refer, in the second, to the affidavits already sworn in the first.—*R. v. MIZEN* (1842), 1 Dowl. N. S. 865; 11 L. J. Q. B. 189; 6 Jur. 857.

5632. — First cause abandoned.]—An affidavit sworn with a view to a proceeding which does not take place, cannot afterwards be used in support of a distinct matter.—*COMPTON v. TAMLIN* (1846), 7 L. T. O. S. 235.

5633. —]Affidavits made in one cause or matter in this ct. were used as evidence in another cause or matter.—*Re PICKANCE'S TRUST* (1853), 10 Hare, App. II., xxxv; 68 E. R. 1134.

5634. — One or both parties the same.]—*PRITCHARD v. BAGSHAW* (1851), 11 C. B. 459; 2 L. M. & P. 323; 20 L. J. C. P. 161; 17 L. T. O. S. 199; 15 Jur. 730; 138 E. R. 551.

Annotations:—Consd. *Richards v. Morgan* (1863), 4 B. & S. 611; *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160.

5635. — —.]—Deft. had made an affidavit in another cause in which pltf. & another person were pltf's. but to which deft. was not a party, & on cross-examination had given evidence with reference to matters stated in her answer in this suit. The cross-examination took place in Jan. & notice of motion for a decree had been given in this suit in the previous June. Pltf. now applied for leave to read at the hearing, deft.'s evidence given in the other cause, which was granted upon certain conditions, there having been no laches on pltf.'s part.—*WATSON v. CLEAVER* (1855), 20 Heav. 137; 25 L. T. O. S. 20; 1 Jur. N. S. 270; 3 W. R. 265; 52 E. R. 555.

5636. — —.]—One of the partners in a firm died intestate, & in a suit for winding up the partnership affairs, a sum of money was paid into ct. The intestate was also possessed of two other sums of stock, which were transferred to the Comrs.

name, in a cause in the Exch. Ct. in 1839, was offered in evidence, in which the as to facts were different from what G. swore at the trial: *Held*: such attested copy was admissible in evidence, proof having been given of the identity of the person who swore the affidavit with the person produced at the trial.—*GARVIN v. CARROLL* (1847), 10 L. L. R. 323.—*IR.*

PART VII. SECT. 10, SUB-SECT. 1.

5628 i. Where made in another cause.]—In an action for goods sold, the question was the authority of A. to bind deft., as their agents:—*Held*: an affidavit made by A. describing the nature of his agency, & filed by defts. on a motion for a new trial in another suit, brought by this pltf. against them, was clearly admissible against defts.—

THAYER v. STREET & FULLER (1863), 23 U. C. R. 189.—*CAN.*

5628 ii. —.]—*R. v. GOPAL DOSS* (1881), 1 L. R. 3 Mad. 271.—*IND.*

5628 iii. —.]—On an issue in replevin as to whether G. was tenant at a certain period to A. or H., G. was produced on the trial, in 1847, as a witness, & an attested copy of an affidavit, made by a person of the same

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Sect. 10.—Affidavits in different causes: Sub-sects. 1, 2 & 3. Sect. 11: Sub-sect. 1.]

for the reduction of the national Debt, since no next of kin of the intestate could be found. A claimant came forward as next of kin, & presented a petition in the partnership suit, claiming the money standing to the separate account of the intestate. In that suit nine affidavits were filed. Same claimant presented a petition praying for a transfer of the sums paid to the Comrs. when nineteen affidavits were filed. On this petition the A.-G. appeared, as representing the Crown & the Comrs. Letters of administration were then granted to the Solr. for the Treasury, as nominee of the Crown, & a suit was instituted against him by the representatives of the first claimant, to prove his relationship to the intestate. Another claimant also came forward in this suit, by whom one affidavit was filed. The persons who made the affidavits were all dead:—*Held*: evidence produced on a former occasion could only be made use of in subsequent proceedings between same parties & upon same issue. Upon this principle, the nine affidavits in the partnership suit & the one affidavit in the present suit by a different claimant, were rejected, but the nineteen affidavits on the petition were admitted.—*LAWRENCE v. MAULE* (1859), 4 Drew. 472; 28 L. J. Ch. 681; 34 L. T. O. S. 3; 7 W. R. 314; 62 E. R. 182.

Annotation:—Reid, Elias v. Griffith (1878), 38 L. T. 871.

5637. ———. ———.]—*ERNEST v. WEISS* (1862), 1 New Rep. 6.

5638. ———. ———.]—Where debts in one suit were some of debts in another suit instituted by same plff. & the facts to be proved were same but different relief was prayed in the two suits, the ct. on an *ex p.* application by plff. allowed the affidavits sworn & to be sworn in the first suit to be read as evidence in the second suit against such of debts therein as were debts in the first suit.—*BROWN v. WHITE, BROWN v. WHITE* (1876), 24 W. R. 456.

5639. Against person using affidavit.—In previous proceedings.]—In trover against the sheriff for taking the goods of plff. an affidavit made by W. & employed by the under-sheriff in an application by him under 1 & 2 Will 4, c. 58, is admissible as evidence for plff. to prove that W. was the agent of the sheriff, & that the sheriff, by W., had

seized the goods.—*BRICKELL v. HULSE* (1837), 7 Ad. & El. 454; 2 Nev. & P. K. B. 426; Will. Woll. & Dav. 610; 7 L. J. Q. B. 18; 2 Jur. 10; 112 E. R. 541.

Annotations:—Consd. Boileau v. Rutlin (1848), 2 Exch. 665; *Richards v. Morgan* (1863), 4 B. & S. 641; *British Thomson-Houston Co. v. British Insulated & Helsby Cables*, [1924] 2 Ch. 160. *Reid, Gardner v. Moulit* (1839), 10 Ad. & El. 464; *Campbell v. Rothwell* (1877), 47 L. J. Q. B. 144. *Mondt, Cole v. Hadley* (1810), 11 Ad. & El. 807.

5640. No notice of intention to use.]—B. instituted two suits against A., in which A. put in answers, & also made an affidavit upon an interlocutory application. Replication was filed on both suits, & A. died after the time for taking evidence had expired, & without having made any affidavit verifying the answers, or having given notice of his intention to read the affidavit at the hearing. The exors. of A. then instituted a suit against B., relating to same matters as the former suit, & applied for liberty to read the answers & affidavit as evidence in the new suit:—*Held*: neither the answers nor affidavit could be so read.—*WILLIAMS v. WILLIAMS* (1864), 3 New Rep. 701; 10 L. T. 286; 10 Jur. N. S. 608; 12 W. R. 663.

5641. Suit for revocation of probate—Attesting witness not procurable—Affidavit previously filed for probate.]—(*JORNALL v. MASON*, No. 5570, *ante*.)

Bankruptcy proceedings.]—See *BANKRUPTCY*, Vol. IV., pp. 513-524, Nos. 4651-1006.

Indictment for perjury.]—See *CRIMINAL LAW*, Vol. XV., pp. 669-671, 684, Nos. 7246-7260, 7395-7406.

SUB-SECT. 2.—HOW PROVED.

5642. Proof of signature.]—On the trial of an indictment for perjury, assigned on an affidavit sworn in the Queen's Bench, proof of debts.' signature to the affidavit, & proof, that, under a *jurat*, "sworn in open ct. at Westminster Hall, June 10, 1846," the words, "by the ct." are in the handwriting of one of the masters of the ct., is sufficient evidence of the swearing of the affidavit in the Ct. of Q. B. without any further proof that the master was in ct. when the affidavit was sworn.—*R. v. TURNER* (1849), 2 Car. & Kir. 732.

5643. ———.]—An affidavit from whichever side it emanates, cannot be used as evidence even against him by whom it is sworn, without proof of

MILNER v. GILBERT (1848), 3 Kerr. 617.—*CAN.*

1. Renewal of application.]—Where an unsuccessful application is made to a judge, & afterwards renewed before the ct., all the affidavits used before the judge should be produced.—*..... v. DUNN* (1854), 3 All. 124.—*CAN.*

m. Instead of new affidavits.]—Affidavits made & used in a cause for one purpose may be used again instead of new affidavits.—*WESTMEATH v. WESTMEATH* (1826), 1 Illog. 354.—*IR.*

n. When entitled in another Division.]—*Semble*. an affidavit entitled in the Queen's Bench cannot be used in the Exch., although filed in & sworn before the proper officer of the latter ct., & although attested copies have been taken out by the opposite party.—*PERRIN & WRIGHT v. BULLEN* (1843), 6 I. L. R. 130.—*IR.*

PART VII. SECT. 10, SUB-SECT. 2.

o. Copy—From proper
In an action for a malicious
an examined copy of the affidavit on
which the arrest was made coming
from the hands of the proper officer
& shown to have been used in the cause,
is sufficient to prove that it was made

56391. Against person using affidavit.—*In previous proceedings.]*—An affidavit made by the clerk of the attorney for plff., on an interlocutory motion is not admissible evidence against plff. at the trial.—*WHITE v. DOWLING* (1845), 8 I. L. R. 128.—*IR.*

o. When deponent dead.]—Where after a verdict for plff. & cause shown on affidavits against a rule for a new trial, a person who made one of the affidavits for plff. died, it was made a condition of the rule absolute that his affidavit should be received in evidence at the next trial.—*GLASS v. COLLEKUTU* (1840), 3 Ont. Dig. 4852.—*CAN.*

l. ———.]—The action having been revived in the name of the administrator *ad litem* of the estate of deceased plff., an order was made, under Rule 263, directing that an affidavit made by original plff., upon an interlocutory application, should be admitted as evidence, *quantum valent*, at the trial, notwithstanding that plff. had not been cross-examined upon it, it appearing that there had been opportunity for doft. to cross-examine, had he so desired.—*MACDONALD v. DELON* (1911), 17 W. L. R. 614.—*CAN.*

g. ———.]—By Customs Act, 51 Vict., c. 14, s. 183, it is provided that

upon a reference of any matter to the ct. by the Minister of Customs, the ct. shall hear & consider the same upon the papers & evidence referred, & upon any further evidence produced under the direction of the ct. Among the documentary evidence referred in connection with a claim for a refund of duties paid, was an affidavit by a witness, since deceased, testifying to a fact adverse to claimant, & in respect of which no opportunity was afforded claimant to cross-examine the deponent:—*Held*: while the statements of deponent were not as effective as if he had been examined as a witness in ct., & so subject to cross-examination, yet the affidavit was admissible as evidence under the statute.—*R. v. MORRIS* (1911), 13 Exch. C. R. 384; 9 E. L. R. 430.—*CAN.*

h. ———. Affidavit made in same suit but not previously used.]—The affidavit of deceased solr. made & filed in the course of a Ch. suit may be admitted in evidence in conjunction with an order of the ct. made upon a motion in the suit shortly afterwards, although it does not appear on the face of the order that the affidavit was used upon the motion.—*WHALEY v. CARLISLE* (1866), 17 I. C. L. R. 792.—*IR.*

k. Subject of action of slander.]—

the handwriting.—*BARNES v. PARKER* (1866), 15 L. T. 218, N. P.

Annotation.—*Dbid.* & *N.F. Fleet v. Perrins* (1868), 19 L. T. 117.

5644. Proof of swearing of affidavit—Necessity for.—*CAMERON v. LIGHTFOOT*, No. 5615, *ante*.

5645. — Sufficiency of.—*R. v. TURNER*, No. 5642, *ante*.

5646. Copy.—*R. v. SMITH* (1718), 1 Stra. 126; 93 E. R. 426.

Annotation.—*Refd.* *R. v. Browne* (1849), 4 Cox, C. C. 1.

Indictments for perjury.—*See CRIMINAL LAW*, Vol. XV., pp. 669–671, 681, 685, Nos. 7246–7260, 7395–7406.

Bankruptcy proceedings.—*See BANKRUPTCY*, Vol. IV., p. 513, Nos. 4640, 4647.

SUB-SECT. 3.—FOR WHAT PURPOSES ADMITTED.

5647. Non-existence of alleged Crown grant.—*Ex p. TYSON* (1837), 1 Jur. 472.

5648. Previous judgment.—An affidavit verifying the shorthand note of the judgment in the action pleaded as *res judicata* was admitted.—*HOUSTON v. SLIGO* (MARQUIS) (1855), 29 Ch. D. 418; 52 L. T. 96; 1 T. L. R. 217, C. A.; *on appeal* (1886), 55 L. T. 614, H. L.

Annotation.—*Mentd.* *Calder v. Moss* (1886), 33 Ch. D. 22.

5649. Execution of will—& capacity—Suit for revocation of probate.—*GORNALL v. MASON*, No. 5570, *ante*.

5650. — Affidavit in application for probate.—*HAYES v. WILLIS*, No. 5571, *ante*.

Perjury.—*See CRIMINAL LAW*, Vol. XV., pp. 669–671, Nos. 7246–7260.

SECT. 11.—FORM AND CONTENTS OF AFFIDAVIT.

SUB-SECT. 1.—IN GENERAL.

See, non. R. S. C., Ord. 38.

5651. Power of court—To look at informal affidavit.—Although an affidavit be informal, yet

by deft.—*FITZGERALD v. WEBSTER* (1839), 2 Ont. Dig. 2562. **CAN.**

PART VII. SECT. 10, SUB-SECT. 3.

p. Affidavit of execution—Of memorial of release of dower.—The execution of a release of dower being disputed, deft. proved the handwriting of P., the subscribing witness, who was dead.—*Seemle*: the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the *res gestæ*, & as showing that P. had sworn to the execution.—*ROSE v. CUYLER* (1868), 27 U. C. R. 270.—**CAN.**

q. Affidavit made on previous application—Made without prejudice.—An affidavit of deft., sheriff, which had been used on an application for an attachment against an attorney of this ct. for aiding in an escape, which application was made by plff.'s attorney free of charge & without prejudice to either party, was used on the trial of an action against the sheriff for escape.—*Held*: this was not ground for a new trial, but the propriety of using it was questioned.—*JONES v. BOTSFORD* (1877), 1 P. & B. 62.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 1.

5652 i. Made in third person.—An affidavit drawn in the third person cannot be read.—*Ex p. WELLING* (1875), 3 Eng. 217. **CAN.**

5655 i. Sums to be set out in words not figures.—In an affidavit for an attachment, deft. was described as of the

parish of L., whereas he really lived in the parish of B. The dates of the notes for the amount for which the attachment issued were stated in figures.—*Held*: neither the misdescription of the residence nor the statement in figures, instead of words at length, afforded sufficient grounds for setting aside the attachment.

GRAY v. ALCOHN (1877), 1 P. & B. 555. **CAN.**

r. Document substantially an affidavit—Answer.—Where an injunction was retained till deft. had answered; after which he moved to dissolve it, & the notice of motion referred to the leave given to deft. to apply to dissolve the injunction after putting in his answer.—*Held*: deft. might use his answer as an affidavit on such application, & that the filing a replication did not prevent its being so used.—*COY v. COY* (1868), N. B. Dig. 646.—**CAN.**

s. — Not formally sworn.—*CROWN LUMBER CO. v. HICKLE*, [1925] 1 D. L. R. 626.—**CAN.**

t. Document neither an affidavit—Nor a statutory declaration.—A writ under Real Property Act was supported by a document beginning: "I, so & so, make oath & say," & ending: " & I make this solemn declaration, conscientiously believing same to be true & in pursuance of the Act respecting extrajudicial oaths."—*Held*: this document was neither an affidavit nor a statutory declaration.—*SCHULTZ v. ARCHIBALD* (1892), 8 Man. L. R. 281.—**CAN.**

a. Insufficiency—Where papers an-

the ct. if they think proper, will look at it for their own information.—*ANON.* (1822), 1 L. J. O. S. K. B. 52.

5652. Made in third person.—Affidavit sworn in the third instead of the first person, as directed by Ord. 126, May 1845, may, notwithstanding, be read in ct.—*HALL v. WATTS* (1846), 6 L. T. O. S. 479.

5653. ——Affidavits made in the third person & sworn in America admitted in evidence.—*Re HUSBAND* (1865), 12 L. T. 303.

Annotation.—*Folld.* *Blamey v. Blamey*, [1902] W. N. 138.

5654. ——*BLAMEY v. BLAMEY*, [1902] W. N. 138.

5655. Sums to be set out in words not figures.—Sums of money ought to be written in the body of affidavits in words at length, & not in figures.—*CROOK v. CROOK* (1855), 3 Eq. Rep. 544; 24 L. J. Ch. 504; 25 L. T. O. S. 73; 1 Jur. N. S. 654; 3 W. R. 398.

5656. Sums to be set out in figures not words—Chancery Division.—The judges of the Ch. Div. have decided that in future it is desirable that in all affidavits for use in ct. & in chambers in the Ch. Div. dates & sums of money should be written & printed in figures & not in words.—*PRACTICE NOTE*, [1923] W. N. 288.

5657. By whom made—Officer of public company.—*CONSOLIDATED INVESTMENT & ASSURANCE SOCIETY v. DODD* (1860), 9 W. R. 12.

5658. — Affidavit of title on petition for payment out of court—Solicitor of infirm tenant for life.—Where a tenant for life was too infirm to make an affidavit of title on a petition for payment to him of the dividends of purchase-money paid into ct. by a railway co. an affidavit made by his solr. was held to be sufficient.—*Re HALSEY'S ESTATE* (1870), 22 L. T. 11.

5659. Document substantially an affidavit—Sworn on oath before notary abroad.—Where an affidavit was sworn before two French notaries, & contained the facts on which it was necessary that the deponent should make oath, the ct., though it was not drawn in the prescribed form,

need. An affidavit is not insufficient for not mentioning the papers annexed separately, nor positively stating to what they are annexed.—*McKAY v. DEARMID* (1851), 2 C. L. Ch. 1. **CAN.**

b. Where made by managing clerk.—An affidavit by a managing clerk of attorney of party, applying for an order to examine under Administration of Justice Act (c. 8), s. 24, is insufficient unless it states that he had some particular charge of the suit.—*ELMELEY v. COSGRAVE* (1874), 6 P. R. 164.—**CAN.**

c. — Not sealed.—An affidavit for use in the ct., sworn before a notary public, should be authenticated by his official seal.—*HOYD v. SPIDGINS* (1889), 17 P. R. 331.—**CAN.**

d. Paragraphs.—It is not necessary that an affidavit should be divided into paragraphs & numbered.—*ELDERBY v. WALTON* (1857), 2 P. R. 147.—**CAN.**

e. Material facts to be stated.—Where a party applying for a *quo warranto* improperly withheld material facts, which ought to have been stated in his affidavit, the rule was discharged with costs.—*Ex p. GILBERT* (1873), 1 Eng. 231. **CAN.**

f. Description of residence.—*GRAY v. ALCOHN* (1877), 1 P. & B. 555.—**CAN.**

g. Not conclusions of law.—Conclusions of law should not be stated in an affidavit.—*GLADWIN v. GILDFORD* (1901), 40 N. S. R. 479. **CAN.**

h. Statement showing on whose behalf

Sect. 11.—Form and contents of affidavit: Sub-sects. 1 & 2, A., B., C. & D.]

admitted it in evidence, as being substantially a statement on oath, made before a recognised foreign authority.—*In the Goods of LAMBERT* (1806), L. R. 1 P. & D. 138; 35 L. J. P. & M. 64; 14 L. T. 227; 14 W. R. 617.

5660. — *Statutory declaration.*—*Re HARDWICK, BOSWELL v. HARDWICK* (1907), 123 L. T. Jo. 322.

SUB-SECT. 2.—TITLE.

A. In General.

See, now, R. S. C., Ord. 38, r. 2.

5661. Where no cause pending.]—An affidavit ought not to be intitled, unless there be some cause depending in the ct.—*R. v. LAURENCE* (1755), Say. 218; 96 E. R. 858.

5662. Where two defendants.]—In an action on a recognisance of bail, the bail must be served with process four days before the return of the writ. In an action against two not bailable one deft. may before declaration well style his affidavits in a cause of A. against B. who is sued with C.—*MACKENZIE v. MARTIN* (1815), 6 Taunt. 286; 128 E. R. 1045.

5663. Where two causes.]—Where an affidavit to set aside a judgment for *non prosequitur* for irregularity, was intitled as being in two several causes against separate defts., but written on one sheet of paper & with one stamp only:—*Held*: insufficient. *WORLEY v. RYLAND* (1823), 8 Moore, C. P. 238.

5664. — To found motion in both causes.]—A motion on behalf of same pltf. in two different actions, upon same ground of application, may be made upon one affidavit intitled in both actions.—*PITT v. EVANS, PITT v. JERVIS* (1833), 2 Dowl. 223; 3 L. J. Ex. 64.

Annotation:—Mentd. Kilmington v. L. & N. W. Ry. (1854), 9 Exch. 766.

5665. ——An affidavit cannot be intitled in two causes. *HARPER v. MOUNT, — v. MOUNT* (1838), 2 Jur. 990.

5666. "A. v. B." not "B. at the suit of A."]—Affidavits must be intitled "A. v. B.," not "B. at suit of A."—*RICHARDS v. ISAAC* (1834), 2 Dowl. 710; 1 Cr. M. & R. 136; 4 Tyr. 863; 149 E. R. 1026.

5667. Parties must be described as plaintiff & defendant.]—In intitling an affidavit the parties

filed.]—The omission to indorse on the affidavit leading to the issue of a garnishee summons a statement showing on whose behalf it was filed is a mere irregularity curable by amendment.—*HART v. GURER* (No. 2) (1915), 33 W. L. R. 41; 9 W. W. R. 709; *CAN.*

PART VII. SECT. 11, SUB-SECT. 2.—A.

5668 i. Title must follow that of writ.]—Where an application was made by a sheriff against an attorney, to compel him to pay the sheriff's fees in certain suits in which the writs had not been served by the sheriff, & the affidavits were intitled in the name of the sheriff against the attorney by name:—*Held*: the affidavits were improperly intitled, there being no such cause in ct.—*DRURY v. HOWE* (1847), 3 Kerr. 588.—*CAN.*

5671 i. Unnecessary words treated as surplusage.]—Deponent who was pltf., described himself as "I, A., of S. merchant, deft. in this cause":—

Held: no objection as the latter words may be rejected as surplusage.—*ALLAN v. CASWELL* (1863), 1 Old. 405.—*CAN.*

5671 ii. ——A rule nisi for a *quo warranto* against J. for usurping the office of councillor had been obtained. On showing cause it was contended that the rule must be discharged as K's affidavit was improperly intitled "in the matter of an election":—*Held*: mere surplusage.—*Ex p. KEEFE* (1877), 1 P. & B. 4.—*CAN.*

5671 iii. ——It is not a ground for setting aside a writ of *habeas corpus* that the affidavits on which the fiat for the writ was granted were intituled "In the Supreme Ct. ex p." etc., the words after "Supreme Ct." being mere surplusage.—*Re SHAGNESSY* (1881), 21 N. B. R. 182.—*CAN.*

5671 iv. ——An affidavit to obtain an order for review of a magistrate's judgment should not be entitled in any ct., but if intituled in a county ct., when the application is made to a judge of that ct., it may be treated as surplusage.—*Ex p. McQUARRIE* (1884), 24

should be described as "pltf." & "deft."—*HARRIS v. GRIFFITH* (1835), 4 Dowl. 289; 1 Har. & W. 515.

5668. Title must follow that of writ.]—The title of affidavits in a cause should pursue the writ of summons.—*MARSHAL v. ADAMS* (1838), 1 Will. Woll. & H. 296; 2 Jur. 944.

5669. ——An affidavit intituled "W. W. carrying on business under the name or style of W. T. & Co., pltf. & C. F. deft."—pltf. having so described himself in the writ, was held sufficient.—*WHITE v. FELTHAM* (1846), 3 C. B. 658; 16 L. J. C. P. 14; 136 E. R. 263.

Annotation:—Refd. Lomas v. Price (1848), 10 L. T. O. S. 378.

5670. ——Affidavits in a cause must be entitled strictly as the cause itself is entitled.—*SUTHERLAND (FALSELY CALLED CROMIE) v. CROMIE* (1863), 3 Sw. & Tr. 210; 32 L. J. P. M. & A. 125; 9 L. T. 23; 164 E. R. 1251.

5671. Unnecessary words treated as surplusage.]—(1) If affidavits used on a rule with respect to a matter of arbitration where there is no cause in ct. improperly introduce the words "pltf." & "deft." after the names of the parties in the title of the affidavits, those words may be treated as surplusage.

(2) A comr. need not put his initials opposite an immaterial alteration in an affidavit sworn before him.—*Re IMESON & HORNER* (1840), 8 Dowl. 651.

5672. After death of plaintiff.]—In a cause of A. v. B., the matter was by rule of ct. referred to the master. A. died before the master's report was read. The exors. obtained a rule to show cause why they should not be made parties to the first rule:—*Held*: the second rule, & the affidavit on which it was granted, ought not to be intituled "A. deceased v. B.," & the rule & affidavits being so intituled, the rule was discharged.—*BLAND v. DAX* (1845), 8 Q. B. 126; 15 L. J. Q. B. 1; 6 L. T. O. S. 170; 10 Jur. 8; 115 E. R. 821.

In criminal informations.]—*See CRIMINAL LAW, Vol. XIV., p. 356, Nos. 3765-3767.*

B. Title in Particular Proceedings.

Certiorari.]—*See CROWN PRACTICE, Vol. XVI., pp. 447, 461, 471, Nos. 3141, 3142, 3396-3398, 3551, 3555.*

Contempt of court.]—*See ARBITRATION, Vol. II., p. 581, Nos. 2130-2132; CONTEMPT OF COURT, Vol. XVI., pp. 68, 84, Nos. 794-801, 1029.*

Divorce.]—*See HUSBAND & WIFE.*

Interpleader.]—*See INTERPLEADER.*

N. B. R. 287.—CAN.

k. Where cause pending.]—Where there is a cause pending, the affidavit must be intituled in it.—*BROWN v. PALMER* (1846), 3 U. C. R. 110.—*CAN.*

l. When annexed to commission under seal.]—The affidavit though not intituled in the ct. or in the cause, is sufficient, when annexed to the commission under the seal of the comrs. & referring to it.—*DOE d. PARK v. HENDERSON* (1849), 7 U. C. R. 182.—*CAN.*

m. Where several causes.]—Where same rule is to be moved for in several causes, the motion may be moved for on a single affidavit, intituled in all the causes.—*BROWN v. TRENHOLM* (1852), 2 All. 515.—*CAN.*

n. "A. v. D." not "C. D. defendants at suit of"]—An affidavit intituled "C. D. defts. at suit of —, or, & A. B. pltf., is bad.—*WINTER v. MIXER* (1852), 10 U. C. R. 110.—*CAN.*

o. "B. v. D." not "A. B. plaintiff"]—*WINTER v. MIXER* (1852), 10 U. C. R. 110.—*CAN.*

5673. Mandamus.]—A *mandamus* applied for by the Earl of R. was directed to the trustees of a turnpike road :—*Held* : an affidavit intituled, "The trustees of the H. roads on the prosecution of the Earl of R." is improperly intituled, & cannot be read.—*R. v. HARNHAM ROADS TRUSTEES* (1841), 5 Jur. 408.

CROWN PRACTICE, Vol. XVI., p. 327, Nos. 1410, 1411.

Prohibition.]—See CROWN PRACTICE, Vol. XVI., p. 393, Nos. 2362-2365.

5674. Service out of jurisdiction.]—When it is necessary to serve a writ in an action on a debt out of the jurisdiction there must be an affidavit in support of the application, & the affidavit should be intituled in the contemplated action & also in the Jud. Acts.—*YOUNG v. BRASSEY* (1875), 1 Ch. D. 277; 45 L. J. Ch. 142; 24 W. R. 110; 1 Char. Pr. Cas. 88.

Annotation :—*Mentd. Stigand v. Stigand* (1882), 19 Ch. D. 460.

Solicitors.]—See SOLICITORS.

C. Title of Court.

5675. Affidavit must be intituled in the court.]—A rule was discharged, because the affidavit on which the rule *nisi* was obtained, was not intituled in any ct.; the words "in the" only being prefixed.—*OSBORN v. TATUM* (1798), 1 Bos. & P. 271; 126 E. R. 900.

Annotation :—*Refd. Rolfe v. Burke* (1827), 12 Moore, C. P. 298.

5676. —.]—An affidavit of debt not intituled in any ct. & only with the words "by the ct." written at the bottom of the *jurat* is not sufficient.—*MOLLING v. POLAND* (1814), 3 M. & S. 157; 105 E. R. 570.

5677. Immaterial mistake.]—An affidavit on a motion was intituled "in the Common Place";—*Held* : sufficient.—*ROLFE v. BURKE* (1827), 4 Bing. 101; 12 Moore, C. P. 298; 5 L. J. O. S. O. P. 99; 130 E. R. 707.

5678. —.]—(1) An affidavit described deponent as "Edward Charles P." but the signature to it was "Chas. Ed. P." :—*Held* : this was no objection.

(2) The affidavit was intituled, "In the Exchequer" :—*Held* : sufficient; it appearing by the *jurat* to be sworn before an officer of this ct.—

HANDS v. CLEMENTS (1843), 11 M. & W. 816; 1 Dow. & L. 379; 12 L. J. Ex. 437; 7 Jur. 658; 152 E. R. 1034.

5679. —.]—*HARLOCK v. ASHBERY* (1883), 28 Sol. Jo. 26.

See R. S. C., Ord. 38, r. 14.

5680. Title of court may be added after swearing.]—An affidavit of debt was sworn in Ireland before a comr. of the Common Pleas & Exchequer :—*Held* : the title of the ct. need not be prefixed to the affidavit at the time it is sworn, but the affidavit might be taken before such comr. & afterwards intituled & used in either ct.—*PENSE v. BROWNING* (1836), 1 M. & W. 362; 2 Gale, 47; Tyr. & Gr. 861; 150 E. R. 474.

D. Names of Parties.

See, now, R. S. C., Ord. 38, r. 2.

5681. Christian & surnames of parties in full.]—The Christian names as well as surnames of the parties must be inserted in the title of an affidavit produced to show cause against any rule.—*FORES v. DIEMAR* (1798), 7 Term Rep. 661; 101 E. R. 1186.

Annotation :—*Refd. R. v. Roper* (1817), 6 M. & S. 327.

5682. —.]—All affidavits in a cause, excepting affidavits of the cause of action before process sued out, must be intituled with the names of all the parties, & plffs. & defts. & with their respective Christian names.—*NOEL v. —* (1801), 1 Smith, K. B. 457.

5683. —.]—An affidavit, intituled A. v. B. & another, is bad; for defts. should be described by their Christian names & surnames. *DOE d. SPENCER v. WANT* (1818), 2 Moore, C. P. 722; 8 Taunt. 617; 129 E. R. 536.

Annotation :—*Refd. R. v. Christian* (1842), Car. & M. 388.

5684. —.]—The affidavit in support of a rule to discharge debt out of custody, upon the ground that the writ described him by the initials of his Christian name only, must set out deft.'s Christian name at full length in its title.—*SHAW v. ROBINSON* (1826), 8 Dow. & Ry. K. B. 123; 4 L. J. O. S. K. B. 295.

Annotation :—*Refd. Belcher v. Goodered* (1817), 9 L. T. O. S. 78, 127.

5685. —.]—In the title of affidavits the Christian & surnames of the parties should be inserted; but where filed in support of a motion,

affidavit is not intituled in the ct.—*O'BRIEN v. MALONEY* (1886), 20 N. B. R. 448.—CAN.

PART VII. SECT. 11, SUB-SECT. 2. —D.

5681 i. Christian & surnames of parties in full.]—Where all the affidavits in a cause, after verdict, were intituled with an initial letter between the Christian & surname of deft. :—*Held* : no objection to an affidavit made by deft., that the second name was not set out at length, as the initial might be nothing more than a distinctive letter.—*KENNIFW v. ALLEN* (1841), 2 Ont. Dig. 2379.—CAN.

5681 ii. —.]—Where one of plffs. described himself in the writ as "Charles A. De Wolf," & in an affidavit made in the cause was intituled "Charles Aubrey DeWolf" :—*Held* : this affidavit could not be read.—*DEWOLFE v. NIEL* (1868), 7 N. S. R. 179.—CAN.

5681 iii. —.]—An affidavit being intituled "Stack ats. Richard P. Cotton & Eliza P. Cotton, his wife," not allowed to be read.—*COTTON v. STACK* (1874), 2 Pug. 431.—CAN.

5681 iv. —.]—*THORP v. BROWNE* (1867), 15 W. L. 1146.—IR.

PART VII. SECT. 11, SUB-SECT. 2. —C.

5675 i. Affidavit must be intituled in the court.]—An affidavit in support of an application to quash a bye-law was not intituled in any ct. & there was nothing to show that it was sworn before an officer of any ct., the comr. styling himself merely "a commissioner, etc." :—*Held* : insufficient.—*RE HIRONS & TOWNSHIP OF AMHERSTBURG* (1854), 11 U. C. R. 453.—CAN.

5675 ii. —.]—The name of the ct. must be inserted in the affidavit.—*ALLMAN v. KENSEL* (1862), 3 P. R. 110.—CAN.

5677 i. Immaterial mistake.]—An affidavit, sworn abroad, of the due execution of a commission, intituled in the Common Pleas instead of the Q. B. :—*Held* : sufficient, the proceedings being clearly identified.—*COMSTOCK v. BURROWS* (1856), 13 U. C. R. 439.—CAN.

5677 ii. —.]—Where the affidavit was intituled in the High Ct. of Justice, but not in the proper division :—*Held* : the objection was clearly amendable.—*ROBERTSON v. COULTON* (1881), 9 P. R. 16.—CAN.

5677 iii. —.]—Affidavits to be used on an application to set aside an order made by the election ct. judge may be

read if sworn before a comr. for taking affidavits in this ct., though intituled "In the election ct." Such intituling is an irregularity only, & may be treated as surplusage.—*EMMERSON v. WOOD* (1887), 26 N. B. R. 632.—CAN.

p. Where good — Though not intituled in court.]—An affidavit may be read, though not intituled in the ct., if it appear on its face to have been sworn in the ct.—*Ex p. KERR* (1873), 2 Pug. 62.—CAN.

q. —.]—Affidavit made in R., purporting to be made before H., "Chief Justice of Superior Ct.," without specifying the ct. :—*Held* : good where the *jurat* contained the words "the seal of which ct. is affixed," & the affidavit bore the seal of the proper ct.—*ROBERTSON v. CAMERON* (1877), 2 R. & C. 261.—CAN.

r. —.]—An affidavit intituled in the Q. B., & sworn before Jud. Act came into force, might under sect. 11 (2), (3), be made the foundation of an order in the Q. B. Div.—*ELLIOT v. CAPELL* (1881), 9 P. R. 35.—CAN.

s. —.]—An affidavit to obtain an order for review of a magistrate's judgment is sufficient if the comr. before whom it is sworn is described in the *jurat* as a "Comr. etc., in the Supreme Ct." though the

Sect. 11.—Form and contents of affidavit: Sub-sect. 2, D., E. & F.]

& incorrect in that respect, & the objection was taken on showing cause, the ct. intimated that they would permit their being altered & resworn to meet the merits of the case.—*LADD v. WILSON* (1830), 1 Tyr. 18; 9 L. J. O. S. Ex. 5.

5686. ———.]—In intitulating an affidavit of service of a rule to compute, the Christian name of pltf. as well as of deft. must be introduced.—*ANDERSON v. BAKER* (1834), 3 Dowl. 107.

5687. ———.]—The Christian names of the parties in a cause must be written at length in the title of an affidavit.—*MASTERS v. CARTER* (1836), 4 Dowl. 577; 1 Har. & W. 672.

5688. ———.]—Where initials used in pleadings.]—*Semble:* in an action where the pleadings describe deft. by the initials of his Christian name, an affidavit which sets out those names at length is wrongly intituled.—*GROOM v. DUFFIN* (1811), 8 Jur. 1101.

5689. ———.]—Where deft.'s affidavits in support of a rule to set aside the proceedings in an action, after a rule to compute, for irregularity, were intituled "In the Queen's Bench, between William Frederick Hodgson, pltf., & Benjamin William May, sued as B. W. May, deft.," & those of pltf. on showing cause, "In the Queen's Bench, between William Frederick Hodgson, pltf., & B. W. May, deft.," & it appeared that in the writ of summons & all subsequent proceedings in the action deft. was described by initials as "B. W. May":—*Held:* neither deft.'s nor pltf.'s affidavits were wrongly intituled; & stating deft.'s name at full length was no objection, as by the words "sued as B. W. May," the title was connected with the previous proceedings in the action.—*HODGSON v. MAY* (1849), 18 L. J. Q. B. 219; 13 L. T. O. S. 215; 14 Jur. 653.

5690. Names of all plaintiffs.]—*ANON.* (1822), 1 L. J. O. S. K. B. 52.

5691. ———.]—*DIXON v. BALL* (1837), 1 Jur. 985.

5692. Names of all defendants.]—Where there are several defts., the names of all should be set out in the title of an affidavit made in the cause.—*THEOBALD v. BRAME* (1837), Will. Woll. & Dav. 219.

5693. ———.]—Where there are several defts., the names of all must be introduced into affidavits used to make applications in the ct.; all besides one cannot be included under the words "& others."—*TOMKINS v. GEACH* (1837), 5 Dowl. 509. *Annotation:*—*Reid. R. v. Christian* (1842), Car. & M. 388.

5694. ———.]—*Omission of one defendant.]*—Affidavit intituled by mistake in a suit between X., pltf., & A., B., C., & D., defts. admitted in a suit between X., pltf. & A., B., C., D. & E., defts., on its being shown that no suit existed in which X. was pltf. & A., B., C., & D., defts. except that between X., pltf. & A., B., C., D., & E., defts.—*FISHER v. COFFEY* (1855), 1 Jur. N. S. 956.

5690 i. Names of all plaintiffs.]—Affidavits styled in short form "A., B., & others, pltf." & "C., D., & others, defts."—*Held:* sufficient.—*DICKER v. HERON* (1869), 2 Ch. Ch. 490.—*CAN.*

5692 i. Names of all defendants.]—In an application by one of two defts. for relief under Insolvent Act, the affidavit was intituled in the name only of one of defts., appert.—*Held:* the intituling was sufficient.—*WILMOT v. CORNWELL* (1835), 2 N. B. R. (Ber.) 61.—*CAN.*

5692 ii. ———.]—*DICKER v. HERON* (1869), 2 Ch. Ch. 490.—*CAN.*

5692 iii. ———.]—*IMPERIAL EL.* (1907), 6 W. L. R. 381.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 2.

5698 i. Wrong Christian name.]—Where in the style of the cause pltf. was called "David Cass," but in the title of affidavits in support of a rule nisi in same case, "David H. Cass" & "David Hawley Cass"—*Held:* a fatal variance.—*BEAUCHAMP v. CASS* (1854), 1 P. R. 291.—*CAN.*

i. Insufficient description.]—In intituling an affidavit in a cause the additions of "pltf." & "def." must be inserted.—*BROWN v. SIMMONDS* (1814), 1 U. C. R. 280.—*CAN.*

a. ———.]—In an affidavit in a the words "pltf." & "def." are

5695. ———.]—*Omission of names of parties.]*—When a case is *ex p.* in this ct. all affidavits should be intituled in the names of the parties. Where, therefore, upon an appeal under Summary Jurisdiction Act, 1857 (c. 43), a motion was made to strike out such appeal on the ground that a had not been complied with, & the affidavit upon which the motion was made was only intituled in the ct., & not in the names of the parties:—*Held:* the affidavit was irregular, & the rule was discharged.—*JOHNSON v. SIMPSON* (1859), 1 L. T. 60; 23 J. P. 775.

B. Mistakes and Omissions in Name of Cause.

See, now, R. S. C., Ord. 38, r. 14.

5696. Mis-spelling of name—Rule of idem sonans.]—*SHORT v. SCURRY* (1728), 1 Barn. K. B. 135; 94 E. R. 94.

5697. ———.]—The omission of a letter in the name of a party in the title of an affidavit, the word remaining *idem sonans*, is no ground for discharging a rule obtained upon such affidavit.—*GRAY v. COOMBS* (1850), 10 C. B. 72; 138 E. R. 30.

5698. Wrong Christian name.]—*HART v. TOMLIN* (1845), 4 L. T. O. S. 375.

5699. Wrong surname.]—A rule nisi for a commission to examine witnesses was obtained upon an affidavit intituled "H. J., pltf., & G. A. F. L. C., commonly called Viscount C., deft.," the title of the cause being "H. J. v. G. A. F. L. C., commonly called Viscount C."—*Held:* insufficient.—*JOIL. v. CURZON (LORD)* (1847), 5 C. B. 205; 10 L. T. O. S. 186; 136 E. R. 855.

Annotation:—*Mentd. Maybury v. Mudie* (1847), 10 L. T. O. S. 227.

5700. ———.]—*UNDERDOWN v. STANNARD*, [1871] W. N. 171.

5701. Insufficient description—Assignee.]—An affidavit, the title of which styles pltf. "assignee," without further explanation, is bad.—*STEYNER v. COTTRELL* (1811), 3 Taunt. 377; 128 E. R. 149.

Annotations:—*Folld. Engler v. Twysden* (1838), 6 Scott, 580. *Distd. Marshal v. Adams* (1838), 1 Will. Woll. & H. 296. *Refd. Fletcher v. Lechmere* (1843), 6 Scott, N. R. 173.

5702. ———.]—Affidavits intituled in a cause, without giving pltf. the addition of "assignee," cannot be used in a cause where pltf. sues as assignee.—*WRIGHT v. HUNT* (1832), 1 Dowl. 457.

Distd. Marshal v. Adams (1838), 1 Will. Woll. & H. 296.

5703. ———.]—"P., assignee, etc.," is an irregular mode of describing a pltf. in intituling an affidavit.—*PHILLIPS v. HUTCHINSON* (1834), 3 Dowl. 20.

Distd. Marshal v. Adams (1838), 1 Will. Woll. & H. 296. *Refd. Fletcher v. Lechmere* (1843), 6 Scott, N. R. 173.

5704. ———.]—"C. assignee, etc.," is not a sufficient description of pltf. in the title of an affidavit.—*CASLEY v. SMYTH* (1835), 4 Dowl. 477; Tyr. & Gr. 219.

Annotation:—*Distd. Marshal v. Adams* (1838), 1 Will. Woll. & H. 296.

must be set out at full length in the title of the case.—*CHAPE v. PARR* (1845), 2 U. C. R. 98.—*CAN.*

b. ———.]—The want of deponent's addition is no objection to an affidavit made for registration of a chattel mfg.—*BRODIE v. RUTMAN* (1858), 16 U. C. R. 207.—*CAN.*

c. ———.]—The abbreviations "pltf." & "def." in the intituling of an affidavit are insufficient, & a rule obtained on such an affidavit will be discharged.—*RAYMOND v. CALDWELL* (1864), 6 All. 56.—*CAN.*

d. ———.]—An affidavit is correctly intituled in the cause, although the words "pltf." & "def." are

PART VII. — EVIDENCE BY AFFIDAVIT.

5705. — Executor.]—The ct. declined to act upon an affidavit which was entitled *A. v. B.*, executor, etc., without specifying the party of whom deft. was exor.—*CLARK v. MARTIN* (1834), 3 Dowl. 222.

*Annotations:—**Reid*, *Engler v. Twysden* (1838), 1 Arn. 269; *Fletcher v. Lechmere* (1843), 5 Man. & G. 265.

5706. — Administrator.]—Qu. is an affidavit in which plff. is styled "administrator etc.," without saying of whom or what he is administrator, defective, as wrongly intitled.—*ENGLE v. TWYSDEN* (1838), as reported in 1 Arn. 269; 6 Scott, 580; 8 L. J. C. P. 128.

*Annotation:—**Reid*, *Baber v. Harris* (1839), 2 Will. Woll. & R. 53.

5707. ——[—An affidavit verifying a plea in abatement was headed "Between S. F. administratrix etc. plaintiff & W. F. defendant":—*Held*: bad as not showing in what character plff. was administratrix.—*FLETCHER v. LECHMERE* (1843), 5 Man. & G. 265; 6 Scott, N. R. 173; 12 L. J. C. P. 151; 134 E. R. 565.

5708. — "The elder."]—An affidavit on which a rule for judgment as in case of a nonsuit was founded, was intitled "Between J. S., plff., & G. J., deft." The affidavit in answer to the rule stated, that there were two G. J.'s, & that all former proceedings in the cause were intitled "J. S. v. G. J. the elder":—*Held*: the affidavit was sufficient.—*SINGLETON v. JOHNSON* (1811), 9 M. & W. 67; 1 Dowl. N. S. 356; 11 L. J. Ex. 88; 5 Jur. 1114; 152 E. R. 30.

*Annotation:—**Reid*, *Fletcher v. Lechmere* (1843), 12 L. J. C. P. 151.

5709. Variance in title—One defendant struck out of cause after swearing.]—An affidavit was filed & intitled in a cause in which there were three defts. Afterwards, plff. struck out the name of one of defts., & then obtained the injunction on the affidavit as it was originally intitled:—*Held*: the injunction was regularly obtained.—*HAWES v. BAMFORD* (1839), 9 Sim. 653; 59 E. R. 511.

5710. ——[—An order, obtained on affidavit of service, was discharged with costs, on the ground of a misnomer of a party in the affidavit.—*SALOMON v. STALMAN* (1841), 4 Beav. 243; 10 L. J. Ch. 327; 49 E. R. 332.

omitted in the heading after the names of the parties.—*HARRIS v. FAPER* (1866), 7 N. S. R. 3; 2 Old. 371.—*CAN.*

e. ——[—Where the title of a cause described plffs. as "trustees for all the creditors of the estate & effects" of an absconding debtor, & the affidavits served on plff. with a view to the discharge of bail, in their titles described plffs. as "trustees for all the creditors, etc.," omitting the words "of the estate & effects":—*Held*: sufficient.—*ALLISON, ETC. (SCOVILL'S TRUSTEES) v. ROBINSON* (1870), 2 Han. 161.—*CAN.*

f. ——[—Where the affidavit of a judgment creditor for a receiver in a petition matter under 4 & 5 Will. 4, c. 55, was intitled as in a cause, & the parties were styled plff. & deft., & petitioner was apprised of the irregularity:—*Held*: the affidavit was insufficient.—*FAWCETT v. FAWCETT* (1844), 6 L. E. R. 388.—*IR.*

5710 i. Variance in title.]—Where deft. moved for a rule, on an affidavit incorrectly intitled as to the cause, & plff., in showing cause by his attorney, intitled his affidavits as deft. had intitled his, stating the proper style of the cause, & showing that he was not attorney for plff. in the cause in which the affidavits were intitled, deft.'s rule was discharged, there being a fatal variance if there was only one cause, & if there were two no service being proved.—*TERRY*

v. MATTHEWS (1840), 2 Ont. Dig. 2381.—*CAN.*

5710 ii. ——[—Where the title of the cause had been reversed by placing deft.'s name before plff.'s, the ct. refused to receive them.—*WIDGITT v. JENNINGS* (1857), 7 C. P. 26.—*CAN.*

g. Style of parties.]—It is irregular in an action of dower, to style the parties in the cause *demondant & resp.* & affidavits so intitled cannot be read.—*FERGUSON v. MALONE* (1845), 1 U. C. R. 519.—*CAN.*

h. Amendment by county court judge.]—The affidavit for appeal from the magistrates' ct. was defective, not being headed in the cause, & the words "Before me" being omitted from the *jurat*. The judge of the county ct. was satisfied that the defects occurred through inadvertence, & without the fault of applt., but dismissed the appeal on the ground that he had no power to amend the affidavit:—*Held*: he had such power.—*WOODWORTH v. INNES* (1883), 18 N. S. R. (6 R. & G.) 295; 6 C. L. T. 440.—*CAN.*

k. Omitting words " & others."]—On the part of plff. it was moved that a certain parchment writing filed with the master in a cause might be taken off the file as not having been properly intitled, being intitled *A. S., plff.; A. P., widow, extrix., & personal representative of T. P. P., deceased,*

5711. ——[—An affidavit, intituled *Doe* "on the demise or demises" of *R. N. & J. N. v. T. L.* is bad; but upon such objection, the ct. will discharge the rule, without costs.—*Doe d. N. v. LLOYD* (1842), 12 L. J. Q. B. 95; 7 Jur. 16.

5712. ——[—By an order under Trustee Act. 1850 (c. 60), a deft. was directed to transfer stock. Upon an affidavit of service of this order, which was intitled in the cause only, a writ of attachment for disobedience was issued, on which deft. was in custody. The writ was discharged for irregularity on account of a variance, but the ct. declined to give deft. costs.—*MACKENZIE v. MACKENZIE* (1852), 5 De G. & Sm. 338; 21 L. J. Ch. 386; 19 L. T. O. S. 28; 64 E. R. 1143.

5713. ——[—*Re HARRIS* (1862), 8 Jur. N. S. 166.

5714. Alteration by commissioner.]—The ct. directed the clerk of inrolments to receive an affidavit verifying the certificate of an acknowledgment by a married woman, taken before comrs., where the heading & the commencement of the affidavit had been altered by the comrs. from the usual form of affidavit.—*Re SHAW* (1841), 3 Man. & G. 236; 3 Scott, N. R. 647; 10 L. J. O. P. 322; 133 E. R. 1130.

F. Omission of Name of Cause.

See, now, R. S. C., Ord. 38, r. 2.

5715. Effect of omission.]—*HARRISON v. MITCHELL* (1731), 2 Barn. K. B. 15, 20; Fitz-G. 303; 91 E. R. 326, 330.

5716. ——[—If an affidavit be put into ct. without any title, the ct. cannot take any notice of it, though the adverse party be willing to waive the objection.—*OWEN v. HURO* (1788), 2 Term Rep. 643; 100 E. R. 346.

*Annotation:—**Reid*, *R. v. Christian* (1842), Car. & M. 388.

5717. ——[—A note to pay a prisoner his sixpences was written upon same paper with an affidavit to verify plff.'s handwriting thereto:—*Held*: the affidavit not being duly intitled in the cause, although the note was so, could not be aided by reference, & could not be read.—*BUCKLEY v. TWEEDIE* (1805), 2 Smith, K. B. 393.

5718. ——*Affidavit sworn*

deft., without stating the names of the other defts.:—*Held*: the omission of the words " & others" after deft.'s name was fatal.—*SMITH v. PIERCE* (1830), 3 L. J. Rec. 1st Ser. 169.—*IR.*

PART VII. SECT. 11, SUB-SECT. 2. —F.

5715 i. Effect of omission.] The affidavits in support of a motion for an order for payment into ct. of moneys realised under an execution to answer claims of third persons against the execution debtor for wages were not intitled in the cause, but "in the matter of the Execution Act & of A. E. Clarke, judgment debtor":—*Held*: irregular.—*McKAY v. CLARKE* (1892), 2 B. C. R. 213.—*CAN.*

5715 ii. ——[—Application by deft. to set aside a writ of summons served on deft. for an alleged failure to sufficiently indorse the address of plffs. on the writ. The affidavits used in support of the application were intitled "In the matter of an intended action." It was objected that the writ of summons having been issued on July 18, 1905, & actually served on deft., the affidavits on the present application were wrongly intitled "In the matter of an intended action" & that the summons be discharged:—*Held*: the summons should be discharged.—*TORONTO & BRITISH COLUMBIA LUMBER Co. v. MOORE* (1905), 2 W. L. R. 239.—*CAN.*

Sect. 11.—Form and contents of affidavit: Sub-sect. 2, F., G. & H.; sub-sect. 3, A.]

affidavits are made abroad & sworn, but without any heading, showing in what cause or matter they are made, they will be ordered to be filed, on special application for that purpose.—*SALVIDGE v. TUTTON* (1869), 20 L. T. 300.

Annotation:—*Folld. Blamey v. Blamey*, [1902] W. N. 138.

5719. ————]—*BLAMEY v. BLAMEY*, [1902] W. N. 138.

5720. ————]—**Statutory declaration made abroad—Verified by affidavit.**—A statutory declaration not intitled in the cause was allowed to be filed with an affidavit intitled in the cause verifying the signatures of the declarants.—*WHITING v. BASSETT* (1872), L. R. 14 Eq. 70; 41 L. J. Ch. 551.

G. Error in Name of Defendant.

5721. Whether true name or description used.]—Where deft. was arrested by a wrong name the affidavit to ground a motion that the bail bond be delivered up to be cancelled must be intitled in deft.'s right name.—*FINCH v. COCKER* (1834), 2 Cr. & M. 412; 2 Dowl. 383; 4 Tyr. 285; 3 L. J. Ex. 93; 149 E. R. 820; *subsequent proceedings* (1835), 3 Cr. M. & R. 196.

Annotations:—*Folld. Jones v. Eldridge* (1842), 4 Man. & G. 266; *Belcher v. Goodered* (1847), 4 C. B. 472. *Mentd. Jarman v. Hooper, Pilcher v. Heenan* (1843), 13 L. J. C. P. 63.

5722. ————]—An affidavit intitled "G. Shrimpton v. Wm. Carter the elder, sued as Wm. Carter," the cause being "G. Shrimpton v. Wm. Carter," was rejected as being badly intitled.—*SHRIMPTON v. CARTER* (1835), 3 Dowl. 618.

Annotations:—*Distd. Singleton v. Johnson* (1841), 9 M. & W. 67. *Refd. Jones v. Eldridge* (1842), 11 L. J. C. P. 192; *Hodgson v. May* (1849), 19 L. J. Q. B. 249.

5723. ————]—Deft., whose real name was Henry R., was described in the writ of summons, & *distingas* thereon, as Humphrey D. R. On an application to set aside the *distingas*, he intitled his affidavit "B. v. Humphrey D. R., sued as Henry R.": *Held*: incorrect, there being no such cause until appearance.—*BORTHWICK v. RAVENSCROFT* (1839), 5 M. & W. 31; 7 Dowl. 393; 2 Horn & H. 4; 8 L. J. Ex. 160; 3 Jur. 703; 151 E. R. 14.

N.F. Jones v. Eldridge (1842), 4 Man. & G. 266; *Belcher v. Goodered* (1847), 4 C. B. 472. *Refd. Swift v. Knight* (1839), 5 M. & W. 618.

5724. ————]—**Addition of Christian name.**—In an action which was described in the writ of summons as "W. v. J. E.": deft. applied to set aside the service of the writ, on the ground of irregularity. The affidavit was intitled "W. v. J. A. E., sued as J. E.": *Held*: the affidavit was well intitled.—*JONES v. ELDRIDGE* (1842), 4 Man. & G. 266; 1 Dowl. N. S. 710; 4 Scott, N. R. 751; 11 L. J. C. P. 192; 134 E. R. 109.

Annotations:—*Folld. Dunn v. Hodson* (1843), 1 Dow. & L. 204. *Consd. Belcher v. Goodered* (1847), 4 C. B. 472. *Distd. Tagg v. Simmonds* (1847), 16 L. J. Q. B. 319.

5725. ————]—**Substitution of Christian name for initials.**—In the writ of summons, plff. described deft. as "James S. Hodson"; deft. entered an appearance as "James Shirley Hodson"; affidavits were produced, the title of which described deft. as "James Shirley Hodson, sued as James S.

Hodson":—*Held*: they were well intitled.—*DUNN v. HODSON* (1843), 1 Dow. & L. 204; 7 Jur. 971.

5726. ————]—Deft. was called, in the writ of summons, "W. W. Kilpin." He entered an appearance as "William Wells Kilpin, sued as W. W. Kilpin." In the title of an affidavit in support of a rule for judgment as in case of a nonsuit, he was described as "William Wells Kilpin":—*Held*: the affidavit was well intitled.—*LOMAX v. KILPIN* (1846), 16 M. & W. 91; 4 Dow. & L. 295; 16 L. J. Ex. 23; 153 E. R. 1113.

5727. ————]—Where the writ of summons described deft. as "Frederick C. Prosser," an affidavit sworn by him in support of a rule for setting aside the judgment for irregularity, the title of which described him as "Frederick Coulston Prosser" was held irregular.—*SIMS v. PROSSER* (1846), 15 M. & W. 151; 15 L. J. Ex. 199; 6 L. T. O. S. 414; 153 E. R. 800.

Annotation:—*Refd. Hodgson v. May* (1849), 18 L. J. Q. B. 249.

5728. ————]—*HODGSON v. MAY*, No. 5689, *ante*.

5729. ————]—In the writ & declaration, the cause was described as "T. v. S. & H." Defts. appeared under that title, & pleaded to the declaration. On motion to set aside a judgment signed for want of a rejoinder:—*Held*: the affidavit, on which the rule to set aside the judgment was obtained, was incorrectly intitled "T. v. S. & P. sued as H.":—*TAGG v. SIMMONDS* (1847), 4 Dow. & L. 582; 16 L. J. Q. B. 319.

5730. ————]—Upon a motion to set aside an appearance the affidavit was intitled in the matter of the attorney in a cause between "A. B. & C. D., plffs., & John G. sued by the name of Henry G., deft.":—*Held*: it was properly intitled.—*BELCHER v. GOODERED* (1847), 4 C. B. 472; 4 Dow. & L. 814; 16 L. J. C. P. 176; 9 L. T. O. S. 127; 136 E. R. 591.

5731. ————]—Deft. was sued as "H. W. B." He appeared as "Henry William B." The declaration described him as "Henry William B., sued as H. W. B." The affidavits were intitled "Hilary John B., sued as Henry William B." The ct. admitted the affidavits.—*BALDWIN v. BAUERMAN* (1852), 12 C. B. 152; 21 L. J. C. P. 160; 16 Jur. 892; 138 E. R. 859.

H. Amendment.

See, note, R. S. C., Ord. 38, r. 14.

5732. Leave to file fresh affidavits—Without change in contents.—Where affidavits had been wrongly intitled, the ct. gave leave to file fresh ones, properly intitled, but they kept the others on the file, & said that no difference in the matter could be permitted to be made in the new ones.—*R. v. MEAD* (1823), 1 L. J. O. S. K. B. 88.

5733. Leave to amend—& reswear.—*LADD v. WILSON*, No. 5685, *ante*.

5734. ————]—Where a rule is obtained upon an affidavit erroneously intitled, the ct. will not discharge it, but will permit the affidavit to be amended & resworn.—*COOPER v. TALBOT* (1839), 7 Scott, 345.

that he signed the note in that manner.—*STEPHEN v. HOAR* (1854), 21 N. B. R. 614.—*CAN.*

5721 iv. ————]—In a cause between A. B. & H. B. junior, the ct. refused to allow an affidavit to be read in which the word "junior" was omitted from the title of the cause.—*BABINEAU v. BABINEAU* (1890), 30 N. B. R. 18.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 2. —G.

5721 i. Whether true name or description used.—An arrest was set aside, where deft., whose name was Patrick, was called Peter in the affidavit & writ.—*BOTSWICK v. STEWART* (1830), 1 Ont. Dig. 198.—*CAN.*

5721 ii. ————]—Plff. must in his affi-

davit for attachment in an action on a note set forth one of deft.'s Christian names, or allege that he signed the note by his initials.—*MULMORE* (1877), 1 P. & B. 291.—*CAN.*

5721 iii. ————]—It is not sufficient, in an affidavit in an action on a promissory note, to describe deft. by the initials of his Christian name without

5735. ———.]—Where a party obtained a rule nisi upon affidavits, which were badly intitled, & discovering his mistake, he applied to the ct. for leave to take the affidavits off the file, & amend & reswear them; the ct. refused to allow such a course to be taken, on the ground that the affidavit would appear to have been sworn after the rule was drawn up.—*DOE d. HILL v. TOLLETT* (1843), 1 Dow. & L. 121.

5736. ———.]—Affidavits filed under a wrong title were permitted to be taken off the file, amended, & resworn.—*Re FORD, Re HARVEY, Ex p. BURTON* (1849), 3 De G. & Sm. 578; 18 L. J. Bey. 17; 13 L. T. O. S. 143; 13 Jur. 297, 420; 64 E. R. 614.

5737. ——— Without fresh stamp.]—Affidavits erroneously intitled allowed to be taken off the file & resworn in their proper title, without a fresh stamp.—*PEARSON v. WILCOX* (1853), 10 Hare, App. II., xxxv.; 1 Eq. Rep. 239; 21 L. T. O. S. 256; 1 W. R. 492; 68 E. R. 1134.

5738. ———.]—UNDERDOWN v. STANNARD, [1871] W. N. 171.

5739. ———.]—If there is a defect in intituling affidavits produced on showing cause against a rule, the ct. will allow the rule to be enlarged, in order that the title may be amended.—*ANDERSON v. ELL* (1834), 3 Dowl. 73.

*Annotation:—*Reffd. *Young v. Walker* (1847), 16 M. & W. 446.

5740. ——— On payment of costs.]—The title of an affidavit on which a rule has been obtained may be amended on payment of costs, the opposite party having leave to file affidavits in reply.—*R. v. WARWICKSHIRE JJ.* (1836), 5 Dowl. 382.

5741. ———.]—Where, upon showing cause against a rule, the affidavits appeared to be wrongly intituled in the cause, the rule was enlarged in order that the title might be amended.—*DOE d. HAYNES v. ROE* (1853), 1 W. R. 167.

PART VII. SECT. 11, SUB-SECT. 2.

—H.

5740 i. *Leave to amend.—On payment of costs.*—[Irregularities such that the affidavits filed by plff. are not endorsed with a note showing on whose behalf they are filed, that one of the affidavits does not show in the *jurat* where it was sworn, that the writ of attachment is not properly intituled, & is not dated, & that the copy served was not a true copy, are in ordinary cases curable by amendment, provided that the opposite party was not misled or prejudiced upon payment of costs. The amendment may be made either before or after the completion of the proceeding; but in attachment proceedings strict compliance with the Rules of Ct. is necessary; & the ct. will usually set aside attachment proceedings based on such irregularities, though the matter is discretionary. *HOLE v. SIMPSON* (1914), 27 W. L. R. 689.—CAN.

1. Defects capable of amendment.—*MOHR v. PARKS* (1910), 15 W. L. R. 250.—CAN.

m. Judge's discretion.—Where objection is made to the filing of an affidavit on account of some trifling error made *bond fide*, & without fraud on the party who raises the objection, the judge has a discretion to cause the affidavit to be amended in that particular. This does not authorise the judge to amend for any cause greater than a defect in title.—*IMPERIAL BANK OF CANADA v. HULL* (1900), 20 C. L. T. 291; 4 Terr. L. R. 331.—CAN.

PART VII. SECT. 11, SUB-SECT. 3.

—A.

5742 i. *Whether necessary.*—De

SUB-SECT. 3.—DESCRIPTION AND RESIDENCE OF DEPONENT.

A. Parties.

See R. S. C., Ord. 38, r. 8.

5742. Whether necessary.—In an affidavit by plff. in a cause, it is not necessary to state his residence.—*CROCKETT v. BISHTON* (1815), 2 Madd. 446; 56 E. R. 399.

5743. ———.]—It is not necessary that an affidavit made by deft. in the cause, stating his abode, & styling him deft. should also contain the addition of his degree.—*ANON.* (1815), 6 Taunt. 73; 128 E. R. 980.

*Annotation:—*Consd. *Hudspeth v. Yarnold* (1850), 15 L. T. O. S. 227.

5744. ———.]—The intituling of an affidavit, by describing plff. as "gent., one, etc." plff. not being an attorney, does not vitiate the affidavit, but the description may be rejected as surplusage.—*REEVES v. CRISP* (1817), 6 M. & S. 274; 105 E. R. 1245.

5745. ———.]—It is not sufficient, in an affidavit by deft. in a cause, to describe him as "above named deft.," without any other addition.—*LAWSON v. CASE* (1833), 1 Cr. & M. 481; 2 Dowl. 40; 3 Tyr. 489; 2 L. J. Ex. 216; 110 E. R. 489.

*Annotations:—*Consd. *Angel v. Ihler* (1830), 5 M. & W. 163. *Apld.* *Cobbett v. Oldfield* (1847), 8 L. T. O. S. 394. *Dld.* *Davies v. Lowndes* (1847), 3 C. B. 808.

5746. ———.]—Where deft. makes an affidavit in a cause, his addition need not be given.—*JACKSON v. CHARD* (1834), 2 Dowl. 469.

*Annotation:—*Fold. *Brooks v. Farlar* (1836), 5 Dowl. 361.

5747. ———.]—Deft. need not give his addition in an affidavit made by him in the cause.—*BROOKS v. FARLAR* (1836), as reported in 5 Dowl. 361; 6 L. J. C. P. 27, n.

*Annotation:—*Mentd. *Dawes v. Anstruther* (1837), 6 L. J. Ex. 194.

5748. ———.]—An affidavit made in a cause by deft. is good, though it does not give him any

ponent's name must be set forth in words at length.—*RICHARDSON v. NORTHROP* (1826), Tay. 331.—CAN.

5742 ii. ———.]—The proper place of residence of deponent must be stated.—*HALL v. BRUSH* (1840), 1 Ont. Dig. 201.—CAN.

5742 iii. ———.]—Deponent's Christian names must be given in full.—*WESTOVER v. BURNHAM* (1810), 1 Ont. Dig. 191.—CAN.

5742 iv. ———.]—*Semble:* an affidavit of either plff. or deft. need not state deponent's degree, certainly not where the affidavit is sworn in a foreign country.—*EWING v. LOCKHART* (1847), 3 U. C. R. 248.—CAN.

5742 v. ———.]—The affidavit of appet. stated him to be a ratepayer, & a resident householder.—*Held:* not necessary to give any further addition of deponent.—*BAKER v. MUNICIPAL COUNCIL OF PARIS* (1853), 10 U. C. R. 621.—CAN.

5742 vi. ———.]—The omission, in the *jurat*, of the name of the deponent, vitiates the affidavit.—*DICKY v. HERON* (circa 1863), 1 Ch. Ch. 293.—CAN.

5742 vii. ———.]—The addition of deponent is only descriptive, not an allegation of a fact.—*HOOD v. CROMKIE* (1868), 4 P. R. 279.—CAN.

5742 viii. ———.]—*Semble:* the omission to describe the parties in the intituling of an affidavit under Insolvent Act, 1875, ss. 9, 14, 18, is not a fatal objection, if the description appears in the body of the affidavit.—*McDONALD v. CLELAND* (1876), 6 P. R. 289.—CAN.

5742 ix. ———.]—In an action for false imprisonment of plff. it appeared that

he was arrested upon a *capias* issued by a justice of the peace.—*Held:* the affidavit upon which the *capias* was granted was sufficient, although it did not state the places of residence of the parties so as to show jurisdiction.—*TEMPERANCE & GENERAL LIFE ASSURANCE CO. v. INGRAHAM* (1901), 35 N. B. R. 510.—CAN.

5742 x. ———.]—Although an affidavit may be defective, in that it does not state the description of deponent, it is open to the judge, if he sees fit to hear the affidavit.—*BROWN v. BARRLETT* (1913), 13 E. L. R. 363; 13 D. L. R. 355.—CAN.

5742 xi. ———.]—The omission in one part of the affidavit of the addition of one of the parties is not material, especially when the addition is contained elsewhere in the affidavit. *Semble:* a title of an affidavit registering a judgment as a mortgage, although not containing the residence of one of the parties, would be sufficient when generally corresponding with the title of the judgment referred to in the body of the affidavit.—*DAVIES v. KENNEDY* (1868), 17 W. R. 305.—IR.

5742 xii. ———.]—A. B. was described in an affidavit as "Esquire." Upon objection taken it was proved that he was a miller & farmer, but it was not disproved that he was an esquire.—*Held:* the affidavit was sufficient.—*Re DOUGHERTY'S ESTATE, MURPHY, PETITIONER* (1868), 18 L. T. 188.—IR.

5742 xiii. ———.]—An affidavit made in an action by one of the parties thereto, who is described in the affidavit as plff. or deft., need not contain the addition or residence of the deponent.—*HARTE v. MCGILLIACH* (1871), 1 L. T. 537.—IR.

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addition.—*THEMANS v. FENN* (1837), Will. Woll. & Dav. 217.

5749. —[.] An affidavit by "A. B., of etc., plff., or deft., in this cause," is sufficient, without any further addition.

An affidavit, commencing in these terms, "R. J. late of the city of W., victualler, but now of etc.," without any further addition:—*Held*: sufficient.—*ANGEL v. HILIER* (1839), 5 M. & W. 163; 151 E. R. 70.

5750. —[.]—*Held*: affidavits made in an action by plff. or deft. are exempted from the operation of the rule of Hilary Term, 2 Will. 4, which requires that the addition of every person making an affidavit shall be inserted therein.—*SHIBER v. WALKER* (1811), 2 Man. & G. 917; 9 Dowl. 667; Drinkwater, 211; 3 Scott, N. R. 235; Woll. 204; 10 L. J. C. P. 228; 133 E. R. 1015.

Annotation:—*Reid*. *Hudspeth v. Yarnold* (1850), 9 C. B. 625.

5751. — Foreigner temporarily in England.]

—A foreigner, whose general residence is abroad, & who only landed here for a temporary purpose, viz. to make an affidavit to hold deft. to bail, may properly describe his place of abode to be in his own country, & not at the place where the affidavit was sworn, within the meaning of the rule of ct.—*BOUHER v. KITTOE* (1802), 3 East, 154; 102 E. R. 556.

5752. Whether deponent can be presumed to be a party.—From identity of description.]—It cannot be presumed that an affidavit made by a baronet, who is party in a cause in which the affidavit is intitled, is made by the person who is a party, merely from the identity of the name & addition.—*DOE d. TAYLOR v. MEERS* (1836), 2 Har. & W. 135.

5753. —[.]—An affidavit was sworn by one of the parties in this cause, to whose name the title of elder was not added:—*Held*: nevertheless, the affidavit must be presumed to be that of the elder.—*YOUNG v. YOUNG* (1812), 6 Jur. 916.

5754. —[.]—In an affidavit made by deft. in a cause in support of a rule moved for by him, it is not necessary for him expressly to swear that he is deft.; it will be sufficient if it appear, with reasonable certainty, from the language of the affidavit, that he is so.

Where, therefore, on an application for a rule to compel plff. to give security for costs, deponent swore, that, on etc. he was served with a copy of a writ of summons, purporting to be issued out of the ct. at the suit of plff.:—*Held*: it sufficiently appeared that deponent was deft. in the action.—*LOUTHRELL v. PHILIPPE* (1846), 1 Saund. & C. 87; 10 Jur. 757.

5755. —[.] (1) The affidavit in support of a suggestion to deprive plff. of costs under the County Cts. Act, 1888 (c. 43), was made by a party of the same Christian & surname as deft., & stated the necessary facts to bring the case within

sect. 128 of above Act; but it nowhere expressly stated that deponent was deft. in the action:—*Held*: sufficient, if a person of ordinary senses reading it candidly, could not doubt that they were one & the same person.

(2) The affidavit in support of a suggestion stated "that the residence of this deponent was at the commencement of this suit, & still is, within the jurisdiction of the county ct., & that no officer of the county ct. was or is a party to this action":—*Held*: a sufficient averment that no officer was a party, at the time of the commencement of the action.—*NIND v. JONES* (1850), 1 L. M. & P. 275; 19 L. J. Q. B. 321; 15 L. T. O. S. 117; 15 Jur. 562; 14 J. P. Jo. 320.

B. Non-Parties.

(a) Description.

See, now, R. S. C., Ord. 38, r. 8.

5756. Whether description necessary.]—Affidavit made in this country to verify the handwriting of a British vice-consul before whom an affidavit was made abroad must contain the addition of deponent.—*THURLT v. FABER* (1819), 1 Chit. 463.

5757. — Deponent described as prisoner.]

(1) Affidavit of prisoner in the Fleet is sufficient without deponent's addition, if it appear that he is a prisoner.

(2) If an affidavit in a cause in an English ct. be sworn in Ireland before one who is not a comr. of the English cts., the signature of such person must be verified.—*SHARP v. JOHNSTON* (1835), 2 Bing. N. C. 216; 4 Dowl. 324; 1 Hodg. 298; 2 Scott, 405; 5 L. J. C. P. 11; 132 E. R. 97.

Annotations:—As to (1) *Reid*. *Brooks v. Farlar* (1836), 3 Scott, 654; *Jervis v. Jones* (1836), 1 Har. & W. 654. *Generally*. *Mentid*. *Robins v. Grant* (1837), Will. Woll. & Dav. 373; *Seymour v. Maddox* (1850), 1 L. M. & P. 543.

5758. —[.]—*In the Goods of* BERNARD, No. 6053, *post*.

5759. —[.]—The omission of deponent's addition in an affidavit constitutes an irregularity only & may be waived. When a rule nisi had been obtained to strike two attorneys in partnership off the rolls, & on showing cause against the rule the two appeared separately, & counsel for one took objection to the affidavit on which the rule had been obtained on the ground that it did not give deponent's addition, but counsel for the other waived the objection so far as his client was concerned:—*Held*: though the rule must be quashed so far as it related to the one, counsel for the other might proceed to show cause against the rule so far as it concerned his client.—*Ex p. KING* (1872), L. R. 7 C. P. 74; 41 L. J. C. P. 59; *sub nom. Re P. & W.*, *Ex p. KING*, 25 L. T. 935; 20 W. R. 316.

5760. — Deponent identified by notarial certificate.]—The ct. allowed a certificate of acknowledgment under Fines & Recoveries Act, 1833 (c. 74), taken at Loch Haven, Pennsylvania,

5752 i. Whether deponent can be presumed to be a party. From identity of description.]—An affidavit made for a ca. sa. by plff. who has two Christian names, need not state the second, where his identity sufficiently appears by the affidavit describing him as the above plff.—*PERKINS v. CONNOLLY* (1840), 9 O. S. 2.—*CAN.*

5752 ii. —[.]—*Held*: on the affidavits set out in the report of this case, it sufficiently appeared that the person applying to quash a bye-law of the city of K. was a resident of the city.—*KINGHORN & KINGSTON CORPN.* (1866), 26 U. C. R. 130.—*CAN.*

n. What is sufficient description.]—The affidavit of a witness was granted for a writ of *habeas corpus* was granted described deponent as "H. M. of H., in the county of ... the place of residence of deponent shown.—*MURRAY v. KAYE* (1899), 32 N. S. R. 206.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 3.— B (a).

5756 i. Whether description necessary.]—Deponent's Christian names must be given in full.—*WESTOVER v. BURNHAM* (1840), 1 Ont. Dig. 191.—*CAN.*

5756 ii. —[.]—If an affidavit on which a rule nisi was granted is defective in not stating deponent's addition, it may be objected to by the opposite party on showing cause.—*Ex p. BOIS* (1884), 24 N. B. R. 159.—*CAN.*

5756 iii. —[.]—On an application to set aside a writ of *replevin* under R. C. Stats. 1873 (c. 24):—*Held*: the affidavit under sect. 4 need not state that deponent is the "servant" or "agent" of claimant.—*KEEFER v. TODD* (1885), 1 R. C. R. pt. 7, 249.—*CAN.*

to be filed, notwithstanding that the *jurat* of the affidavit of verification was defective, in not naming the place where the acknowledgment was taken, or describing deponent, there being a notarial certificate identifying the place & the parties.—*Re COLDWELL* (1875), 1 L. R. 10 C. P. 667.

5761. What is sufficient description—"Gentleman."—"Gentleman" is a good description of a clerk in the Post Office.—*WOOD v. RAY* (1834), 2 Dowl. 692.

Annotation:—**N.F.** Anon. (1847), 10 L. T. O. S. 310.

5762. ————**]**—The description of a surety in the affidavit under Judgments Act, 1837 (c. 110) as "gentleman," he being a clerk in the office of the General Steam Navigation Co., is incorrect, & vitiates the affidavit.—*ANON.* (1847), 10 L. T. O. S. 310.

5763. ————**In affidavit of fitness.**—It is not sufficient to describe a person making an affidavit of the fitness of a new trustee merely as a "gentleman."—*Re ORDE* (1883), 24 Ch. D. 271; 52 L. J. Ch. 832; 49 L. T. 430; 31 W. R. 801, C. A.

Annotations:—**Expld. & Distd.** *Re* Dodsworth, Spence v. Dodsworth, [1891] 1 Ch. 657. **Mentd.** *Re* Ambler's Trusts (1888), 59 L. T. 210.

5764. ————**]**—In support of a petition for the appointment of a new trustee in the place of a trustee who had become lunatic, two affidavits were filed as to the fitness of the person proposed to be appointed.

The deponent of one affidavit was described as a "gentleman" the other deponent being described as an accountant. Each affidavit described the proposed new trustee as a "gentleman" but also stated that he was a person of independent means:—*Held*: (1) the description of deponent as a "gentleman" was insufficient; the position in life of deponent ought to be stated, so as to enable this ct. to judge whether his evidence was reliable, & the costs of the affidavit must be disallowed; (2) the other affidavit was sufficient.—*Re HORWOOD* (1886), 55 L. T. 373, C. A.

Annotation:—*As to* (1) **Expld. & Distd.** *Re* Dodsworth, Spence v. Dodsworth, [1891] 1 Ch. 657.

5765. ————**]**—The decision in *In re Orde*, No. 5763, *ante*, does not justify the control office in refusing to file any affidavit in which the deponent is described only as "a gentleman."

When the ct. has . . . to consider the question of the fitness of a proposed new trustee, the value & weight of deponent's evidence ought to be supported by some further & better description than the somewhat vague term of "gentleman," that it may be able to judge whether his evidence as to the fitness of the proposed new trustee can be relied on (*CURRY, J.*).—*Re DODSWORTH, SPENCE v. DODSWORTH*, [1891] 1 Ch. 657; 61 L. T. 282; 39 W. R. 362; *sub nom.* *Re DODSWORTH, SPENCE v. DODSWORTH*, 60 L. J. Ch. 798.

5766. ————**"Clerk to ———"]**—"A. B. of No. 21 Tokenhouse Yard, in the city of London, clerk to C. D. of the same place," is a sufficient description of deponent in an affidavit.—*COOPER v. FOLKES* (1840), 1 Man. & G. 942; 9 Dowl. 46; Drinkwater, 62; 2 Scott, N. R. 200; 133 E. R. 614.

Annotation:—**Mentd.** Needham v. Bristow (1842), 4 Scott, N. R. 773.

5767. ————**]**—In support of a motion to

5761 l. What is sufficient description—"Gentleman."—In an affidavit it is not sufficient to describe deponent as a "gentleman" if he has a trade or profession.—*SPADACINI v. TREACY* (1899), 21 L. R. Ir. 553.—**IR.**
o. ————*Now acting for plaintiff.*
—Deponent, not being pltf. himself,

did not describe himself as servant or of pltf., but used the words, "now acting for" pltf.—*Held*: this alone would have been insufficient; but the affidavit went on to state other facts from which the agency might be inferred; & an application to set aside the writ was therefore

dispauper deft., an affidavit was filed, which was made by a party who described himself merely as clerk to Messrs. A. & Co., solrs.:—*Held*: this was sufficient.—*BODDINGTON v. WOODLEY* (1842), as reported in 12 L. J. Ch. 15.

Annotations:—**Mentd.** Kydd v. Liverpool City Watch Committee (1908), 72 J. P. 113; *Re* Atkin's Trusts, Smith v. Atkin, [1909] 1 Ch. 471.

5768. ————**]**—"H. B., clerk to the above named deft.," is not a sufficient description of deponent in an affidavit.—*ELTON v. MARTINDALE* (1847), 5 Dowl. 248.

Annotation:—**Folld.** Winch v. Williams (1852), 12 C. B. 416.

5769. ————**]**—An affidavit upon which a rule was obtained described deponent as "Benjamin Lawrence, clerk to Messrs. Thomas Frederick Beale & William Chappell, of No. 211, Regent street, in the county of Middlesex, music publishers":—*Held*: a sufficient description, notwithstanding General Rules of Hilary Term, 1853, r. 138.—*Re PHILP* (1853), 21 L. T. O. S. 170; 1 W. R. 449.

5770. ————**"Clerk."**—Deponent in an affidavit was described as "M. B., clerk — S. N.," the word "to" being omitted:—*Held*: insufficient.—*SHAKEPEAR v. WILLAN* (1850), 19 L. J. Ex. 184; 14 Jur. 92.

5771. ————**"Process server."**—"Process server" is a sufficient addition in an affidavit.—*PHILLIPS v. BASFORD* (1840), 4 Jur. 52.

5772. ————**"Agent for plaintiff."**—In an affidavit "W. A., of No. 37, Threadneedle Street, agent for the above named pltf. in this cause," is a sufficient description of deponent's degree.—*JENKINS v. GROOMBRIDGE* (1842), 2 Dowl. N. S. 332; 12 L. J. Q. B. 99; 7 Jur. 87.

5773. ————**"Articled clerk."**—"Articled clerk" is not a sufficient addition of the person making an affidavit. The business of the master to whom he is articled clerk should be stated.—*R. v. REEVE* (1843), 4 Q. B. 211; 3 Gal. & Dav. 560; 114 E. R. 877.

Annotation:—**Appld.** Cobbett v. Oldfield (1847), 8 L. T. O. S. 394.

5774. ————**"Widow."**—Where an application is made to the ct. under Fines & Recoveries Act, 1833 (c. 74), s. 91, to dispense with the concurrence of the husband in a conveyance of the wife's property, an affidavit describing her as a "widow" is informal.—*Re NOY* (1843), 7 Scott, N. R. 434.

Annotation:—**Folld.** *Re* Anderson (1857), 2 C. B. N. S. 118.

5775. ————**"Wife or widow."**—Upon a motion for an order to enable a married woman to execute a conveyance without her husband's concurrence, under Fines & Recoveries Act, 1833 (c. 74), s. 91, the ct. declined to receive an affidavit in which she was described as "wife or widow of W. A."—*Re ANDERSON* (1857), 2 C. B. N. S. 118; 140 E. R. 356.

5776. ————**"Lawful widow & relict."**—M. in the oath for extrix., described herself as of, etc. "the lawful widow, & relict of deceased" without any other addition. The affidavit was rejected in the registry as contrary to the practice, on the ground that deponent might be a married woman notwithstanding the terms of the addition:—*Held*: the addition was sufficient.—*In the Goods of MORGAN* (1863), 32 L. J. P. M. & A. 139; 27 J. P. 504; 11 W. R. 749.

Annotation:—*Refused.*—*ARNOLD v. HAMILTON* (1854), 1 P. R. 263.—**CAN.**

p. ————**"Liquidator."**—The description of deponent in the affidavit, as "one of the liquidators" of the bank, was a sufficient allegation of that fact.—*CENTRAL BANK OF CANADA v. FAIRLE* (1889), 28 N. B. Ir. 173.—**CAN.**

Sect. 11.—Form and contents of affidavit: Sub-sect.

5777. — “**Stockbroker.**”]—An affidavit by a person who is a stockbroker does not state the description & true place of his abode by describing him as “Stock Exchange, stockbroker.”—*Re LEVY, LEVIN v. LEVIN* (1889), 60 L. T. 317; 37 W. R. 396.

5778. — “**Director of public companies.**”]—In a debenture holders’ action by plffs., S. had been by order of Nov. 27, 1916, appointed receiver & manager of the property & assets of defts. In an affidavit of C., described as a “director of public companies,” he stated that for five years past he had known S., of No. 1, R. street, A., “accountant,” the proposed receiver & manager, that the accountant had carried on business as such for upwards of five years at No. 1 R. street & elsewhere in the City of London & that S. was a person of respectability & a fit & proper person to be appointed receiver & manager of defts.’ property & assets. S. was, according to the evidence, secretary to a political league, & had an office at No. 1, R. street for two months past, & there was no evidence that he had carried on business as an accountant. On motion to discharge S. from the receivership:—*Held*: “Director of public Cos.” or “merchant” is not a proper description of deponent in an affidavit, & does not conform to the requirements of R. S. C., Ord. 38, r. 8.—*Re CHURCH PRESS, LTD., VICTORIA HOUSE PRINTING CO., LTD. v. CHURCH PRESS, LTD.* (1917), 116 L. T. 247.

5779. — “**Merchant.**”]—*Re CHURCH PRESS, LTD., VICTORIA HOUSE PRINTING CO., LTD. v. CHURCH PRESS, LTD.*, No. 5778, *ante*.

(b) Residence.

See, now, R. S. C., Ord. 38, r. 8.

5780. “**Late of**”—**Where new residence.**]—Where deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, describing himself *bond fide* in an affidavit in ct. as late of such prison, is sufficient to satisfy the rule of ct. of Michaelmas Term, 1663, ordering the true place of abode of every person making affidavit in the King’s Bench to be inserted. But deponent who had left one place of residence, & resided in another would not satisfy the rule by describing himself as late of the former. — *SEDLEY v. WHITE* (1809), 11 East, 528; 103 E. R. 1108.

Annotation: *Reid, Stuart v. Gaveran* (1836), 1 Har. & W. 699.

5781. — — — — —.]—It is not sufficient in an affidavit to describe deponent as “late of etc.” If an affidavit be joint, an objection to the description of one of deponents does not render the statements of the other inadmissible.—*Ex p. EDMONDS* (1837), 5 Dowl. 702; Will. Woll. & Dav. 369; *sub nom. Re WESTLAKE, Ex p. EDMONDS*, 1 Jur. 515.

5782. — — — — —.]—**“But now of.”**]—*ANGEL v. IHLER*, No. 5749, *ante*.

5783. — — — — —.]—An affidavit of debt, in which deponent described himself as “late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle”:—*Held*: sufficient.—*v. GAVERAN* (1836), 1 Har. & W. 699.

5784. **What is sufficient—Attorney’s clerk.**]—**If address of master stated.**]—The residence of an

attorney’s clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated.—*BOTTOMLEY v. BELCHAMBER* (1835), 4 Dowl. 26; 1 Har. & W. 362.

5785. — — — — —.]—In an affidavit by an attorney’s clerk, it is unnecessary for him to state his own residence, if he states that of his master.—*STRIKE v. BLANCHARD* (1836), 5 Dowl. 216; 2 Har. & W. 329.

5786. — — — — —.]—“A. B., clerk to C. D., deft.’s attorney” is not a sufficient description of deponent.—*DANIELS v. MAY* (1836), 5 Dowl. 83; Tyr. & Gr. 834.

Annotation:—*Folld, Winch v. Williams* (1852), 12 C. B. 416.

5787. — — — — —.]—**Barrister’s clerk.**]—In an affidavit deponent described himself as “S., clerk to E. J., Esq., barrister-at-law & assessor of the Ct. of Passage of the borough of L.”:—*Held*: insufficient for not stating deponent’s place of residence.—*WINCH v. WILLIAMS* (1852), 12 C. B. 416; 21 L. J. C. P. 216; 16 Jur. 935; 138 E. R. 968.

5788. — — — — —.]—“**Strand.**”]—A description of deponent in an affidavit as of the Strand, without giving the number, held sufficient.—*NOWELL v. HART* (1837), Will. Woll. & Dav. 394.

5789. — — — — —.]—“**Mitre Tavern, Greenwich, in the hundred of Blackheath.**”]—The 74th sect. of a local Act provides, that, if any action or suit for any amount recoverable in the local ct. [of requests] shall be brought elsewhere, & it shall appear to the judge or judges of the ct. in which the trial shall be had, that, at the time of commencing the action, the deft. “was within the jurisdiction of the ct. of requests, & was liable to be warned & summoned before the ct. for such debt or demand,” plff. shall have no costs, but costs shall be awarded to deft. Upon a motion under this Act, deft. in his affidavit described himself as of “the Mitre Tavern, Greenwich, in the hundred of Blackheath,” & swore that he was, “before & at the time of the issuing the writ, wholly resident at the above tavern, & was liable to be warned & summoned to the ct. of requests for the hundred of Blackheath”:—*Held*: a sufficient affidavit of residence within the local jurisdiction, to entitle him to costs.—*BURTON v. CAMPBELL* (1838), 5 Scott, 582; 2 Jur. 81.

5790. — — — — —.]—“**Stock Exchange.**”]—*Re LEVY, LEVIN v. LEVIN*, No. 5777, *ante*.

SUB-SECT. 4. SIGNATURE OF DEPONENT.

5791. How signed—Christian & surname in full.

—All affidavits must be signed with the full Christian & surname of deponent, otherwise they cannot be read.—*Re CUMBERLAND (PRINCESS)* (1830), 8 L. J. O. S. C. P. 109.

5792. — — — — —.]—**Christian names contracted.**]—*HANDS v. CLEMENTS*, No. 5678, *ante*.

5793. — — — — —.]—**Illiterate person.**]—A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file.—*v. CHRISTOPHER* (1841), 11 Sim. 409; 10 L. J. Ch. 145; 59 E. R. 931.

5794. — — — — —.]—**Foreigner.**]—*ST. KATHERINE DOCK CO. v. MANTZOU*, No. 5866, *post*.

5795. Omission of signature—In accordance with practice of foreign court.]—(1) An affidavit

PART VII. SECT. 11, SUB-SECT. 4.

5792 i. How signed—Christian name contracted.]—An affidavit, made by “William D. Baby,” signed “W. I

Baby”:—*Held*: sufficient.—*FOLGER v. McCALLUM* (1852), 1 P. R. 352.—*CAN.*

5792 ii. — — — — —.]—It is no objection that the second Christian name of a

deponent to an affidavit of the execution of a chattel mortgage, is not written in full, but the initial only given.—*DEFOREST v. BUNSELL* (1858), 15 U. C. R. 370.—*C*

of verification of the certificate of the acknowledgment of a married woman under Fines & Recoveries Act, 1833 (c. 74), the parties being resident in Germany, must be sworn before a native et., & an affidavit sworn before the English consul is not sufficient.

(2) It is no objection to an affidavit sworn before a native et., that it is originally in the German language, if it is translated, & the translation verified; & the oath may be administered in the German language if it is translated by an interpreter to deponent.

(3) It is sufficient that the affidavit should be signed by the judge of the country, & that deft.'s signature should not be attached, the judge's signature being verified, & an affidavit being produced that such is the course of practice in Germany.—*Re EADY* (1838), 6 Dowl. 615.

Annotation:—As to (3) *Apld. Re Howard, Re Ashcroft* (1874), L. R. 9 C. P. 347.

5796. —.]—An affidavit not signed by deponent, but having been sworn before a justice of the peace in America, whose signature was duly certified by the governor of that state, was refused to be filed by the clerk in the affidavit office. On motion, the ct. refused to order the clerk to file the affidavit. *Qu.*: whether the defect could be supplied by the production of another affidavit verifying the former as an exhibit.—*ANDERSON v. STATHER* (1845), 6 L. T. O. S. 216; 9 Jur. 1085.

5797. —.]—The affidavit verifying the certificate of an acknowledgment taken by special comrs. in the East Indies left a blank for the place of abode of one of the comrs.; but, as the affidavit stated that he was "the other comr. in the certificate mentioned," the ct. allowed it to pass. The affidavit was not signed by deponent. The *jurat*, however, stated that it was sworn before a magistrate & justice of the peace (who duly described his office or authority) by deponent:—*Held*: the defect was cured.—*Re HOWARD, Re ASHCROFT* (1874), L. R. 9 C. P. 347; 43 L. J. C. P. 245; 30 L. T. 471; 22 W. R. 653.

5798. When affidavit resworn—Whether further signature necessary.—An affidavit resworn need not be re-signed by deponent.—*LIEFFIN v. PITCHER* (1842), 6 Jur. 537.

5799 Where second signature unnecessarily attached.—An affidavit made by a married woman before a notary abroad, was signed by the husband as well as the wife. In another case the notarial *jurat* appended to an affidavit was worded "sworn to & subscribed before me," without specifying by whom the affidavit was sworn:—*Held*: in both cases the affidavits might be received.—*GATES v. BUCKLAND* (1861), 5 New Rep. 32; 13 W. R. 67.

5796 i. Omission of signature.—*PASSMORE v. HARRIS* (1848), 4 U. C. R. 344.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 5.—A.

5801 i. Effect of omission.—If the words "before me" are omitted from the *jurat* of an affidavit, it is a nullity.—*LYONS v. ALLISON* (1862), 5 All. 367.—*CAN.*

5801 ii. —.]—The omission of the date & words "before me" from the *jurat* of an affidavit accompanying a bill of sale makes such affidavit void & the defect cannot be supplied by parol evidence in proceedings by a creditor of the assignor against the mortgaged goods.—*ARCHIBALD v. HUBLEY* (1890), 18 S. C. R. 116.—*CAN.*

g. Omission of "deponent appeared to understand."—When sworn by an illiterate person, the omission in the *jurat* of the statement that the de-

ponent appeared to understand it is fatal.—*MOORE v. JAMES* (1830), Dra. 245.—*CAN.*

r. Omission of "duly."—Under 7 Vict. c. 31, the *jurat* must state that the affidavit was duly read over & explained to deponent; the omission of the word "duly":—*Held*: fatal.—*THAYER v. HENSLEY* (1845), 1 U. C. R. 335.—*CAN.*

s. Omission of "me."—A *jurat* to an affidavit "Sworn before at, etc.," omitting the word me:—*Held*: sufficient, for all might be read as one continuous sentence, when it would mean that it was sworn before the comr. signing.—*MARTIN v. McCHARLES* (1866), 25 U. C. R. 279.—*CAN.*

t. "Fully" instead of "perfectly."—The affidavit on which a rule nisi for a *certiorari* was granted was made by a marksman. Objection

5800. Position of signature.—*DOWN v. YEARLEY*, [1874] W. N. 158.

SUB-SECT. 5.—JURAT.

A. Omissions by Commissioner.

See also R. S. C., Ord. 38, r.

5801. Effect of omission.—It is no objection to the validity of an affidavit sworn at a judge's chambers, that the *jurat* does not describe it as having been sworn "before" the judge; *aliter*, in the case of a comr.—*EMPEY v. KING* (1844), 13 M. & W. 519; 2 Dow. & L. 375; 1 New Pract. Cas. 174; 14 L. J. Ex. 48; 8 Jur. 1034; 153 E. R. 216.

Annotations:—*Distd.* *Graham v. Ingleby* (1848), 1 Exch. 651. *Reid*, R. v. Norbury (1846), 6 Q. B. 534, n.; *Thorne v. Jackson* (1846), 3 C. B. 661; *Eddowes v. Argentine Loan & Agency Co.* (1890), 59 L. J. Ch. 392. *Mentd.* R. v. Ratcliffe Culey (1846), 10 Jur. 661.

5802. —.]—The *jurat* of an affidavit purporting to be sworn by E., was drawn as follows: "Sworn at B. in the county of O., Feb. 8, 1844. W. M., a comr.," etc.:—*Held*: a fatal objection that the words "before me" were not inserted between the date & the signature, though an exhibit was annexed having subscribed to it the words, "This is the notice referred to in the annexed affidavit of E. sworn before me Feb. 8, 1844. W. M."—*R. v. BLOXHAM (INHABITANTS)* (1844), 6 Q. B. 528; 2 Dow. & L. 168; 1 New Pract. Cas. 76; 1 New Mag. Cas. 123; 1 New Sess. Cas. 370; 14 L. J. Q. B. 13; 4 L. T. O. S. 132A; 9 J. P. 101; 8 Jur. 1117; 115 E. R. 197.

Annotations:—*Consd.* *Empey v. King* (1844), 1 New Pract. Cas. 174. *Folld.* R. v. Norbury (1846), 6 Q. B. 534, n.; *Graham v. Ingleby* (1848), 1 Exch. 651. *Reid*, R. v. Ratcliffe Culey (1846), 9 Q. B. 18.

5803. —.]—An affidavit was taken by a comr., in which the words "before me," in the *jurat*, were omitted:—*Held*: a nullity.—*R. v. NORBURY (INHABITANTS)* (1846), 6 Q. B. 534, n.; 1 New Pract. Cas. 481; 1 New Mag. Cas. 519; 2 New Sess. Cas. 344; 15 L. J. Q. B. 264; 7 L. T. O. S. 138; 10 J. P. Jo. 293; 115 E. R. 200.

Annotation:—*Folld.* *Graham v. Ingleby* (1848), 1 Exch. 651.

5804. —.]—An affidavit sworn before a comr., omitting in the *jurat* the words "before me," is bad.—*GRAHAM v. INGLEBY* (1848), 1 Exch. 651; 5 Dow. & L. 737; 3 New Pract. Cas. 53; 10 L. T. O. S. 307; 154 E. R. 277.

Annotation:—*Mentd.* *Park Gate Iron Co. v. Coates* (1870), L. R. 5 C. P. 634.

5805. —.]—The ct. being satisfied that an affidavit was sworn before the person who signed the *jurat*, though it was not so stated in it, made an order under Ord. 38, r. 14, that the affidavit should

be taken on showing cause that the certificate of the comr. before whom the affidavit was sworn was not a compliance with Rule 1 of Hilary Term 11 Vict., in that the word "fully" was used instead of "perfectly" in the clause "who signed perfectly to understand same":—*Held*: a sufficient compliance with the rule.—*Ex p. ALLAIN* (1900), 20 C. L. T. 87; 35 N. B. R. 107.—*CAN.*

a. Omission of identification of deponent.—*Affidavit sworn outside jurisdiction.*—A comr. of the Ct. of Exch. in Ireland for taking affidavits in the county of Middlesex omitted to certify in the *jurat* of an affidavit that he knew deponent, or any person who certified that he knew the party:—*Held*: the affidavit was thereby vitiated, & could not be used.—*CARROLL v. CORNELLE* (1845), 4 L. T. O. S. 246.—*IR.*

Secl. 11.—Form and contents of affidavit: Sub-secl. 5, A., B., C., D., E. & F.]

be received.—*EDDOWES v. ARGENTINE LOAN & AGENCY CO.* (1890), 59 L. J. Ch. 392; 62 L. T. 514; 38 W. R. 629; 6 T. L. R. 261, C. A.
Annotation:—Consd. Re Clonke (1891), 61 L. J. Ch. 69.

B. Place of Swearing.

See, now, R. S. C., Ord. 38, r. 5.

5806. Whether county must be stated.]—An affidavit of justification of bail, in the *jurat* of which it was stated to have been "sworn at Beverley," omitting the county, rejected.—*BOYD v. STRAKER* (1819), 7 Price, 662; 146 E. R. 1094.

5807. —.]—*R. v. BURN*, No. 5961, *post*.

5808. How stated.—By reference to body of affidavit.]—The place of swearing an affidavit may be stated in the *jurat*, by reference to the place in the body of the affidavit.—*GRANT v. FRY* (1810), 8 Dowl. 234.

5809. When dispensed with.—Affidavit taken abroad.—Acknowledgment of married woman.]—Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken.—*Re SHUFFLEBOTTOM* (1838), 6 Scott, 898.

Annotations:—Apld. Re Partridge (1855), 17 C. B. 18. *Follid. Re Sanderson* (1860), 8 C. B. N. S. 93. *Refd. Ex p. Hutchinson* (1848), 5 C. B. 499.

5810. —.]—*Ex p. HUTCHINSON*, No. 5841, *post*.

5811. —.]—The ct. allowed the certificate of an acknowledgment of a deed by a married woman, taken at Chippawa, in Upper Canada, under Fines & Recoveries Act, 1833 (c. 74), to be received & filed; although the affidavit of verification omitted to state the place where the acknowledgment was taken, there being sufficient on the face of the documents to satisfy them that the commission had been *bona fide* executed beyond the seas.—*Re PARTRIDGE* (1855), 17 C. B. 18; 25 L. J. C. P. 1; 26 L. T. O. S. 75; 1 Jur. N. S. 1140; 4 W. R. 12; 139 E. R. 971.

Annotations:—Follid. Re Sanderson (1860), 8 C. B. N. S. 93. *Refd. Re Booth, Re Colk, Re Foster* (1858), 4 Jur. N. S. 1301.

5812. —.]—The ct. allowed a special commission for taking the acknowledgment of a married woman in America, the certificate of the taking thereof, & the affidavit of verification, to be filed by the proper officer pursuant to Fines & Recoveries Act, 1833 (c. 74), s. 85, notwithstanding

that there was a slight defect in that part of the affidavit which negated the interest of the comrs., & that the *jurat* did not show where the affidavit was sworn.—*Re CHANDLER* (1856), 1 C. B. N. S. 323; 28 L. T. O. S. 125; 5 W. R. 122; 140 E. R. 134.

Annotations:—Follid. Re Coldwell (1875), L. R. 10 C. P. 667. *Refd. Re Denton* (1859), 33 L. T. O. S. 136.

5813. —.]—The ct. allowed a certificate of an acknowledgment taken at Adelaide under Fines & Recoveries Act, 1833 (c. 74), to be filed, notwithstanding the affidavit of verification omitted to mention the place where the acknowledgment was taken, it appearing by affidavit that the acknowledgment was taken at that place.—*Re SAUNDERSON* (1860), 8 C. B. N. S. 93; 29 L. J. C. P. 264; 141 E. R. 1100; *sub nom. Re SANDERSON*, 6 Jur. N. S. 1373; *sub nom. Re* —, 8 W. R. 417.

5814. —.]—*Re COLDWELL*, No. 5760, *ante*.

5815. —.]—Affidavit sworn abroad ordered to be filed, although the place at which it was sworn was omitted in the *jurat*.—*MEEK v. WARD* (1853), 10 Hare, App. I. i; 10 Hare, App. II. lv.; 21 L. T. O. S. 334; 1 W. R. 275; 68 E. R. 1113.

C. Date of Swearing.

See, now, R. S. C., Ord. 38, r. 5.

5816. Effect of omission.—Of date.]—*DOE v. ROE* (1819), 1 Chit. 574.

5817. —.]—A rule obtained on an affidavit the *jurat* of which is without date, will hereafter be discharged with costs.—*BLACKWELL v. ALLEN* (1840), 7 M. & W. 146; 10 L. J. Ex. 65; 151 E. R. 715.

Annotations:—Refd. Frost v. Hayward (1842), 10 M. & W. 673; *Cobbett v. Oldfield* (1847), 16 M. & W. 469; *Brunswick v. Harmer* (1850), 19 L. J. Q. B. 1.

5818. —Of month.]—If a declaration against a prisoner in custody be delivered on the last day of the term in which the writ is returnable, the affidavit of the delivery need not be filed till twenty days after the expiration of the following term.

If the month be omitted in the *jurat* of such affidavit it is defective, & cannot be amended.—*WOOD v. STEPHENS* (1819), 3 Moore, C. P. 236.

5819. —Of day.]—An affidavit, the *jurat* of which was: "Sworn Nov. — 1819":—*Held*: defective.—*BRUNSWICK (DUKE) v. HARMER* (1850),

1 Kerr, 88.—CAN.

I. Name of county abbreviated.]—The *jurat* to an affidavit on a chattel mortgage, was as follows: "Sworn before me at the Brantford of — in the county of Brantford, this 13th day of October, A.D. 1855: George W. Malloch, a commissioner for taking affidavits in the Queen's Bench, in & for the said county of Brant":—*Held*: sufficient.—*DEFORREST v. BURNELL* (1858), 15 U. C. R. 370.—CAN.

PART VII. SECT. 11, SUB-SECT. 5.—C.

5816 i. Effect of omission.—Of date.]—*ARCHIBALD v. HURLEY* (1890), 18 S. C. R. 116.—CAN.

5816 ii. —.]—The *jurat* to an affidavit did not mention the date upon which the affidavit had been sworn.—*Held*: the absence of the date was not a fatal defect, & even if it could be so considered at common law, such a defect would be cured by B.C. Oaths Act, & the B.C. Supreme Ct. Rule 415 of 1890.—*PAULSON v. BEAMAN* (1902), 23 C. L. T. 60; 32 S. C. R. 655.—CAN.

PART VII. SECT. 11, SUB-SECT. 5.—B.

5806 i. Whether county must be stated.]—"Sworn before me at B." not saying in what district:—*Held*: sufficient.—*RIDLEY v. WILKINS* (1848), 1 C. L. Ch. 26.—CAN.

5806 ii. —.]—In affidavits it is that the place where they are sworn to, but not the county should be stated in the *jurat*.—*ROCKWELL v. ROSS* (1868), 7 N. S. R. 183.—CAN.

5806 iii. —.]—"Sworn at T." without giving the name of a county:—"*Held*: sufficient.—*YEOMAN v. STEINER* (1871), 5 P. R. 466.—CAN.

5806 iv. —.]—*Held*: where the *jurat* to an affidavit was "sworn to at M., July 6, 1891," etc., without naming the county, the ntge. was void, notwithstanding the affidavit was headed "In the county of A."—*MOHR v. PHINNEY* (1894), 22 S. C. R. 563.—CAN.

5808 i. How stated.—By reference to body of affidavit.]—The *jurat* to an affidavit is sufficient if the place of swearing can be ascertained by reference to the body of the affidavit.—*Re*

Terr. L. R. 134.—CAN.

b. When dispensed with.—Official acting within authority.]—The *jurat* of an affidavit sworn before an attorney of this ct., being a comr. for taking affidavits, need not state the place where it was sworn.—*DOED. ANDOVER* KENNEDY N. B. R. 83.—CAN.

c. —.]—No mention was made in the *jurat* of the place of swearing the affidavit.—*Held*: the affidavit was sufficient, as it would be presumed, from the fact that the affidavit was on the face of it sworn before a comr. for taking affidavits in B.C., that the official acted within the territorial limits of his authority & not elsewhere.—*BROWN & FRIS v. JOWETT* (1895), 4 B. C. R. 44.—CAN.

d. Whether place must be stated.]—An affidavit not considered as insufficient because the place of taking it was omitted in the *jurat*.—*McLEAN v. CUMMING* (1824), Tay. 184.—CAN.

e. —.]—When the *jurat* omitted to state the place where an affidavit taken before a comr. was sworn, the ct. would not allow it to be read.—*GILMOUR & RANKIN v. Du*

1 L. M. & P. 505; 19 L. J. Q. B. 456; 15 L. T. O. S. 248; 11 Jur. 620.

5820. Effect of alteration.—If the date mentioned in the *jurat* of an affidavit is struck out with a pen, & the right date introduced, it is an excuse within the rule of *et. Michaelmas Term, 1796*, which will prevent the affidavit from being heard. —*CHAMBERS v. BARNARD* (1841), 9 Dowl. 557.

5821. Statement that sworn on Sunday.—*Qu.*: whether an affidavit which appears by the *jurat* to have been sworn in *et.* on a Sunday, is void. —*DOE d. WILLIAMSON v. ROE* (1845), 15 L. J. Q. B. 39.

5822. Informality in statement of date.—Where the *jurat* of an affidavit was, "Sworn by," *et.*, "at my chambers, Rolls Gardens, Chancery Lane, dated this 24th day of April, 1850," the *et.* discharged the rule, drawn up on reading such affidavit, on the ground that the *jurat* did not show the day on which the affidavit was sworn. —*Re LLOYD* (1850), 15 Q. B. 682; 1 L. M. & P. 545; 19 L. J. Q. B. 457; 14 Jur. 621; 117 E. R. 617.

Annotation.—*Refd.* Bell v. Port of London Assoc. (1850), 20 L. J. Q. B. 89.

5823. —[The *jurat* of an affidavit was in the following form: "Sworn by" "at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, eighteen hundred and fifty years, before me, G. R. T. a comr. for Scotland, for taking affidavits in the Ct. of Q. B. at Westminster." —*Held*: the date & the authority of the comr. were sufficiently stated. —*BELL v. PORT OF LONDON ASSURANCE CO.* (1850), 1 L. M. & P. 691; 20 L. J. Q. B. 89; 16 L. T. O. S. 155.

5824. Defective date in body—Explained by date in jurat.—Where an affidavit stated the date of a particular event to be "the 19th of this present month of Jan.," & the *jurat* gave the full date: —*Held*: sufficient. —*CRAIG v. LLOYD* (1849), 3 Exch. 232; 18 L. J. Ex. 165; 12 L. T. O. S. 378, 404; 151 E. R. 828.

5825. —[An affidavit, the *jurat* of which was of the "13th day of Jan., 1819," stated that deponent, "on this 13th day of Jan., previous to making this affidavit," searched the judgment book, & found that judgment was signed "this day": —*Held*: the date of the year, omitted in the affidavit, might be supplied by reference to the *jurat*. —*HOLMES v. LONDON & SOUTH WESTERN RY. CO.* (1849), 13 Q. B. 211; 6 Dowl. & L. 536; 18 L. J. Q. B. 87; 13 Jur. 81; 116 E. R. 1213.

Mistakes & omissions in affidavit.—See Subsect. 10, *post*.

5821 i. Statement that sworn on Sunday.—It is irregular to make an affidavit of debt on Sunday. —*HALL v. BRUSH* (1840), 1 Ont. Dig. 201.—**CAN.**

g. Jurat post-dated.—The *jurat* of an affidavit stated that it was sworn on a day which had not then arrived: —*Held*: the affidavit was a nullity. —*Re ROBERTSON* (1869), 5 P. R. 132.—**CAN.**

h. —[Affidavit purporting to be sworn on a day not arrived is bad. —*Ex p. EMERSON* (1895), 33 N. B. R. 340.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 5.—E.

5828 i. Effect of omission.—The want of a signature to a *jurat* of the affidavit of the applying creditor, upon which a warrant of attachment is issued under 26 Geo. 3, c. 13, is a fatal defect in the proceedings, & is not waived by an application for a *superveneas* by debtor. —*Ex p. NASON* (1833), N. B. Dig. 30.—**CAN.**

5828 ii. —[The *et.* refused without costs & rule for judgment *quasi*

nonsuit, for not proceeding to trial pursuant to notice, where the name of the comr. was omitted from the *jurat* in the copy of the affidavit stating *plff.*'s default, served on *plff.*'s attorney. —*BEYEE v. HAMM* (1870), 2 Han. 26.—**CAN.**

5828 iii. —[When the signature of the comr. to the affidavit of *bona fides* to a chattel mtge. was omitted through inadvertence: —*Held*: the instrument was invalid as against a subsequent execution creditor, although it was satisfactorily proved that the oath was in fact administered. —*NISBET v. COCK* (1879), 4 A. R. 200.—**CAN.**

5828 iv. —[A chattel mtge. is invalid & of no effect as against the execution creditors of the mtgor., where the *jurat* on the affidavit of execution filed with the mtge. has not been signed by the comr. before whom it was sworn. The signature of a person having authority to administer the oath is an essential part of an affidavit. —*INMAN v. BAK* (1895), 10 Man L. R. 411. —**CAN.**

5826. Defective date in jurat—Not explained by reference in another affidavit.—The want of a date in the *jurat* of an affidavit is not cured by a reference to it in another affidavit as "an affidavit of A. B. sworn on such a day." —*BRUNSWICK (DUKE) v. SLOWMAN* (1849), 8 C. B. 617; 14 L. T. O. S. 222; 137 E. R. 649; *subsequent proceedings* (1850), 1 L. M. & P. 247.

Annotation.—*Fold.* Brunswick v. Harnor (1850), 19 L. J. 1.

D. Name of Deponent.

5827. Where name omitted.—*GATES v. BUCKLAND*, No. 5799, *ante*.

E. Signature of Commissioner.

Sec. now, R. S. C., Ord. 38, rr. 5, 6.

5828. Effect of omission.—Where an affidavit was sworn in the usual way at a judge's chambers, but through mistake was not laid before the judge, & therefore the *jurat* was not signed by him, it was held irregular, & an order obtained upon such affidavit for a *capias*, & all the proceedings thereon were set aside; although after some days, but after the execution of the *capias*, the affidavit was laid before the judge, & signed by him. —*BILL v. BAMENT* (1841), 8 M. & W. 317; 10 L. J. Ex. 302; 5 Jur. 510; 151 E. R. 1000.

5829. —[A warrant for the committal of a bkpt. was expressed to be made on the reading of the affidavits therein referred to. The comr., before whom one of these affidavits was sworn, had omitted to sign the *jurat*: —*Held*: the warrant must be discharged, & the *et.* could not enter into the question whether there was enough in the other affidavits to support it, & the defect could not be cured by the comr. signing the *jurat* on the hearing of the application to discharge the warrant. —*Re HEYMANN, Ex p. HEYMANN* (1872), 7 Ch. App. 488; 26 L. T. 339; 20 W. R. 457, L. JJ.

F. Description of Commissioner.

Sec. now, R. S. C., Ord. 38, r. 5.

5830. General rule.—Where an affidavit is duly entitled in the *et.*, a *jurat* in these terms: "Sworn before A. B. a comr. *et.*," is sufficient. —*BURDEKIN v. POTTER* (1841), 9 M. & W. 13; 1 Dowl. N. S. 134; 11 L. J. Ex. 82; 5 Jur. 992; 152 E. R. 6.

Refd. *Re Chapman, Ex p. Johnson* (1884), 26 D. 538.

5831. Authority of commissioner—May be proved allunde.—To render the certified copy of

k. Whether presumed genuine.—The signature & seal of a person affixing same to an affidavit proving the due execution of a commission issued from this *et.*, will be presumed genuine until the contrary is proved. —*DOE d. LEMOINE v. RAYMOND* (1837), 5 G. S. 337.—**CAN.**

l. Omission of seal.—An affidavit to set aside pleas was sworn without the Province before a comr. appointed to take affidavits for use within the Province, but was not authenticated by the seal of the comr.: —*Held*: the affidavit could not be read. —*LEVIN v. BRIAND* (1884), 17 N. S. R. (5 R. & G.) 293.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 5.—F.

5830 i. General rule.—If an affidavit is properly entitled in the *et.*, it is sufficient in the *jurat* to describe the person before whom it is sworn "A comr. *et.*," Supreme Ct. —*Ex p. LEE v. STILES* (1847), 3 Kerr 366.—**CAN.**

Sect. 11.—Form and contents of affidavit: Sub-sect. 5. F., G. & H.]

the affidavit made by the proprietor of a newspaper evidence under 38 Geo. 3. c. 78, it must either appear upon the *jurat* that the person before whom it was made, had authority to take it, or this fact be proved *aliunde*.—*R. v. WHITE* (1811), 3 Camp. 98, N. P.

5832. "Commissioner" omitted.]—An affidavit of debt, sworn before a comr. in the country, without stating him to be a comr. in the *jurat*, is insufficient, although entitled in the ct.; & the ct. will not allow a supplemental affidavit to aid the defence, to be filed.—*HOWARD v. BROWN* (1827), 4 Bing. 393; 1 Moo. & P. 22; 6 L. J. O. S. C. P. 9; 130 E. R. 819.

*Annotations:—*Folld. Doe d. Hill v. Hill (1843), 1 L. T. O. S. 145. *Consd.* *Re* Chapman, *Ex p.* Johnson (1884), 26 Ch. D. 338. *Re*ld. Burdick v. Potter (1841), 9 M. & W. 13; Shaw v. Perkin (1841), 11 L. J. Q. B. 52; Cheney v. Curtiss (1863), 7 L. T. 680.

5833. ———.]—*DOE d. HILL v. HILL* (1843), 1 L. T. O. S. 145.

5834. ———.]—A certified copy from the Stamp Office of the return filed there by a banking co-partnership, under County Bankers Act, 1826 (c. 46), ss. 4, 5, is evidence, under sect. 6, that a person named in such return as a partner was so at the time of the *jurat*, though it be not proved that such return was delivered at the Stamp Office between Feb. 28 & Mar. 25, & though the return itself contain no date except that of the *jurat*, which is not between the above-mentioned days, & is much later than Mar. 25. The return was sworn to before Joseph Lomer, who was proved to be a magistrate of Southampton, but the words of the *jurat* were only, "Sworn before me at the town & county of Southampton, Nov. 9, 1839, Joseph Lomer"; not further stating the authority to administer the oath:—*Held*: sufficient. — *v. WOODFORD* (1843), 5 Q. B. 310; 1 Day. & Mer. 419; 13 L. J. Q. B. 93; 2 L. T. O. S. 227; 8 Jur. 242; 114 E. R. 1260.

*Annotations:—*Mentd. Bosanquet v. Graham (1843), 6 Q. B. 601; Harvey v. Scott (1847), 11 Q. B. 92; R. v. Stainforth (1847), 11 Q. B. 63.

5835. ———.]—The affidavit filed on the registration of a bill of sale was sworn before a comr. to administer oaths, but in the *jurat* he merely signed his name & did not add his title as comr.:—*Held*: this omission, the affidavit was sufficient. *Re* CHAPMAN, *Ex p.* JOHNSON (1884), 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693, C. A.

*Annotations:—*Mentd. Richardson v. Harris (1889), 22

5832 I. "Commissioner" omitted.]—*Held*: the mere signature was insufficient.—*HARCOCK v. TOWNSHIP OF BRIDFORD* (1850), 8 C. P. 527.—*CAN.*

5832 II. ———.]—The comr. taking the affidavit need not state himself to be a comr.—*MAREKAT v. CHAMBERS* (1847), 4 U. C. R. 171.—*CAN.*

5832 III. ———.]—The affidavit of bona fide in a chattel mtrg. purported to be sworn before "T. B. F." without any addition. The affidavit of execution was sworn before same comr., his name being followed by the words, "A. comr. in B. R.," etc.:—*Held*: no objection to the affidavit of bona fide.—*HAMILTON v. HARRISON* (1881), 46 U. C. R. 127.—*CAN.*

5832 IV. ———.]—An affidavit sworn before a comr., who did not, in the *jurat*, state that he was a comr. of that ct., not admitted.—*ANON.* (1823), 2 Ir. L. Rec. 1st Ser. 436.—*IR.*

5836 I. Commissioner abbreviated.]—The addition of the words "a commissioner, etc.," or "a commissioner," or "a comr." to the comr.'s signature

is sufficient. *Semble*: no addition is necessary.—*HENDERSON v. HARPER* (1815), 2 U. C. R. 97.—*CAN.*

5836 II. ———.]—*BROWN v. PAIR* (1845), 2 U. C. R. 98.—*CAN.*

5836 III. ———.]—*MURPHY v. BOULTON* (1847), 3 U. C. R. 177.—*CAN.*

5836 IV. ———.]—*PAWSON v. HALL* (1833), 1 P. R. 294.—*CAN.*

m. What amounts to statement of authority.—Police judge.]—Where the due taking of the evidence was sworn to by A. before B., who certified at the foot of the affidavit that he was "police judge" of a certain town in the state of K.; that A. was a person well known to him; & that he deposed before him the truth of the matters stated, & who signed the certificate with a scroll, O. in the place of a seal, adding that he had no notarial seal:—*Held*: upon an objection because there was no proof of the authority of B., & no seal attached to his name, the affidavit was duly executed, & be read.—*FAIRMORE v.* (1848), 4 U. C. R. 344.—*CAN.*

Q. B. D. 268; *Administrator-General of Jamaica v. Lascelles, De Merendo, Re* Ross' Bkpcy., [1894] A. C. 135; *Re* Smith, *Ex p.* Tarbuck (1894), 72 L. T. 59; *Baker v. Ambrose*, [1896] 2 Q. B. 372; *Darlow v. Bland*, [1897] 1 Q. B. 125; *Re* Rouard, *Ex p.* Trustee (1915), 85 L. J. K. B. 393.

5836. "Commissioner" abbreviated.]—It was objected to a party showing cause against a rule nisi that the affidavits on which he appeared to show cause were in the *jurat* attested thus, "A. B., Comr.," instead of "commissioner" written in full; but it also appearing from the office copy of the affidavits on which the rule was granted, that a similar abbreviation existed, the ct., as the office copies are always copies of the original, discharged the rule nisi on the objection raised against the affidavits in showing cause.—*HILL v. ROYSTER* (1843), 1 L. T. O. S. 293; 7 Jur. 930.

*Annotation:—*Consd. Munden v. Brunswick (1847), 4 C. B. 321.

5837. ———.]—An affidavit with a *jurat* signed "A. B. a comr. etc." is sufficient.—*MUNDEN v. BRUNSWICK (DUKE)* (1847), 4 C. B. 321; 2 New Pract. Cas. 213; 9 L. T. O. S. 126; 136 E. R. 530.

5838. What amounts to statement of authority.—"By commission."]—An affidavit purporting to be sworn before "H. B. by commission," sufficiently shows that H. B. was a comr. for taking affidavits.—*HOPKINS v. PLEDGER* (1843), 1 Dow. & L. 119; 12 L. J. Q. B. 313; 1 L. T. O. S. 261; 7 Jur. 941.

*Annotations:—*Folld. Fairbrass v. Pettit (1844), 12 M. & W. 453. *Mentd.* Clapperton v. Monteith (1844), 6 Man. & G. 909.

5839. ———.]—The *jurat* of an affidavit was in the following form: "Sworn before me, J. E. S., by commission":—*Held*: sufficient.—*FAIRBRASS v. PETTIT* (1844), 12 M. & W. 453; 13 L. J. Ex. 121; 2 L. T. O. S. 329; 8 J. P. 728.

*Annotation:—*Mentd. Balday v. Jenkins (1850), 14 J. P. Jo. 703.

5840. ——— "Judge of the Court of Common Pleas."]—An affidavit, the *jurat* of which stated it to be sworn at the judge's chambers, Chancery Lane, in the county of Middlesex, before a judge of the Ct. of Common Pleas, in the absence of any counter affidavit:—*Held*: sufficient.—*HEMSWORTH v. BRIAN* (1845), 1 C. B. 131; 2 Dow. & L. 814; 14 L. J. C. P. 131; 4 L. T. O. S. 315; 135 E. R.

*Annotation:—*Mentd. Rule v. Bryde (1847), 1 Exch. 151.

5841. ——— Authority to take oaths in foreign country.]—(1) A statement in the affidavit of verification of an acknowledgment under Fines &

n. ——— *Where not intitled in court.]*—Where the comr. designates himself, "A comr. in B. R. etc.," it is no objection that the affidavit is not intitled in any ct.—*ELLERY v. WALTON* (1857), 2 P. R. 147.—*CAN.*

o. ———.]—An affidavit in support of a motion to quash a by-law, not intitled in any ct., but sworn before a comr. styling himself "A Commissioner in B. R. & C. P." etc.:—*Held*: sufficient.—*KINGSTON & KINGSTON CORPN.* (1866), 26 U. C. R. 130.—*CAN.*

p. ———.]—If, in an affidavit intitled in a county ct. the comr., before whom it is sworn, describes himself as "a comr. etc., Supreme Ct.":—*Held*: as the affidavit was not properly intitled in the county ct., it could not be intended that the words "comr. etc." meant a comr. for taking affidavits.—*Ex p.* McQUARRIE (1884), 24 N. B. R. 287.—*CAN.*

q. ——— Commissioner for taking affidavits.]—The affidavit upon which was based a motion to set aside pleas

Recoveries Act, 1833 (c. 74), that it was taken "at Madeira" is sufficiently precise.

(2) The ct. received an affidavit sworn before the British consul in the island of Madeira, the *jurat* describing him as being authorised by the laws of the island to administer oaths there; & the affidavit being accompanied by a notarial certificate to the same effect.—*Ex p. HUTCHINSON* (1848), 5 C. B. 499; 5 Dow. & L. 523; 17 L. J. C. P. 111; 10 L. T. O. S. 393; 136 E. R. 973.

Annotation:—As to (2) *Folld. Re Cooper* (1865), 18 C. B. N. S. 220.

5842. ——— *Commissioner for Scotland for taking affidavits.*—*BELL v. PORT OF LONDON ASSURANCE CO.*, No. 5823, *ante*.

G. Joint Affidavits.

See, now, R. S. C., Ord. 38, r. 9.

5843. What must be stated.—That all deponents sworn.—In affidavits to be read, it must appear by the *jurat* that all deponents have been sworn.—*R. v. LONDON, SHERIFFS, PARLETT v. BARNETT* (1815), 1 Price, 338; 145 E. R. 1422.

5844. ——— *It is sufficient that affidavits appear expressly by the jurat to have been sworn by all deponents.*—*r.*—(1815), 2 Price, 1; 146 E. R. 1.

5845. ——— *Severally.*—The *jurat* of a joint affidavit must show that deponents were severally sworn.—*PARDOE v. TEUWITT* (1843), 5 Man. & G. 291; 6 Scott, N. R. 273; 12 L. J. C. P. 143; 7 Jur. 217; 134 E. R. 575.

5846. ——— *(1) In an affidavit, where there are two or more deponents, each should have an addition to his name besides a description; & where there is no such addition to each deponent, the affidavit cannot be used at all, although the other deponents may have additions, & the part deposed by them may be that only which would be most material, as the ct. cannot go through the affidavit to see how much one swore, & how much another.*

(2) The *jurat* of an affidavit should contain, & have written on it the name of the party purporting to be sworn; & where there is more than one sworn, the names of each deponent should be given in the *jurat* by which it should appear also that they were severally sworn. A rule *nisi* having been obtained upon an affidavit by two deponents, each having a separate *jurat*, without the name of either deponent appearing in either *jurat*:—*Held*: the rule must be discharged with costs.—*COBBETT v. OLDFIELD* (1847), 16 M. & W. 469; 4 Dow. & L. 492; 2 New Pract. Cas. 124; 16 L. J. Ex. 150; 8 L. T. O. S. 394; 153 E. R. 1273.

Annotation:—As to (1) *Reid. Re P. & W., Ex p. King* (1872), 25 L. T. 935.

5847. Names of all deponents.—Where an affidavit is sworn by two deponents, the names of both must be specified in the *jurat*.—*HOULDEN*

v. FASSON (1829), 6 Bing. 236; 3 Moo. & P. 559; 8 L. J. O. S. C. P. 18; 130 E. R. 1271.

Annotation:—*Reid. Lackington v. Atherton* (1843), 12 L. J. C. P. 143.

5848. ——— *—[A jurat to a joint affidavit of two deponents, "Sworn before me, C. C.," is insufficient.]—LACKINGTON v. ATHERTON* (1843), 2 Dowl. N. S. 904; 6 Scott, N. R. 240; 12 L. J. C. P. 143.

5849. ——— *—[COBBETT v. OLDFIELD, No. 5840, ante.]*

5850. ——— *—[Where there are two deponents to one affidavit, the names of both must be inserted in the jurat, & it is not sufficient to say, "sworn by both deponents." HARRISON v. THOMPSON* (1848) 3 New Pract. Cas. 57; 10 L. T. O. S. 308.

5851. ——— *—[The rule requiring that in affidavits sworn by more than one person the names of deponents should be written in the jurat, & forbidding any interlineation or erasure, will not be relaxed in favour of affidavits sworn abroad.]—Re PAGE* (1848), 10 L. T. O. S. 305.

See, also, Sub-sect. 6, post.

H. Illiterate Persons.

See, now, R. S. C., Ord. 38, r. 13.

5852. What should be stated.—That mark affixed in presence of commissioners.—An affidavit by a marksman must state that the mark was made in the presence of the court. *ANON.* (1815), 1 Chit. 92.

5853. ——— *—(1) Where an answer had been put in by an illiterate deft., unaccompanied by any affidavit by his solr. as to its having been read over & explained to him previously to his being sworn, & the jurat did not state that he had affixed his mark to it in the presence of the courts; ordered, upon motion, that the answer should be taken off the file, for irregularity, with costs.*

(2) Objections to the form of the *jurat* of an answer cannot be waived by the parties to the suit.—*PIRKINGTON v. HIMSWORTH* (1835), 1 Y. & C. Ex. 612; 5 L. J. Ex. Eq. 47; 160 E. R. 250.

Annotations:—As to (1) *Reid. Wilton v. Clifton* (1843), 12 L. J. Ch. 425. *Generally, Mend. A-G v. Thompson* (1849), 8 Hare, 106.

5854. Affidavit sworn abroad.—

(1) An erasure in a foreign affidavit in the recital of a death, the certificate whereof is proved as an exhibit, is immaterial, notwithstanding the notary, before whom the affidavit was sworn, had not affixed his initials to the erasure.

(2) The practice of verifying the mark of a marksman in an affidavit sworn abroad not requiring as in this country, the notary to insert in the *jurat* that "the witness saw deponent make his mark":—*Held*: the omission of these words was immaterial.—*SAVAGE v. HUTCHINSON* (1855), 3 Eq. Rep. 368; 24 L. J. Ch. 232; 25 L. T. O. S. 22.

as false, frivolous & vexatious, purporting to be sworn to at M. in the county of W. & province of N.B., before a court, for taking affidavits to be read in the Supreme Ct. of N.B., the court, at same time certifying that there was no court for N.S. at the place where the affidavit was sworn:—*Held*: the affidavit was properly received.—*HUMPHREY v. LE VATTE* (1892), 24 N. S. R. 187.—CAN.

r. ——— *"Commissioner etc."*—An affidavit of *bona fides* in a chattel mortgage sworn before a person who is in fact a court, authorised to take affidavits & for the high etc., but who after his signature in the *jurat*

only the words "A Court, etc.," is good.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TODD* (1895), 22 A. R. 315.—CAN.

PART VII. SECT. 11, SUB-SECT. 5.—G.

5843 l. What must be stated.—That all sworn.—An affidavit by two persons, not stating distinctly in the *jurat* that both were sworn, cannot be read.—*NICHOLSON d. SPAFFORD v. REA* (1833), 3 O. S. 85.—CAN.

5845 l. ——— *Severally.*—The words "sworn & affirmed," without saying which of the two deponents swore, & which affirmed, & omitting

the word "severally" in the affidavit to a mortgage.—*Held*: sufficient.—*MOYER v. DAVIDSON* (1858), 7 C. P. 521.—CAN.

5845 li. ——— *—[The jurat of an affidavit made by more than one person should state that each of the several deponents was sworn. The objection that the jurat does not contain such a statement is one of substance & not of form merely.]—Re CUNNINGHAM*, 2 J. R. N. S. 229.—N.Z.

5847 l. ——— *Names of all deponents.*—A *jurat* stating that two deponents, naming them, were sworn is sufficient.—*KEEFE v. HAWLEY* (1850), 1 P. R. 1.—CAN.

Sect. 11.—Form and contents of affidavit: Sub-sect. 5, H., I., J. & K.]

5855. ————*J.*—The *jurat* of an affidavit made by a person who cannot write must state that he affixed his mark to the affidavit. But if it omits that statement it may be amended without re-swearing the affidavit.—*WILSON v. BLAKEY* (1841), *Woll.* 126; 5 *Jur.* 367.

5856. ————*Before officer of court.*—In the *jurat* to an answer of an illiterate person, taken before the clerk of inrolments, it is not necessary that it should appear that on the answer being read over to deft., she appeared to understand it; nor that it should appear that her mark was put to it in the presence of the clerk of inrolments; nor that the signature of the clerk of inrolments should be placed at length, nor the description of his office be added. *WILTON v. CLIFTON* (1843), 2 *Harc.* 535; 12 *L. J. Ch.* 425; 7 *Jur.* 215; 67 *E. R.* 221.

5857. ————*That read over & explained & understood.*—The *jurat* to an affidavit by a marksman must state that it was understood by him as well as that it was read over & explained to him.—*ALWORTHY'S BAIL* (1815), 2 *Chit.* 92.

5858. ————*J.*—If an illiterate person is sworn in *ct.* or before a *comr.*, the fact of the affidavit being read over to him & his appearing to understand it must be stated in the *jurat*.—*HAYNES v. POWELL* (1835), 3 *Dowl.* 599.

5859. ————*J.*—*WILTON v. CLIFTON*, No. 5856, *ante*.

5860. ————*Explanation must be by commissioner.*—An affidavit of a marksman which expresses in the *jurat* that A. B. had been first sworn to the fact that he had read over & explained the affidavit to the marksman & that he understood it, is insufficient; the officer himself ought to explain it.—*R. v. MIDDLESEX, SHERIFF* (1836), 4 *Dowl.* 765.

5861. ————*Explanation in presence of commissioner.*—Affidavits made by an illiterate person were sworn with the usual form of *jurat* not containing the certificate required by R. S. C., Ord. 38, r. 13. The managing clerk of deponent's solr. deposed that he had prepared the affidavits from deponent's personal instructions, that he carefully read them over to him before they were sworn, & that deponent appeared perfectly to understand them. It was not, however, deposed that the affidavits were read over in the presence of the *comr.*: *Held*: there was no sufficient evidence to satisfy the *ct.* that the affidavits were

read over to & appeared to be perfectly understood by deponent within the meaning of the above rule, & that the affidavits must be taken off the file.—*Re LONGSTAFFE, BLENKARN v. LONGSTAFFE* (1881), 51 *L. J. Ch.* 516; 52 *L. T.* 681.

5862. ————*In presence of commissioner.*—Where deponent is an illiterate person, or marksman, it should be stated in the *jurat* that it was read over in the presence of the *comr.*—*ANON.* (1822), 1 *L. J. O. S. K. B.* 50.

5863. ————*J.*—*Semble*: the *ct.* will not grant permission to enter up judgment as an old warrant of attorney executed by a marksman, where it is only sworn that the warrant was duly executed & it is not stated that it was read over to deft.—*JAMES v. HARRIS* (1837), 6 *Dowl.* 181.

5864. ————*J.*—The *ct.* will hear the petition of a marksman, although the attestation of it is defective in not stating that the petition has been read to him; if petitioner's affidavit, being an echo of the petition, is expressed, in the *jurat*, to have been read to him.—*Re BROWN, Ex p. WASHBROOK* (1842), 2 *Mont. D. & De G.* 490; 6 *Jur.* 156, *Ct. of R.*

5865. *Effect of omission of jurat.*—Where affidavits made by marksmen have been properly read over to them before they made their mark, but the *jurat* stating that they had been so read had been omitted & the *comr.* after deponent had made his mark refused to supply the omission; the *ct.* on the refusal of the clerk of records & writs to file the affidavits without the *jurat* ordered the affidavits to be filed as they stood.—*FERNYHOUGH v. NAYLOR* (1875), 23 *W. R.* 228.

I. Foreigners.

5866. *Form of jurat.*—(1) It is not necessary, that deft., a foreigner, ignorant of the English language, should put in an answer in his native language. An answer in the English language is sufficient. It is not necessary that such deft. should apply, by motion or petition, for an interpreter. The answer of such a deft. had the following *jurat*: "Sworn at the office of the clerk of records & writs, by deft. M. M., by the interpretation of B. C.; the interpreter being first sworn that he had truly, distinctly, & audibly interpreted the answer to deft. & will truly interpret the oath about to be administered to him":—*Held*: this *jurat* was sufficient.

(2) The signatures of a Moorish Jew, a deft., to an answer, although differing from his name as

sufficient.—*COTTER v. BROWNELL* (1873), 1 *Pug.* 356.—*CAN.*

5863iv. ————*J.*—If the *jurat* of an affidavit, made by a marksman, states that it was read over to deft. by the *comr.* it will be presumed that it was so read before being sworn to.—*Ex p. McQUARRIE* (1881), 24 *N. B. R.* 287.—*CAN.*

5863v. ————*J.*—Where an affidavit is made by a marksman, the *jurat* should state that it was read & explained by the *comr.* to the party before it was sworn by him; & a statement in the margin that the affidavit was read & explained to the party by a third person, is insufficient.—*BREDIN v. BREDIN* (1845), 7 *I. Eq. R.* 501.—*IR.*

PART VII. SECT. 11, SUB-SECT. 5. I.

5866i. *Form of jurat.*—An affidavit drawn up in a language not understood by deponent cannot be read in *ct.*: it must be drawn up & sworn to in the language of deponent.—*Re AN GWAY*,

PART VII. SECT. 11, SUB-SECT. 5. H.

5857i. *What should be stated.—That read over & explained & understood.*—In the *jurat* of the affidavit of a marksman, upon which a rule had been obtained, instead of the words "he, or who," seemed perfectly to understand same," were the words "seemed fully to understand same":—*Held*: sufficient.—*Ex p. ALLAIN* (1900), 20 *C. L. T.* 87; 35 *N. B. R.* 107.—*CAN.*

5862i. ————*In presence of commissioner.*—The *jurat* to an affidavit for an order for replevin, made by an illiterate person, after the words "sworn, etc." contained the words, "& I certify that this affidavit was read in the presence of the deponent, & that the said deponent seemed perfectly to understand the same":—*Held*: the affidavit was bad, being apparently signed by an illiterate person, & there being no certificate that it was subscribed in the presence of the *comr.*—*KASSOP v. DAY* (1903), 36 *N. S. R.* 430.—*CAN.*

5862ii. ————*J.*—In the *Ch.*

Div. in the case of an affidavit made by an illiterate person, it is not necessary that the *jurat* should state that the affidavit was read over to deponent in the presence of the person before whom the affidavit was sworn.—*VEINER v. COCHRANE* (1889), 23 *L. R. Ir.* 422.—*IR.*

5863i. ————*J.*—Under 7 Vict. c. 31, the *jurat* must state that the affidavit was duly read over & explained to deponent.—*THAYER v. HENSLEY* (1845), 1 *U. C. R.* 335.—*CAN.*

5863ii. ————*J.*—The *jurat* of an affidavit made by an illiterate person must state that it was read by the *comr.* to deponent before swearing in the terms of the rule of Hilary Term, 1848.—*Ex p. IRVINE* (1852), 2 *All.* 472.—*CAN.*

5863iii. ————*J.*—The affidavit was objected to on the grounds that deponent was illiterate & there was no certificate of the affidavit having been read over:—*Held*: the objections taken to this affidavit were not

t. How amended — By insertion of names.)—Amendment allowed by insertion of names in *jural* of two

Sect. 11.—Form and contents of affidavit: Sub-sect. 5, K. & L.; sub-sects. 6 & 7, A. & B.]

5885. — By direction of judge.]—Where the names of deponents are omitted in the *jurat* through the inadvertence of the judge's clerk, it will be amended by direction of the judge.—*Ex p. SMITH* (1834), 2 Dowl. 607.

Annotations.—*Consd. R. v. Norbury* (1846), 6 Q. B. 534, n. *Reid. Re Wenham* (1848), 10 L. T. O. S. 444.

5886. After time for filing expired.—If originally sworn within time.]—Where an affidavit, sworn before a commr., was by that commr.'s own act sent up to the ct. in an imperfect state, the ct., though the time for filing affidavits had passed by, allowed it to be sent back to be made perfect, first being satisfied that it had originally been made in due time.—*Ex p. HALL* (1830), 8 L. J. Q. B. 211.

Annotation.—*Obtd. R. v. Bloxham* (1844), 6 Q. B. 528.

5887. Without reswearing.]—*WILSON v. BLAKEY*, No. 5855, *ante*.

L. Effect of Defective Jurat.

5888. Not removed from file—Unless scandalous or irrelevant.]—The ct. will not order an affidavit which is not shown to be scandalous or irrelevant, to be taken off the file merely because it cannot, upon some technical ground, such as a defect in the *jurat*, be read in the cause in which it is filed.—*BRUNSWICK (DUKE) v. SLOMAN* (1850), 1 L. M. & P. 247; 15 L. T. O. S. 92.

persons sworn to same affidavit.—*FISHER v. THAYER* (1837), 5 O. S. 513.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 5.—L.

a. Subsequent application not prejudicial.—The answers to interrogatories, being styled in the cause, and intituled in the proper ct., were headed, "The answers upon oath of," etc., & proceeding thus: "To the first interrogatory, he saith," etc. 2. "To the second interrogatory," etc., not adding he saith. To the fifteenth interrogatory only the figures 15 were affixed. The *jurat* stated that deponent was sworn, etc., " & made oath that the foregoing answers were true, on the 8th day of March, 1854."—*Held*: the form of the answers & the *jurat* were defective; & a summons obtained upon them was discharged.—*ADDY v. BROUSE* (1854), 1 P. R. 234.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 6.

b. Affidavit of merit.—Whether all should join in the affidavit of merit. Where two out of three defts. made affidavits, & only one swore to merits.—*Held*: insufficient.—*LIPPY v. AUSTIN* (1858), 4 All. 77.—**CAN.**

c. One witness swearing before the other.—One of the witnesses swore to the affidavit proving the execution of the memorial of a deed before the other witness.—*Held*: no objection.—*LEWIS v. WHITEHEAD* (1864), 10 Gr. 446; *reversd.* 2 N. & A. 580.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 7.—A.

5896 i. Statements must be on personal knowledge.]—An affidavit verifying the copy of a paper "that it is a true copy as the deponent is informed & verily believes," is insufficient.—*CHAPE v. PARR* (1845), 2 U. C. R. 98.—**CAN.**

5896 ii. —.]—As a general rule, each deponent should state in his affidavit the facts to which he swears, not by reference to the statements in other affidavits filed.—*Re CAMPBELL & BROWN* (1857), 3 P. R. 391.—**CAN.**

5896 iii. —.]—An affidavit made by plt.'s counsel, containing a mere general statement that the pleas are

false, frivolous or vexatious, as he has been informed by plt. & verily believes, though uncontradicted by an affidavit on the part of deft., is not sufficient.—*GIBSON v. KILBY* (1865), 1 Old. 724.—**CAN.**

5896 iv. —.]—Where application is made for an order for the appearance of an absent deft., the affidavit should state, if within plt.'s knowledge, whether such deft. has a known place of residence abroad, or should show that plt. has no means of ascertaining deft.'s residence.—*PUTNAM v. CANCO HAY* (1871), N. B. Dig. 648.—**CAN.**

5896 v. —.]—Affidavits are not verified by a bold general statement that the allegations in a pleading are true. They should contain a statement under oath of facts or circumstances which, taken together, prove the allegations to be true, from which the ct. or judge may be satisfied that the party applying has a *prima facie* case for defts. to answer.—*Re HODGES WINNIE* (1872), P. E. I. 254.—**CAN.**

5896 vi. —.]—*REYNOLDS v. WILLIAMSON* (1875), 25 C. P. 49.—**CAN.**

5896 vii. —.]—In order to support an order to hold deft. to bail, plt. need not disclose in his affidavit the names of the persons on whose information he founds his belief that deft. is about to leave the Province, where he files also other affidavits, stating facts which would justify such belief: in that case, it is the same as if the plt. had stated that these deponents had informed him of the facts stated in their affidavits.—*WATSON v. CHARLTON* (1876), 40 U. C. R. 142.—**CAN.**

5896 viii. —.]—In proceedings in insolvency by attachment the affidavit must state facts showing that defts. estate has become subject to compulsory liquidation; mere hearsay is not sufficient.—*COLWELL v. ROBERTSON* (1877), 1 P. & B. 481.—**CAN.**

5896 ix. —.]—An affidavit consisting of mere hearsay ought not to be put on the files of the ct.—*Re HOLSTEAD* (1881), 20 N. B. R. 512.—**CAN.**

5896 x. —.]—Dft.'s affidavit, stating his belief that he had a good defence on the merits.—*Held*: insufficient.—

SUB-SECT. 6.—JOINT AFFIDAVITS.

See, now, R. S. C., Ord. 38, r. 9.

5889. Affidavit defective as to one deponent—Admissible as to other.]—*NATHAN v. COHEN* (1835), 1 Har. & W. 107.

5890. —.]—*Ex p. EDMONDS*, No. 5781, *ante*.

5891. —.]—*GILL v. GILBERT* (1852), 9 Hare, App. I., xvi.; 68 E. R. 764; *sub nom. GILBERT v. GILL*, 1 W. R. 4.

5892. —.]—*In the Goods of WOODBURN* (1862), 31 L. J. P. M. & A. 89, n.

5893. Each deponent must have proper description.]—*CORBETT v. OLDFIELD*, No. 5846, *ante*.

SUB-SECT. 7.—STATEMENTS IN AFFIDAVIT.

A. In General.

See, now, R. S. C., Ord. 38, r. 3.

5894. Statement of words spoken—May be qualified "or words to that effect."—Not swearing expressly to words spoken, but adding, or to that effect, is a proper caution in an affidavit.—*AYLIFFE v. MURRAY* (1740), 2 Atk. 58; 28 E. R. 433, L. C.

5895. Statement of date—Must be precise.]—In the statement of a particular date in an affidavit, where that date is essential, it must be stated positively.—*WILLES v. JAMES* (1832), 1 Dowl. 498.

5896. Statements must be on personal know-

McDONALD v. POTTS (1882), 22 N. B. R. 146.—**CAN.**

5896 xi. —.]—A statement of plt.'s residence out of the jurisdiction, on information & belief is not sufficient.—*HOLLINGSWORTH v. HOLLINGSWORTH* (1883), 10 P. R. 58.—**CAN.**

5896 xii. —.]—The affidavit, in support of the petition for a winding-up order was made by a person who deposed upon information & belief, & upon cross-examination thereon it appeared that he had no personal knowledge of the matters deposed to:—*Held*: the affidavit must be treated as a nullity.—*Re ATLAS CANNING CO.* (1897), 5 B. C. R. 661.—**CAN.**

5896 xiii. —.]—Dft. was arrested upon an order for arrest granted on the affidavit of plt.'s solr. that he had probable cause for believing, & did believe, that deft., unless he was arrested, was about to leave the province.—*Held*: statement of belief that deft. is about to leave the province being all that is required under the practice to procure an order for arrest, deft. is entitled to be discharged if he negatives that intention, unless plt. can state facts from which it can be clearly inferred that it was the intention of deft. to leave.—*McLAUGHLIN CARRIAGE CO. v. FADER* (1901), 34 N. S. R. 534.—**CAN.**

5896 xiv. —.]—A winding-up order finally determines the rights of the parties; & a petition for such an order cannot be supported by statements on information & belief. A statement on affidavit by an accountant, who said that he had examined the books of the co. on behalf of petitioners & secured information from the presidents & manager, & that he had arrived at the conclusion that the co. was hopelessly insolvent, was an expression of his opinion, & was not evidence of the co.'s insolvency, nor of an acknowledgment by the co. of its own insolvency.—*Re MANITOBA COMMISSION CO.* (1912), 21 W. L. R. 86; 2 W. W. R. 276; 2 D. L. R. 1.—**CAN.**

5896 xv. —.]—Affidavits on information & belief are not sufficient to support a petition under Dominion Winding-up Act, 1906 (c. 144).—*Re*

ledge.]—**BROWN v. LAWRENCE** (1850), 15 L. T. O. S. 281.

5897. —. —.]—In support of a rule to enter a suggestion in order to deprive pltf. of costs in an action on a bill for £20, the affidavit of A. stated that the cause of action arose in a material point within the jurisdiction of City Small Debts Extension Act, 1852 (c. 77); that at the trial B. was called as a witness, & stated that he indorsed the bill to pltf. within that jurisdiction, & that C., being also called stated facts confirming B.'s statement. The affidavit of B. & C. in opposition to the rule, positively stated that the bill was indorsed to pltf. out of the jurisdiction of the City ct.:—**Held:** the affidavit of A. in support of the rule stated hearsay evidence in opposition to the positive oath of B. & C. & was insufficient, & that the rule must be discharged.—**LEE v. SANDELL** (1857), 26 L. J. Q. B. 165; 5 W. R. 270.

5898. —. —.]—**Except on interlocutory application.** —**BIRD v. LAKE**, No. 5909, *post*.
Interlocutory proceedings, *see* Sub-sect. 7, B., *post*.

5899. —. —.]—In a suit by a married woman to establish her equity to a settlement of leasehold & personal estate to which she was entitled as next of kin of her father & of her brother, a defence was set up by answer, on the part of the husband, on the ground of her intemperance & adultery, part of the evidence in support of that defence being an affidavit of a person stating a conversation with pltf.'s alleged paramour, in which the latter admitted acts of adultery:—**Held:** an affidavit of mere hearsay evidence ought to be removed from the file on the ground of irrelevancy.—

KERNICK v. KERNICK (1864), 9 L. T. 800; 12 W. R. 335.

5900. —. —.]—**PRACTICE NOTE**, [1870] W. N. 59.
5901. —. —.]—**Re PALMES, PALMES v. R.**, [1901] W. N. 146.

5902. Effect of evidence on belief only—Whether answer required.—Effect of affidavits as to facts on belief only, is to put the opposite party to answer them.—**BUSK v. BRETHAM** (1840), 2 Beav. 537; 48 E. R. 1290.

5903. —. —.]—**GILBERT v. ENDEAN**, No. 5904, *post*.

B. In Interlocutory Proceedings.

See, now, R. S. C., Ord. 38, r. 3.

5904. What is an interlocutory application—Not one finally deciding rights of parties.—Upon a proceeding which, though interlocutory in form, finally decides the rights of the parties, evidence on information & belief is not admissible, & the party against whom it is adduced is not bound to contradict it; but if in the ct. below he deals with the evidence as admissible, he may be precluded from objecting to it before the Ct. of Appeal.—**GILBERT v. ENDEAN** (1878), 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252, (C. A.).

Annotations.—**Reid**, *Re Diamond Fuel Co.* (1879), 13 Ch. D. 400. **Mentid.** *Re Gaudet Frères S.S. Co.* (1879), 12 Ch. D. 882; *Arkwright v. Newbold* (1881), 17 Ch. D. 301; *Charles v. Butson* (1895), 39 Sol. Jo. 346; *Turner v. Groen* (1895), 43 W. R. 537; *Ainsworth v. Wilding*, [1896] 1 Ch. D. 673; *Stephenson v. Garnett*, [1898] 1 Q. B. 677; *Halford v. Hardy* (1899), 81 L. T. 721; *Carver v. Roberts*, [1903] 2 Ch. 312; *Townend v. Townend* (1905), 93 L. T. 680; *Re Launder, Launder v. Richards* (1908), 98 L. T. 554.

5905. Affidavit may be on information & belief—

COLONIAL INVESTMENT CO. OF WINNIPEG (1913), 26 W. L. R. 361; 23 Man. L. R. 871.—**CAN.**

5896 xvi. —. —.]—In an action for the recovery of personal property the affidavit made by the manager of an incorporated co. under which the sheriff seized the property, which stated that he had personal knowledge of the facts deposed to, is sufficient without stating his means of knowledge.—**DALHOUSIE LUMBER CO. v. WALKER** (1916), 44 N. B. R. 81.—**CAN.**

5902 i. Effect of evidence on belief only—Whether answer required.—**R. v. WILKINSON** (1877), 41 U. C. R. 1.—**CAN.**

d. Statement of time of service.—The affidavit of service of a declaration in ejectment, & notice upon the tenant, must show the time when the declaration, etc., was served.—**DORR v. SHIRWOOD v. ROR** (1849), 5 U. C. R. 319.—**CAN.**

e. Statement of management of business—Showing source of information.—An affidavit by pltf.'s agent, stating that he had the management of all pltf.'s business in this country:—**Held:** sufficient to show his source of information.—**McEWEN v. BOULTON** (1869), 2 Ch. Ch. 398.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 7.—B.

5905 i. Affidavit may be on information & belief—Sources must be stated.—Where deponents reside far from the debtor they should state the grounds of their belief.—**BANK OF UPPER CANADA v. SPAFFORD** (1832), 2 O. S. 373.—**CAN.**

5905 ii. —. —.]—An affidavit of pltf.'s attorney, stating the absence of a material witness, & his belief that the testimony of the witness could be procured at the next circuit, is not sufficient to oppose a rule for judgment as in case of a nonsuit for not going to trial pursuant to notice, without stating the grounds of his belief.—**MITCHELL v. CURPAGE** (1838), 2 N. B. R. (Ber.) 433.—**CAN.**

5905 iii. —. —.]—Where a party to a suit in a justice's ct. after the expiration of thirty days obtained a rule nisi for a *certiorari* to remove the judgment on an affidavit, simply stating that he was informed & believed one of the jurymen was under age:—**Held:** the rule was improperly granted.—**R. v. PERREY** (1874), 2 P.ug. 449.—**CAN.**

5905 iv. —. —.]—In an affidavit to hold to bail under 38 Vict. c. 4, s. 2, it is not sufficient to swear in the words of the statute, without setting forth the grounds of pltf.'s expectation of recovering his debt by deft.'s arrest.—**STEPHENSON v. ELLIOTT** (1875), 3 P.ug. 199.—**CAN.**

5905 v. —. —.]—In an affidavit to hold to bail, under 37 Vict. c. 7, s. 77, it is not sufficient to follow the words of the Act without setting forth the grounds for deponent's belief that deft. is about to quit the province & in what manner pltf. will be prejudiced in prosecution of his suit.—**McCALLUM v. PERKINS** (1875), 3 P.ug. 185.—**CAN.**

5905 vi. —. —.]—An affidavit of deft.'s attorney, stating that the deft. had a good defence to the action on the merits, as he was informed & believed; that he had intended to appear in the action, & thought he had done so until he heard of the judgment, stating his reasons for so thinking:—**Held:** sufficient to let deft. in to defend on terms.—**GERMAIN v. WATT** (1887), 28 N. B. R. 266.—**CAN.**

5905 vii. —. —.]—Where the affidavit of a pltf. stated that he verily believed it was necessary for pltf. to get immediate judgment in order to protect their interests & prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, & the utmost shown was that deft. was in financial straits, & had refused to submit his affairs to investigation or to make an assignment:—**Held:** a motion under Con. Rule 744 for judgment before

appearance must be refused.—**GREENE v. WRIGHT** (1888), 12 P. R. 426.—**CAN.**

5905 viii. —. —.]—An affidavit to hold to bail should be direct & positive as to the existence of a cause of action. An affidavit to hold the master of a vessel to bail on an action for negligently losing a scow, which stated that the scow had been taken to the vessel with deals for loading, & made fast thereto, & taken charge of by the master, but only alleged the negligence of the master, & consequent loss of the scow, as matter of information & belief:—**Held:** insufficient.—**SAYRE v. WILLIAMS** (1889), 29 N. B. R. 531.—**CAN.**

5905 ix. —. —.]—An affidavit to hold to bail after the commencement of an action by writ of summons & before judgment need not state the reasons for deponent's belief that deft. is about to leave the province.—**McMANUS v. WELLS** (1890), 29 N. B. R. 449.—**CAN.**

5905 x. —. —.]—The uncontradicted affidavit of a counsel, that he verily believed that G. travelled a distance of 720 miles for the purpose of attending & giving evidence, etc., is not sufficiently positive to warrant the clerk taxing witness fees thereon.—**LOVITT v. SNOWBALL** (1895), 33 N. B. R. 368.—**CAN.**

5905 xi. —. —.]—**MANNEY-HARRIS v. WARENE** (1897), 12 Man. L. R. 48.—**CAN.**

5905 xii. —. —.]—Pltf., who lived out of the jurisdiction, moved to set aside a *propre* order for security for costs on the ground that he owned real estate of sufficient value within the jurisdiction to secure costs. The affidavit in support of the motion alleged that half a section of land in the province was vested in him & that, according to the best of his knowledge, information & belief it was worth \$3,000, & that it was unincumbered as he was informed & verily believed:—**Held:** such affidavit did not comply

Sect. 11.—Form and contents of affidavit: Sub-sect. 7, B.; sub-sect. 8.]

Sources must be stated.]—BURTON v. MALOON (1740), Barn. Ch. 401; 27 E. R. 695, L. C.

5906. ———.]—Where a vessel has been seized on charges of offences against Acts of Parliament other than that usually called the Navigation Act, & if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the ct. will, on motion, grant deft. a commission to examine persons residing abroad, & make it part of the order, that their depositions shall be received in evidence on the trial.

The affidavit of the solr. for deft. will be received in support of such a motion; & it will be sufficient if he swear, that he is informed of, & believes the statements in the bill, if he also add, that his belief is founded on documents in his possession, & that, from the nature of the defence involving the question of what country the ship belongs to, he considers the commission necessary.—**LARAGOTTY v. A.-G.** (1816), 2 Price, 172; 146 E. R. 58.

Annotations:—Mentd. A.-G. v. Boyet (1846), 3 Dow. & L. 492; Dyson v. A.-G., [1911] 1 K. B. 410.

5907. ———.]—Recovery not permitted to be amended on unqualified affidavit that the possession had gone with the title for a period long before the knowledge of deponent, not stating the grounds of his belief.—**NOBLE, DEMANDANT** (1817), 7 Taunt. 607; 129 E. R. 277.

5908. ———.]—An order for the arrest of a deft. under sect. 3 of Judgments Act, 1838 (c. 110), may be made on an affidavit of pltf. that his

been informed & believes that deft. is about to leave England, provided it state the name & description of the person from whom he received such information.—**GIBBONS v. SPALDING** (1843), 11 M. & W. 173; 2 Dowl. N. S. 811; 12 L. J. Ex. 185; 7 Jur. 21; 452 E. R. 763.

Annotations:—Expld. Arkenheim v. Colegrave (1845), 13 M. & W. 620. **Mentd.** Heath v. Nesbitt (1843), 11 M. & W. 669; Bullock v. Bentinck (1850), 16 L. T. O. S. 174; Kilkenny Ry. v. Fielden (1851), 15 Jur. 191; Sanderson v. Procter (1854), 10 Exch. 189.

5909. ———.]—Evidence of belief only is admissible on interlocutory application, though not at the hearing of a cause, & the grounds of such belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be but are not produced, & where the deponent swears that he disbelieves the statements made to him by such persons.—**BIED v. LAKE** (1863), 1 Hem. & M. 111; 8 L. T. 632; 71 E. R. 49.

Annotations:—Mentd. Smith v. Hancock, [1894] 2 Ch. 377; Cory v. Harrison (No. 2) (1904), 48 Sol. Jo. 350.

5910. ———.]—An affidavit stated that deponent had been informed, & believed, that negotiable securities had been negotiated, & that he was unable to ascertain in whose hands they were:—**Held:** such affidavit was insufficient in not stating the grounds of belief, & the steps taken to ascertain who were the holders of the securities.—**Re ANDERSON, Ex p. DOBSON** (1864), 10 L. T. 802; 10 Jur. N. S. 812; 12 W. R. 1094, L. C.

5911. ———.]—Upon the application of the receiver in a cause supported by an affidavit

with Queen's Bench Act, 1895, r. 500, as it did not give pltf.'s grounds of belief, & there was no sufficient evidence to support pltf.'s application.—**DOBSON v. LEASK** (1897), 11 Man. L. R. 620.—**CAN.**

5905 xiii. ———.]—An affidavit leading to an order for an *ex juris* writ should show the grounds on which deponent believes that pltf. has a good cause of action.—**NORTHERN COUNTIES INVESTMENT TRUST, LTD. (FOREIGN) v. NATHAN** (1900), 7 B. C. R. 136.—**CAN.**

5905 xiv. ———.]—Affidavit founded on leading to an order for an *ex juris* writ containing allegations of fact which must necessarily have been founded on information & belief only, must state source of information.—**TATE v. HENNESSY** (1900), 8 B. C. R. 220.—**CAN.**

5905 xv. ———.]—An application for security for costs on the ground that pltf. is insolvent & is only nominally interested in the action, should be based on an affidavit of belief on deft.'s part that such are the facts, & such an affidavit should at least be furnished by deft. before he attempts to establish the facts by examining pltf. *Semble:* the proper practice in such a case is to have the grounds set forth in the notice of motion.—**PRITCHARD v. PATRISON** (1900), 20 C. L. T. 435; 19 P. R. 277.—**CAN.**

5905 xvi. ———.]—By decree of Sept. 18, 1878, in a partition action, it was directed that the share of an infant deft., M., should remain in et., & the interest thereon should be paid to his father, a co-deft., as tenant by the curtesy. On Sept. 24, 1900, M. & his father moved for payment out of M.'s share upon the father's affidavit identifying the infant deft. as his son, M., & stating that M. was of age, having reached the age of twenty-one years on Feb. 5, 1899.—**Held:** the proof of the age was not sufficient, the father not having stated his reasons for believing that the son was of age

records in support of his statement.—**TOLTON v. MacGREGOR**, 20 C. L. T. 391.—**CAN.**

5905 xvii. ———.]—Affidavits must state the source on which belief is founded.—**CHONG v. McMOIRAN** (1901), 8 B. C. R. 261.—**CAN.**

5905 xviii. ———.]—**GRIGGS v. GRAIN** (1904), 5 Terr. L. R. 501.—**CAN.**

5905 xix. ———.]—In an interlocutory proceeding applying for security for costs pltf. took out a summons on deft.'s affidavits.—**Held:** the same being defective since pltf. did not in the same set out the grounds on which he obtained his facts could not be strengthened by the filing of an additional affidavit.—**KEIR v. SCOTER** (1905), 6 Terr. L. R. 255.—**CAN.**

5905 xx. ———.]—**MACDONALD v. SOVEREIGN BANK** (1912), 21 O. W. R. 702; 3 O. W. N. 1006; 2 D. L. R. 892.—**CAN.**

5905 xxi. ———.]—Motion to extend time for giving security for costs. The affidavit on which the motion was based was made merely on information & belief, & was not filed until after the notice of motion was served. The master in chambers refused to consider the affidavit in view of its non-compliance with Con. Rules 518 & 524.—**NEMINEN v. DOME MINES** (1912), 23 O. W. R. 405; 4 O. W. N. 301; 6 D. L. R. 899.—**CAN.**

5905 xxii. ———.]—Affidavits in which the deponents state the essential matters on belief only, & do not state the grounds of that belief, cannot be accepted as evidence.—**R. v. POINT GRAY LICKENS, COMRS.** (1913), 26 W. L. R. 46.—**CAN.**

5905 xxiii. ———.]—An affidavit on information & belief, not giving the grounds of belief nor the source of the information, is no foundation for an order allowing service of writ of summons out of the jurisdiction.—**DAVIS v. WENATCHEE VALLEY FRUIT GROWERS' ASSOCN.** (1913), 23 W. L. R. 326; 3 W. W. R. 922; 9 D. L. R. 402.—**CAN.**

5905 xxiv. ———.]—Deft. moved to set aside a writ of attachment issued by pltf.:—**Held:** an application for a writ of attachment is an interlocutory proceeding; & therefore, two paragraphs in the affidavit upon which the order for the issue of a writ was based, containing statements on information & belief, without giving the source of the information or the grounds of belief, were not available to support the order.—**HOLE v. SIMPSON** (1914), 27 W. L. R. 689.—**CAN.**

5905 xxv. ———.]—The ct. will not refuse to consider an affidavit produced in answer to affidavits upon which a rule absolute for a *certiorari* to remove an assessment & a rule *nisi* to quash the same were granted, on the objection that it is based only on information & belief, if it states the source of the information.—**R. v. MARYSVILLE TOWN ASSESSORS** (1919), 46 N. B. R. 330.—**CAN.**

5905 xxvi. ———.]—An affidavit by deft. merely stating that he had been informed & believes that pltf. has no visible means, is defective for not showing the source whence he has derived his information.—**MOHUN v. CREEDON** (1878), 2 L. R. Ir. 115.—**IR.**

5905 xxvii. ———.]—Where pltf. were a limited liability co., & the affidavit grounding the motion for final judgment was made by a book-keeper in pltf.'s employ who did not show or allege that the facts deposed to were within his own knowledge, & who did not allege that he had pltf.'s authority to make the affidavit:—**Held:** the affidavit was defective, & a supplemental affidavit filed pending adjournment could not be relied on to supply the defects in the original affidavit.—**IMPERIAL TOBACCO Co., LTD. v. McALLISTER** (1916), 50 I. L. T. 156.—**IR.**

1. ———.]—*When rule relaxed.*—The ct., in a proper case, may relax the rule requiring a deponent to state his means of information; & where deponent swore that such a disclosure

founded on information & belief only, the ct. ordered deft., who had obtained payment of certain debts adversely to the receiver, within one week to make an affidavit of the amounts as received by him, & to pay the same to the receiver, or in default to be committed.—*PARKER v. POCOCK* (1874), 30 L. T. 458.

5912. ———.]—Where an affidavit is made upon information & belief the rules of the ct. require that deponent should state what are the grounds of his information & belief (*JESSEL, M.R.*).—*QUARTZ HILL CONSOLIDATED GOLD MINING Co. v. BEALL* (1882), 20 Ch. D. 501; 51 L. J. Ch. 874; 46 L. T. 746; 30 W. R. 583, C.A.

*Annotations:—**Consd. Bonnard v. Perryman*, [1891] 2 Ch. 269. *Mentd. Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674; *Toulet* (commonly called *Hinton*) *v. Chatto & Windus & Walford* (1887), 4 T. L. R. 35; *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345; *London Motor Cab Proprietors Assocn. & British Motor Cab Co. v. Twentieth Century Press* (1912), Ltd. (1917), 34 T. L. R. 68.

5913. ———.]—Where an order was obtained *ex parte* for the examination *de bene esse* of thirty witnesses, the solr. of pltf., in his affidavit in support of the motion, merely alleging that they were over seventy years of age, without stating the grounds for the allegation:—*Held*: the affidavit of the solr. was insufficient under R. S. C., Ord. 38, r. 3.—*BIDDER v. BRIDGES* (1884), 26 Ch. D. 1; 53 L. J. Ch. 479; 50 L. T. 287; 32 W. R. 445, C.A.

*Annotations:—**Consd. Bonnard v. Perryman*, [1891] 2 Ch. 269. *Mentd. Grammond v. Thompson* (1895), 11 T. L. R. 572; *Re Wagstaff*, *Wagstaff v. Jalland* (1907), 96 L. T. 605.

5914. ———.]—An affidavit by deft. pleading justification of a libel in opposition to an interlocutory motion for restraining the publication must show the grounds of his belief in such justification, & in default of any such grounds being shown, the ct. is justified in granting such an injunction.—*BONNARD v. PERRYMAN*, [1891] 2 Ch. 269; 60 L. J. Ch. 617; 65 L. T. 506; 39 W. R. 435; 7 T. L. R. 453, C.A.

*Annotations:—**Mentd. Salomons v. Knight*, [1891] 2 Ch. 291; *Collard v. Marshall*, [1892] 1 Ch. 571; *Lee v. Gibbings* (1892), 67 L. T. 263; *Champion v. Birmingham Vinegar Brewery Co.* (1893), 10 T. L. R. 164; *Re Evelyn, Ex p. General Public Works & Assets Co.* (1894), 1 Mans. 195; *Monson v. Tussauds*, *Monson v. Tussaud*, [1891] 1 Q. B. 671; *White v. Mellin*, [1895] A. C. 154; *Leslie v. Tucker* (1896), 40 Sol. Jo. 780; *Lyons v. Wilkins*, [1896] 1 Ch. 811; *Newton v. Amalgamated Musicians' Union* (1896), 12 T. L. R. 623; *London & Northern Bank v. Newnes* (1899), 16 T. L. R. 76; *Cowley v. Cowley*, [1909] 1 F. 305; *Ellis v. National Union of Conservative & Constitutional Assocns., Middleton & Southall* (1900), 44 Sol. Jo. 750; *Correll v. Wall* (1906), 22 T. L. R. 532; *Watson v. Daily Record (Glasgow) Ltd.*, [1907] 1 K. B. 853; *Dyson v. A.-G.*, [1911] 1 K. B. 410; *Re v. Blumenfeld, Ex p. Tupper* (1912), 28 T. L. R. 308.

5915. ———.]—*SACCHARIN CORPN., LTD. v. CHEMICAL & DRUGS CO., LTD.*, No. 5512, *ante*.

5916. ———.]—An affidavit or information & belief founded on statements made to deponent by an informant, who declined to repeat them on affidavit unless subpoenaed, was not admitted on an interlocutory motion, in a case where the informant might have been but was not subpoenaed, & no irremediable injury could result from the exclusion of the evidence.—*Re BURELL* (ANTHONY), *PEARCE & Co., Doig v. BURELL*

(ANTHONY), *PEARCE & Co., Re* (ANTHONY), *PEARCE & Co., Groos v.* (ANTHONY), *PEARCE & Co.*, [1899] 2 Ch. 50; 68 L. J. Ch. 444; 80 L. T. 688.

5917. ———.]—An affidavit of information & belief, not stating the source of the information or belief, is irregular, & therefore inadmissible as evidence, whether on an interlocutory or a final application; & a party or solr. attempting to use such an affidavit will do so at his peril as to costs.

When a deponent makes a statement on his information & belief, he must state the ground of that information & belief (*RIGBY, LORD*).—*Re YOUNG (J. L.) MANUFACTURING CO., LTD., YOUNG v. YOUNG (J. L.) MANUFACTURING CO., LTD.*, [1900] 2 Ch. 753; 69 L. J. Ch. 868; 83 L. T. 418; 49 W. R. 115, C.A.

*Annotation:—**Reid. Lumley v. Osborne* (1901), 70 L. J. Q. B. 416.

5918. ———.]—By C. C. R., Ord. 25, r. 14 (b), where a judgment is recovered against a firm & pltf. seeks to enforce it by judgment summons against a person whom he alleges to be a partner in the firm, he shall file an affidavit in Form 52 (c), & thereupon a judgment summons shall issue:—*Held*: the statement of pltf.'s sources of information & grounds of belief that the person against whom the judgment summons is sought was a partner is a material part of the form, & its omission from the affidavit will render irregular the issue of the summons & all subsequent proceedings thereon.—*LUMLEY v. OSBORNE*, [1901] 1 K. B. 532; 70 L. J. K. B. 416; 81 L. T. 461; 49 W. R. 374; 45 Sol. Jo. 277, D. C.

5919. Belief must be stated.—Where the evidence of intention to abscond, & probable cause for believing the debtor is about to quit England, with intent to delay the creditor, is founded on hearsay information, the affidavit in support of the application for the warrant must expressly state deponent's belief in the correctness of the information so received.—*CANDY v. WAUGH, QUICK v. HUISS* (1853), 21 L. T. O. S. 261.

5920. ———.]—In a creditors' suit an affidavit by the solr. of pltf. deposing that one of debts whose estate was sought to be administered had stated to him that a power of attorney authorising the sale of the estate had been sent out to two other debts, who were also interested in the estate, & were living out of the jurisdiction, & had been returned duly executed by them, but without stating that he, pltf.'s solr., believed the statement to be true:—*Held*: not to be sufficient evidence on which to make an order for substituted service on two debts, who were out of the jurisdiction.—*BROOKER v. SMITH* (1861), 30 L. J. Ch. 670; 4 L. T. 545.

In garnishee proceedings.—*See* EXECUTION, Vol. XXI., pp. 635–637, Nos. 2160–2166.

Affidavit verifying cause of action.—*See* PRACTICE.

SUB-SECT. 8.—TRANSLATIONS OF AFFIDAVIT.

5921. Affidavit in foreign tongue—Verified translation must be filed.—*SIMMONDS v. DU*

would tend to defeat the ends of justice, the ct. dispensed with it.—*MERCHANTS' UNION EXPRESS Co. v. MORTON* (1868), 15 Gr. 274; 2 Ch. Ch. 319.—*CAN.*

5. ———.]—An order for attendance of witnesses for examination for the purposes of a suit in a foreign ct. is only an interlocutory order & may be founded on affidavits sworn merely on information & belief.—*BANK OF NOVA*

SCOTIA v. BOOTH (1910), 19 Man. L. R. 394.—*CAN.*

h. ———.]—Affidavits in support of application for security for costs is sufficient if it states that deft. has a good defence upon the merits & that the deponent is informed & verily believes that pltf. resides outside the province.—*CAMERON v. ROYAL BANK OF CANADA* (1914), 30 W. L. R. 157; 7 W. W. R. 693; 8 Sask. L. R. 19; 21 D. L. R. 821.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 8.

5921 l. Affidavit in foreign tongue—Verified translation must be filed.—The answer of a foreigner, who does not understand English, must be sworn in the language he speaks, & be filed with an English translation; & if he file an answer in English only, it will be taken off the file.—*ITAVES v. LEQUIN* (1825), 274.—*IR.*

translation may be

Sect. 11.—Form and contents of affidavit: Sub-sects. 8, 9, 10 & 11.]

BARRE (COUNTESS) (1791), 3 Bro. C. C. 263; 29 E. R. 526.

5922. ———. *—[—Re EADY, No. 5795, ante.]*

5923. Affidavit of verification—Must state translator understands foreign language.]—Where a part of the proceedings in a recovery taken in France were written on paper & in the French language, & a copy thereof ingrossed on parchment in English, & certified by a notary to be "a faithful translation":—*Held*: the notary must also make affidavit that he understood the French language; & the proceedings must be retaken on parchment.—*Re NICHOLAS* (1829), 7 L. J. O. S. C. P. 169.

5924. ———. *—Dispensed with by consent.]*—Affidavits sworn in a foreign language, with an English translation attached, such translation not being verified by an interpreter, allowed by consent to be filed, & office copies of the English parts only authorised to be issued.—*RELMERS v. DRUCE* (1859), 4 W. R. 665.

SUB-SECT. 9.—CONSTRUCTION OF AFFIDAVIT.

5925. Meaning apparent.]—*ANON.* (1773), *Lofft*, 274; 98 E. R. 648.

5926. ———. *—[—Clerical errors such as "deft." instead of "deponent," "et." instead of "office" held immaterial in an affidavit where the meaning was clear.]*—*ANON.* (1815), 1 Chit. 562, n.

5927. ———. *—[—Defective affidavits cannot be amended. The ct. will read the defective affidavits according to their obvious meaning if the errors are so manifest that the meaning is apparent.]*—*EAGER v. GRIMWOOD* (1847), 8 L. T. O. S. 368; *subsequent proceedings*, 1 Exch. 61.

*Annotations:—***Reid**, *Lockett v. Niklon* (1847), 10 L. T. O. S. 166. **Mentd.** *Evans v. Walton* (1867), L. R. 2 C. P. 615.

5928. ———. *—[—An affidavit, which was not sworn till Sept., stated that a debtor's summons had been served on "19th Aug. inst.":—Held: this error did not invalidate the affidavit, as the words "Aug. inst." could not mean anything but Aug. last past.]*—*Re HUNT, Ex p. HUNT* (1872), 8 Ch. App. 234; 28 L. T. 3; 21 W. R. 161, L. J.

*Annotation:—***Mentd.** *Re Lancaster, Ex p. Lancaster* (1876), 3 Ch. D. 498.

5929. Ambiguous word—"Sterling."]—(1) *Qu.*: whether a British Consul, resident in a foreign port, has authority to take an affidavit of debt for the purpose of holding a party to bail in this country. The judges equally divided in opinion upon the point.

Affidavit of debt made in Spain, that deft. was indebted to plff. in so many pounds sterling:—*Held*: ill for not going on to say, "pounds sterling English," for, *non constat* but that it may be Irish sterling money.—*PICKARDO v. MACHADO*

read in court.]—An affidavit drawn up in a language not understood by the deponent cannot be read in ct.; it must be drawn up & sworn to in the language of the deponent, but a sworn translation of it may be read in ct.—*Re AH GWAY, Ex p. CHIN SU* (1893), 2 B. C. R. 343.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 9.

1. Reference to jurat.—To explain date.]—The jurat may be referred to, to explain the date of a fact deposed to in the affidavit.—*LYMAN v. BRETHRON* (1852), 2 C. L. Ch. 108.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 10.

m. Omission of by whom money

lent.]—An attachment was set aside, the affidavit being for money lent, & not stating by whom.—*McKENZIE v.* (1834), 3 O. S. 343.—**CAN.**

n. Word misspelt.]—It is no for setting aside an arrest that the word "malicious" is spelt with a "t" instead of a "c" in the affidavit of debt.—*GARDENER v. MORRISON* (1841), 1 Ont. Dig. 201.—**CAN.**

o. "Examination" instead of "commission."]—*Semble*: an affidavit stating that the examination of the witnesses was duly taken, & not that the commission was duly taken, in accordance with the literal wording of a statute, is sufficient.—*McLEOD v.*

(1825), 4 B. & C. 886; 7 Dow. & Ry. K. B. 478; 107 E. R. 1288.

5930. ———. *—[—Where an affidavit contains an ambiguous word, the ct. will not construe it to bear the same meaning as some more appropriate & well known term, which might have been used.]*—*R. v. MANCHESTER & LEEDS RY. CO.* (1838), 8 Ad. & El. 413; 3 Nev. & P. K. B. 439; 1 Will. Woll. & H. 458; 7 L. J. Q. B. 192; 2 Jur. 857; 112 E. R. 895; *subsequent proceedings*, 1 Per. & Dav. 104.

*Annotations:—***Mentd.** *R. v. Pickles* (1842), 12 L. J. Q. B. 49; *R. v. G. W. Ry.* (1844), 1 Dow. & L. 874; *Taylor v. Clemson* (1844), 11 Cl. & Fin. 610; *Tilt v. Dickson* (1847), 4 C. B. 736; *Dodgson v. Scott* (1848), 2 Exch. 457; *Cordon v. Universal Gaslight Co.* (1848), 5 Ry. & Can. Cas. 677.

5931. Word used colloquially.]—In pleading, words must be used in their legal sense, & if the matter pleaded is connected with an Act of Parliament, the Act must be looked into to ascertain what force the word in question has. But, in an affidavit, words may be used in a colloquial sense; or then facts not necessarily comprehended within that sense should be stated (*COLERIDGE, J.*).—*R. v. SLATTER* (1840), 11 Ad. & El. 505; 3 Per. & Dav. 263; 9 L. J. Q. B. 115; 4 J. P. 73; 4 Jur. 316; 113 E. R. 507.

*Annotation:—***Mentd.** *R. v. Quayle* (1840), 11 Ad. & El. 508.

5932. Construction most in favour of deponent.]—A rule calling upon justices to show cause why they should not issue a distress warrant, was founded upon an affidavit, showing the refusal only but not stating the proceedings which took place before the justices, or the reason why they refused. The parties showing the cause against the rule made no affidavit:—*Held*: the affidavit must be construed in favour of the party making it; & the rule should be absolute.—*R. v. DEVERELL* (1854), 3 E. & B. 372; 23 L. J. M. C. 121; 118 E. R. 1181.

*Annotations:—***Mentd.** *R. v. Kingswinford Overseers* (1854), 3 E. & B. 688; *Backhouse v. Bishopwearmouth Churchwardens* (1861), 7 Jur. N. S. 338.

SUB-SECT. 10.—MISTAKES AND OMISSIONS IN AFFIDAVITS.

See, now, R. S. C., Ord. 38, r. 14.

5933. Omission of "oath"—Whether affidavit admissible.]—*ANON.* (1772), *Lofft*, 85; 98 E. R. 515.

5934. ———. *—[—An affidavit, in which the word "oath" was omitted:]*—*Held*: insufficient.—*OLIVER v. PRICE* (1834), 3 Dowl. 261.

*Annotations:—***Fold.** *Doe d. Britton v. Clarke* (1842), 12 L. J. Q. B. 69; *Phillips v. Prentice* (1843), 2 Hare, 542.

5935. ———. *—[—An affidavit commencing thus: "O. S., of, etc., maketh & saith," the word "oath" being omitted will not be received by the ct., even though it purports by the jurat to have been duly sworn.]*—*DOE d. BRITTON v.*

TOHRANCE (1846), 3 U. C. R. 146.—**CAN.**

p. Omission of jurat.]—An affidavit of loss under a fire policy which had no jurat, & was not in the form of an affidavit:—*Held*: insufficient.—*SHAW v. ST. LAWRENCE COUNTY MUTUAL INSURANCE CO.* (1853), 11 U. C. R. 73.—**CAN.**

q. "Assignor" instead of "assignee."]—An affidavit that the deed was not made to enable the assignor, instead of the assignee, to hold the goods against creditors:—*Held*: bad.—*OLMSTEAD v. SMITH* (1858), 15 U. C. R. 421.—**CAN.**

r. Omission of date of instrument

CLARKE (1842), 2 Dowl. N. S. 393; 12 L. J. Q. B. 69; *sub nom.* DOE d. BRITTON v. CLARK, WELLS v. BRITTON, 7 Jur. 327.

Annotation.—*Fold*. PRENTICE v. PHILLIPS (1842) 7 Jur. 528.

5936. ———.]—An affidavit which does not express that deponent "made oath" is not admissible.—PHILLIPS v. PRENTICE (1843), 2 Hare, 542; 67 E. R. 224; *sub nom.* PRENTICE v. PHILLIPS, 12 L. J. Ch. 497; 7 Jur. 528.

5937. ———.]—An affidavit, instead of being headed as usual "We, A. B., C. D., & E. F., severally make oath & say," was headed "The joint & several affidavits of A. B., C. D., & E. F. We the said A. B., C. D., & E. F. say as follows." Leave to file it was refused.—*Re* NEWTON (1860), 2 De G. F. & J. 3; 45 E. R. 522; *sub nom.* *Re* NEWTON'S WILL TRUSTS, 2 L. T. 342; 8 W. R. 425, L. J.

5938. ———.]—The omission in the formal part of an affidavit of the words "make oath &" will render it inadmissible.—ALLEN v. TAYLOR (1870), L. R. 10 Eq. 52; 39 L. J. Ch. 627; 22 L. T. 512.

5939. Omission of "copy"—In affidavit of service.]—An affidavit stating that deponent served a party with a "true," omitting the word "copy," of the declaration in ejectment, is bad.—ANON. (1813), 1 Chit. 562, n.

5940. "The deponent maketh oath & said."]—An affidavit "the deponent maketh oath & said," is insufficient.—HARWOOD v. ——— (1835), 1 Gale, 47.

5941. Mistake in name of commissioner—Before whom previous affidavit sworn.]—Where an affidavit alleged that the [comr. by] whom a prior affidavit annexed thereto [was sworn], verifying the certificate of the acknowledgment of a deed by a married woman, had been sworn, & [the affidavit] sufficiently showed the authority of the magistrate before whom the first affidavit was sworn, & accounted for the absence of a notarial certificate:—*Held*: it was not vitiated by its stating that the former affidavit was sworn by another comr., it having in fact been sworn by deponent himself.—WARBURTON v. WARBURTON (1841), 3 Man. & G. 633; 133 E. R. 1294.

5942. Omission of name of commissioner.]—*Re* (1850), 15 L. T. O. S.

SUB-SECT. 11.—INTERLINEATIONS, ALTERATIONS, AND ERASURES.

See, now, R. S. C., Ord. 38, r. 12.

5943. Alterations—After swearing.]—An affi-

& of execution.]—*Held*: no objection that the affidavit of execution did not state the date of the bill of sale or on what day it was executed.—MCLEOD v. FORTUNE (1859), 19 U. C. R. 100.—CAN.

s. Mistake in name of witness.—A misnomer of a witness David instead of Daniel, in an affidavit of disbursements:—*Held*: immaterial.—HAM v. LASHIER (1865), 24 U. C. R. 357.

t. Omission of "for good consideration."—An affidavit that an assignment was made *bond fide*, omitting the words "for good consideration":—*Held*: bad.—MASON v. THOMAS (1864), 23 U. C. R. 305.—CAN.

a. "Father" instead of "really the father."—In an action for the maintenance of an illegitimate child, under C. S. U. C. c. 77, s. 4, it appeared that plaintiff was a married woman, & that the affidavit, filed by the mother, stated that defendant was the father of such child, not "really the father," as required by the Act:—*Held*: the affidavit was fatal.—

JACKSON v. KASSEL (1867), 26 U. C. R. 341.—CAN.

b. Omission to state causes of insolvency.—The insolvent swore to an affidavit verifying the statement of liabilities & assets, but inadvertently omitted the statement of the causes to which he attributed his insolvency, which, however, he made verbally at the first meeting of creditors, where the contestant was present. The defect was not pointed out for more than a year, & after the discharge had been applied for, & the insolvent then swore to another affidavit supplying the omission:—*Held*: the omission to furnish the statement within seven days from the assignment under Insolvent Act, 1875, s. 17, was immaterial.—*Re* MARTIN & ENGLISH (1880), 5 A. R. 647.—CAN.

c. "Intent to defraud" instead of "intent to defraud."—The use in the affidavit upon which an order for the issue of a *ca. re.* was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. 1877,

did not make use of, if altered after it is sworn.—WRIGHT v. SKINNER (1836), 5 Dowl. 92; Tyr. & Gr. 597.

5944. ——— Presumption where no proof of time of alteration.]—GILL v. GILBARD (1852), 9 Hare, App. I., xvi.; 68 E. R. 764; *sub nom.* GILLBART v. GILL, 1 W. R. 4.

5945. ———.]—On a trial, proceedings in bkpey. were put in, & it appeared that there were erasures & interlineations in the affidavit verifying the petition for adjudication:—*Held*: the presumption of law was, that the affidavit was in the same state as when it was sworn; as to alter it after it was sworn would be an act of fraud & misconduct which would not be presumed.—R. v. GORDON (1855), Dears. C. C. 586; 25 L. J. M. C. 19; 20 J. P. 211; 2 Jur. N. S. 67; 4 W. R. 46, 118; 7 Cox, C. C. 19, C. C. R.

Annotations.—*Mentid*. Cockerell v. Van Diemen's Land Co. (1857) 5 W. R. 312; R. v. Lingham (1859), 23 J. P. 740.

5946. ——— Whether initialing necessary.]—*Re* IMESON & HORNER, No. 5671, *ante*.

5947. ———.]—Affidavits were sent out to New Plymouth, New Zealand, to swear the widow of K., deceased, as administratrix. In the meantime she had moved to Hobart Town, in Tasmania, & certain interlineations in accordance were made in the affidavit, but not initialed by the judge who administered the oath; the description of Mrs. K., as widow, was also slightly irregular. The judge made an order that such affidavit should be filed.—*In the Goods of KING* (1862), 2 Sw. & Tr. 621; 32 L. J. P. M. & A. 14; 7 L. T. 394; 27 J. P. 216; 11 W. R. 171; 164 E. R. 1139.

5948. Interlineation—No proof of time of interlineation.]—The ct. refused to direct the officer to receive a certificate & affidavit of an acknowledgment under Fines & Recoveries Act, 1833 (c. 74), the affidavit having an interlineation in an important part, without anything to denote that the interlineation had been made before the affidavit was sworn.—*Re* WORTHINGTON (1848), 5 C. B. 511; 136 E. R. 978.

5949. ———.]—An affidavit in which the Christian names of two persons were interlined in the place where they were first mentioned allowed to be filed.—VORWEIG v. BAREISS (1855), 3 W. R. 259.

5950. ——— Initialed by King's Bench master—Affidavit sworn in Chancery action.]—An affidavit in support of a motion in the Ch. Div. was sworn in a foreign country before a notary public. It contained an interlineation, which was not

c. 67, w. 5:—*Held*: not fatal to the affidavit.—LAING v. SLINGERLAND (1888), 12 P. R. 366.—CAN.

d. Clerical error.—*Held*: "his indorsement" might read "my indorsement," as this was clearly a clerical error.—BOLDRICK v. RYAN (1890), 17 A. R. 253.—CAN.

e. Effect of substantial omission.—The affidavit tending to an *ex furis* writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, & if there are omissions of substance the order should not be made.—TATE v. HENNESSY (1900), 7 B. C. R. 262.—CAN.

f. Mistake in translation of affidavit in foreign language.—A mistake in the English translation of an answer, in a foreign language, is no ground for taking it off the file.—HAYES v. LEQUIN (1825), 1 Hog. 274.—IR.

PART VII. SECT. 11, SUB-SECT. 11.

g. Interlineations.—Must be initialed by commissioner.]—All erasures & interlineations in affidavits must be

Sect. 11.—Form and contents of affidavit:

initialed by the notary. The affidavit was initialed & passed by a master of the Q. B. Div., & then placed on the file:—*Held*: according to the practice of the Ch. Div., an affidavit with an interlineation not properly initialed ought not to be filed without an order of the ct., & a master of the Q. B. Div. has no authority in a matter in the Ch. Div.—*Re CLOAKE* (1891), 61 L. J. Ch. 69; 65 L. T. 455; 40 W. R. 74; 36 Sol. Jo. 29.

5951. Erasure—In recital of contents of exhibit.]
—*SAVAGE v. HUTCHINSON*, No. 5854, *ante*.
Interlineations, alterations & erasures in jurat.]
—*See* Sub-sect. 5, J., *ante*.

SUB-SECT. 12.—SCANDALOUS, IMPROPER, AND PROLIX AFFIDAVITS.

See, now, R. S. C., Ord. 38, rr. 2, 3, 11.

5952. Scandalous matter—Referred to master.]
—*JOHNSON v. LEIGHTON* (1741), 1 Dick. 112; 21 E. R. 211.

5953. ———.]—Where affidavits contained scandalous & impertinent matter as to the way of life of deft. a female, the ct. granted a rule absolute in the first instance for referring them to the master.—*BALLS v. SMYTH*, *SPALDING v. SMYTH* (1841), 2 Man. & G. 350; 2 Scott, N. R. 495; 133 E. R. 781.

5954. ——— Contempt of court by solicitor filing.]
—Upon an affidavit being taken off the file for scandal, the solr. who filed it is liable for all costs & expenses as between solr. & client.—*Re BOOTH*, *Ex p. WAKE* (1833), 3 Deac. & Ch. 246; Mont. & B. 259; 2 L. J. Bey. 38, Ct. of R.

5955. ——— Power of court to strike out scandalous part.]—Where an affidavit in opposition to a petition claiming [the right to be paid six months' salary] under 6 Geo. 4, c. 16, s. 48, stated that on A.'s accounts being taken it would appear that by his imprudence property of his employer had been lost, this passage in the affidavit was ordered to be expunged as scandalous & impertinent, resps. not having proposed to take the accounts & sustain the charge.—*Re BURKILL, Ex p. HAMISON* (1842), 2 Mont. D. & De G. 462; 11 L. J. Bey. 12.

5956. ———.]—(1) The ct. has power to strike out scandalous matter from an affidavit, or to order the person who has filed it to pay the costs of it, on the application of any person, even a stranger to the action, or *mero motu*. It is not that an application should be made by the injured person

(2) Direction was given to the taxing master under Additional Rules of Ct., Aug. 1875, Ord. 6 r. 18, to look into & to disallow the costs of affidavits of unnecessary length.—*CRACKNALL v. JANSON* (1878), 11 Ch. D. 1; 39 L. T. 31; 2 W. R. 55; *on appeal* (1879), 11 Ch. D. 14, C. A. *Annotation*:—*Generally, Mend. Wigan v. English & Scottish Law Life Assocn.*, [1909] 1 Ch. 291.

initialed by the court, before whom they are sworn, otherwise they cannot be read.—*McMARTIN v. DARTNELL* (circa 1870), 2 Ch. Ch. 322.—*CAN.*

h. ———.]—In pltf.'s affidavit on a motion to sign final judgment the word "defence" had been struck out, the word "appearance" interlined, without being initialed by the court, before whom the affidavit was sworn:—*Held*: the affidavit could not be read.—*BOYD v. McNUTT* (1883), 9 P. R. 493.—*CAN.*

PART VII. SECT. 11, SUB-SECT. 12.

5958 i. Scandalous matter—Power of

court to take off file.]—Pltf.'s claim was for payment of \$6,000 which she alleged deft. had received for her as the purchase-money of real estate belonging to her. Deft., who was a solr., applied for an order for security for costs, on the ground that the pltf. was permanently resident out of Manitoba, & in support of the application, filed his own affidavit in which he set forth certain communications alleged to have been made by pltf. to him as her solr., & which, if true, showed that she was not legally married to her alleged husband, & stated in effect that pltf. had returned to & was living

5957. ———.]—*WARNER v. MOSSES*, [1881] 7 N. 69, C. A.

5958. ——— Powers of court to take off file.]—Where deft. cross-examined pltf.'s witness, & with the view of discrediting his evidence, asked a question to elicit a fact irrelevant to the issue in the suit, but which, if admitted, might have subjected witness to legal penalties, the witness, in answer to the question, simply denied the fact: deft. procured two affidavits to be filed in proof of the fact, & pltf. then moved to take them off the file, as scandalous & impertinent:—*Held*: they must be taken off the file, the party filing them to pay the costs of so doing, & of the motion to take them off.—*GODDARD v. PARR* (1855), 24 J. Ch. 783; 26 L. T. O. S. 19; 3 W. R. 633.

5959. ———.]—*OSMASTON v. LAND FINANCIERS' ASSOCN.*, [1878] W. N. 101.

5960. ——— At what stage expunged—Not after order made.]—Where there is scandal in affidavits filed on the hearing of a petition, & a motion is made, after an order on such petition, to expunge such affidavits as scandalous, the ct. will not grant the motion, but in consideration of the scandal refuses it without costs.—*Re BAILEY'S SETTLEMENT* (1854), 3 W. R. 133.

5961. ——— After entered as read.]—Where evidence has been entered in an order as read, the ct. will have great hesitation in ordering any part of it to be expunged on the ground of scandal or irrelevancy.—*BRUFF v. COBBOLD, Ex p. AYRES* (No. 2) (1872), 26 L. T. 786; 20 W. R. 734, L. J.

5962. ———.]—A motion by defts. to expunge evidence for scandal & impertinence was ordered to stand over till the hearing of the cause. At the hearing a decree was made both on the hearing & on the motion, by which substantial relief was given & the motion was refused, & the evidence sought to be expunged was entered as read. Pltf. appealed from part of the decree, which was varied by the Lords Justices:—*Held*: the whole decree was open to resps. on the appeal, & on their application the order on the motion was reversed, & the evidence directed to be expunged.—*MIDDLEMAS v. WILSON* (1875), 10 Ch. App. 230; 44 L. J. Ch. 476; 32 L. T. 105; 23 W. R. 301, L. J.

5963. Prolixity—Reference to master.]—Where long affidavits are filed in support of a motion a great part of which is unnecessary, the ct. will refer them to the master, & make the party applying pay the costs of the unnecessary affidavits.—*LEWIS v. WOOLRYCH* (1835), 3 Dowl. 692.

—— Affidavits of documents.]—*See* DISCOVERY, Vol. XVIII., p. 75, Nos. 301-307.

5964. Libellous matter.]—(1) If an affidavit in support of a rule for a criminal information contains matter slanderous of deft., the ct. will in some cases discharge the rule without costs.

(2) *Seemle*: it is not necessary that the county in which an affidavit is sworn should appear in the *jurat*, if it does appear from the contents of the

with such alleged husband, who was a non-resident:—*Held*: the affidavit should be ordered off the files as containing matter which pltf. was entitled to have treated as privileged from disclosure & which was scandalous & irrelevant to the application.—*A. v. B.* (1904), 24 C. L. T. 249; 14 Man. L. R. 249.—*CAN.*

k. ———.]—If an affidavit is filed containing scandalous statements, the ct. can act in the matter, not only on the application of the aggrieved party, but also on the application of any party to the action, or without any

affidavit.—*R. v. BURN* (1837), 7 Ad. & El. 190; 1 J. P. 167, 310; 1 Jur. 657; 112 E. R. 443; *sub nom. R. v. BYRNE*, 6 Dowl. 36; 2 Nev. & P. K. B. 152; Nev. & P. M. C. 334.

5965. Matter disclosed in breach of professional confidence—Power of court to take off file.]—The ct. will not relax the rule, not allowing affidavits in reply to be used, but will, in particular circumstances, either grant a rule for taking off the file, an affidavit into which matters have been introduced, disclosed in professional confidence, or for preventing such portions of the affidavit from being read.—*BURY v. CLENCH* (1842), 6 Jur. 346.

5966. Irrelevant matter—Whether struck out.]—*Re JESSOPP* (A SOLICITOR) (1910), 54 Sol. Jo. 513, C. A.

SUB-SECT. 13.—AMENDMENT OF AFFIDAVIT.

See, now, R. S. C., Ord. 38, r. 14.

5967. Omission of deponent's addition.]—*DOWLING'S BAIL CASE* (1837), 1 Jur. 822.

5968. —.]—On showing cause against a rule, the ct. allowed an affidavit, which omitted deponent's addition, to be amended, & resworn.—*BOSKAY v. LISTER* (1837), Will. Woll. & Dav. 216.

5969. Not by fresh evidence—On appeal.]—The affidavit on which a writ of *ne exeat regno* had been granted having been held to be defective, the order for the writ was discharged; & upon appeal it was held that the defect in the original affidavit could not be supplied by new affidavits produced upon the appeal.—*WHITEHEAD v. BENNETT* (1846), 6 L. T. O. S. 313.

Amendment of jurat, *see* Sub-sect. 5, K., *ante*.

SUB-SECT. 14.—WAIVER OF IRREGULARITIES.

5970. What may or may not be waived—Omission of title.]—*OWEN v. HURD*, No. 5716, *ante*.

5971. — Defective jurat.]—*PILKINGTON v. HIMSWORTH*, No. 5853, *ante*.

5972. — Defective addition.]—*Exp. KING*, No. 5759, *ante*.

application at all.—*DEVONSHIRE v. RYALL* (1878), 11 L. R. Eq. 460.—**IR.**

l. Prolixity.]—Anciently, where affidavits were prolix or impertinent, it was thought to be too late to complain after the party had used the affidavits; but now the ct. will apply itself to set right the extra costs caused by the prolixity or impertinence at any time.—*Ex p. TOWNSEND* (1828), 3 Mol. 74.—**IR.**

m. Irrelevant matter.]—*DAVIDSON v. GRANGE* (1870), 5 P. R. 258.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 13.

n. Omission to identify magistrates.]—The affidavit of service of notice of motion for a *certiorari* to remove a conviction, must identify the magistrates served as the convicting magistrates. An affidavit defective in this respect was allowed to be amended, the time for moving for the *certiorari* not having expired.—*Re LAKE* (1877), 42 U. C. R. 206.—**CAN.**

o. Non-disclosure of interest.]—The lessor of ptt. & deft. both died after the commencement of the action & before trial. This being admitted when the case was called on for trial, the judge struck the case off the docket. Subsequently a rule nisi to amend the declaration by making E. J. & C. J. lessors of ptt., & calling upon certain parties to come in & defend was obtained. The affidavit on which the rule was granted did not disclose the interest of E. J. & C. J., nor did it

show that the right of the deceased lessor of ptt. would be barred by Stat. Limitations if the amendments were not made.—*Qu.*: whether under the circumstances an amendment can be made.—*DOE d. JARVIS v. TRITES* (1879), 19 N. B. R. 471.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 14.

5975 l. What amounts to waiver—Affidavit in reply.]—An *ex p.* order was obtained by the liquidator of a co. being wound up voluntarily, directing M., a shareholder, to pay the amount of a call within 14 days, or to show cause why he should not do so. The affidavit on which the order was obtained did not state that the co. was incorporated under Companies Statute 1864.

On motion by M. to set aside the order, his affidavit alleged that the co. was duly incorporated under Companies Statute 1864.—*Held*: the omission in the affidavit of the liquidator was cured by the affidavit of M.—*Re MELBOURNE BANKING CORPN., LTD., Re COMPANIES STATUTE, 1864* (1885), 11 V. L. R. 610.—**AUS.**

p. — Affidavit to hold to bail—Pleading to action.]—An irregularity in affidavit to hold to bail is waived by pleading to the action.—*McFHELM v. LAWSON* (1858), 4 All. 71.—**CAN.**

q. — Putting in special bail.]—*Held*: where an affidavit to arrest a debtor made by the managing agent of a foreign banking corp. did not sufficiently negative that the arrest

5973. What amounts to waiver—Appearance.]—An objection, that deft.'s Christian name is omitted in the title of an affidavit supporting a rule, is not waived by appearing & producing affidavits in answer.—*CLOTHIER v. ESS* (1833), 2 Dowl. 731; 3 Moo. & S. 216.

Annotations.]—*Folld. Barham v. Lee* (1834), 4 Moo. & S. 327. *Mentd. Clarke v. Jones* (1834), 3 Dowl. 277; *Ex p. Alecock* (1875), 1 C. P. D. 68.

5974. —.]—Appearing to oppose a rule does not waive an objection to the affidavit on which the rule was obtained.—*BARHAM v. LEE* (1834), 2 Dowl. 779; 4 Moo. & S. 327.

5975. — Affidavits in reply.]—*CLOTHIER v. ESS*, No. 5973, *ante*.

5976. — By consent to order.]—Where it was agreed that the rule for setting aside an attachment against the sheriff should be made absolute, but a discussion was to be raised as to the terms to be imposed on the sheriff, which were settled by the ct.:—*Held*: an objection could not be taken on a subsequent day to the affidavit on which the rule was moved for.—*LANGTON v. VINEY* (1836), 1 M. & W. 479; 5 L. J. Ex. 164; 150 E. R. 523; *sub nom. VINEY v. LANGTON*, 5 Dowl. 92.

5977. — By application for particulars.]—(1) A deft. does not waive a defect in the affidavit to hold to bail, by applying for particulars or demanding a declaration.

(2) An affidavit in order to obtain a judge's order to arrest deft. in an action on the case, was made by ptt.'s attorney, & stated that deft. was tenant to ptt. of a shop & premises of the value of £80 *per annum*; that deft. had commenced, on a day stated, & since continued pulling down & destroying the upper part of the premises, & had already committed waste to the amount, as deponent was informed & believed, of £63:—*Held*: sufficient.—*HODGSON v. DOWELL* (1838), 3 M. & W. 281; 1 Horn & H. 29; 7 L. J. Ex. 96; 150 E. R. 1151.

SUB-SECT. 15.—EXHIBITS.

5978. Effect of failure to annex—Where opponent not misled.]—Where an affidavit refers to certain

was made for the purpose of vexing & harassing the debtor, the omission to make such a statement in the affidavit is an irregularity only, & is waived by putting in special bail if the bail might have known of the irregularity by examining the affidavit in the clerk's office.—*HALFAX BANKING CO. v. SMITH* (1886), 25 N. B. R. 610.—**CAN.**

r. — Affidavit as to assessment work on claim—Certificate of work.]—Ptt., owner of the R. mineral claim & having an interest in the L., an adjoining claim, performed the assessment work for both claims on the L., as believed, but in reality, as shown by subsequent survey, a few feet outside the claim. The Gold Comr. told him the work on the L. would be regarded as done on the R. Ptt. received a certificate of work in respect of the L., & in his affidavit stated that the work was done on the R.:—*Held*: the incorrect filling up of the affidavit was an irregularity which was cured by the certificate of work.—*LAWN v. PARKER* (1900), 7 B. C. R. 418; *affd.* (1901), 8 B. C. R. 223.—**CAN.**

s. — Payment into court by garnishees.]—The defect in the affidavit was an irregularity only, & payment into ct. by the garnishees was a waiver by them of their right to object.—*HARRIS v. HARRIS* (1901), 8 B. C. R. 307.—**CAN.**

PART VII. SECT. 11, SUB-SECT. 15.

t. Effect of failure to annex.]—A copy of the bye-law moved against was

Sect. 11.—Form and contents of affidavit: Sub-sects. 15, 16 & 17. Sect. 12: Sub-sect. 1, A.]

documents as being annexed, but which are not annexed, the objection is not a sufficient one to the validity of the affidavit, unless the other side has been misled by the omission.—*JONES v. JONES* (1848), 5 Dow. & L. 628; *Cox, M. & H.* 92; 2 *Saund. & C.* 281; 17 L. J. Q. B. 170; 11 L. T. O. S. 109; 12 Jur. 397.

Annotations:—Mentd. Metcalfe v. Brown (1852), 16 J. P. Jo. 790; *Irving v. Askew* (1870), L. R. 5 Q. B. 208; *Martin v. Mackonochie* (1878), 3 Q. B. D. 730; *Mowlem v. Dunno* (1912), 106 L. T. 611.

5979. Exhibit must be certified as document referred to in affidavit.]—An affidavit sworn before the British Consul at Philadelphia referred to a deed, of which it was stated the paper writing thereto annexed was a correct copy. The paper writing referred to was attached to the affidavit by a ribbon under the consular seal; but it contained on the face of it no reference to the affidavit:—*Held*: the affidavit was irregular, & leave to have it filed was refused.—*HEWETSON v. TOD-HUNTER* (1854), 22 L. T. O. S. 315; 2 W. R. 298.

5980. ——*J*—A comr. before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit.—*Re ALLISON* (1854), 10 Exch. 501; 18 J. P. 740; 3 W. R. 62.

5981. Must be handed in with affidavit.]—Documents referred to in affidavits, & exhibited, must be handed in with the affidavits, & remain in ct. until the matter, in respect of which the affidavits are sworn, has been disposed of.—*ATTENBOROUGH v. CLARK* (1857), 2 H. & N. 588; 157 E. R. 242.

Annotation:—Reid. Pratt v. Goswell (1861) 9 C. B. N. S. 706.

5982. Need not be printed.]—Where a long schedule forms an integral part of an affidavit the record & writ clerks have no authority to file it unless it is printed under Ord. 31, r. 7, or the ct. has ordered it to be filed in writing. But if the matter contained in the schedule be in the form of an exhibit it need not be printed.—*WEBB v. BOMFORD* (1876), 46 L. J. Ch. 288; 25 W. R. 251.

5983. Copy of document exhibited.—In interlocutory application.]—*SPENCER v. BAILEY* (1892), 93 L. T. Jo. 223.

5984. Whether opponent entitled to see & take copy of.]—Irrespective of any question as to discovery, property, or privilege, if a document is made an exhibit to an affidavit, any person who has the right to inspect & take copies of the affidavit has a similar right as to the exhibit also.—*Re HINCULIFFE*, [1895] 1 Ch. 117; 64 L. J. Ch. 76; 71 L. T. 532; 43 W. R. 82; 39 Sol. Jo. 25; 12 R. 33, O. A.

Annotations:—Distd. Sloane v. Britain S.S. Co., [1897] 1 Q. B. 185. *Reid. Carter v. Roberts*, [1903] 2 Ch. 312.

5985. ——*J*—Pltf. suing in *forma pauperis* cannot be ordered to produce for inspection by deft. the case laid before counsel under R. S. C., Ord. 16, r. 23, & his opinion thereon, even where they have been made exhibits to the affidavit

described as annexed, but was not annexed to appct.'s affidavit:—*Held*: no objection.—*BRASSY & GRANTHAM MUNICIPAL COUNCIL* (1854), 11 U. C. R. 166.—CAN.

PART VII. SECT. 11, SUB-SECT. 16.

party filing.]—As the affidavits filed on showing cause to a rule for a *mandamus* were unnecessarily long, the corpn. were only allowed half their costs.—*Re SOUTH FRANKRICKSBURG SCHOOL*

filed in accordance with r. 24.—*SLOANE v. BRITAIN S.S. Co.*, [1897] 1 Q. B. 185; 66 L. J. Q. B. 72; 75 L. T. 542; 45 W. R. 203; 13 T. L. R. 124; 41 Sol. Jo. 126, C. A.

SUB-SECT. 16.—COSTS OF AND PENALTIES FOR IMPROPER OR IRREGULAR AFFIDAVITS.

See, now, R. S. C., Ord. 38, rr. 2, 3.

5986. Affidavit sworn on information & belief.—Without grounds—Committal of defendant.]—*BURTON v. MALOON* (1740), Barn. Ch. 401; 27 E. R. 695, L. C.

5987. ——— Liability in costs.]—PRACTICE NOTE, [1876] W. N. 59.

5988. ———.]—Re YOUNG (J. L.) MANUFACTURING CO., LTD., YOUNG v. YOUNG (J. L.) MANUFACTURING CO., LTD., No. 5917, *ante*.

5989. Libellous matter—Costs disallowed.]—Where libellous & impertinent matter was introduced into an affidavit in support of a rule, the ct. deprived the party of the costs of the rule to which he would otherwise have been entitled.—*THOMPSON v. DICAS* (1833), as reported in 2 Dowl. 93; 2 L. J. Ex. 294.

Annotation:—Reid. R. v. Burn (1837), 7 Ad. & El. 190.

5990. Scandalous matter—Liability in costs of party filing.]—*Re BOOTH, Ex p. WAKE*, No. 5954, *ante*.

5991. ———.]—Re BAILEY'S SETTLEMENT, No. 5900, *ante*.

5992. ———.]—GODDARD v. PARR, No. 5958, *ante*.

5993. Prolixity—Liability in costs of party filing.]—*LEWIS v. WOOLRYCH*, No. 5903, *ante*.

5994. ———.]—Where, in an interpleader suit, pltf's filed an affidavit of some length as to merits:—*Held*: in making the usual order on defts. to interplead, & for taxation of costs, there should be a direction to the taxing master to have regard to any prolixity in pltf.'s affidavits.—*SCOTTISH UNION INSURANCE CO. v. STEELE* (1861), 9 L. T. 677.

5995. ———.]—CRACKNALL v. JANSON, No. 5956, *ante*.

5996. Unnecessary matter—Contents of written documents—Liability in costs of party filing.]—*HIRST v. PROCTER*, [1882] W. N. 12.

SUB-SECT. 17.—IN PARTICULAR PROCEEDINGS.

Attachment & committal.]—See CONTEMPT OF COURT, Vol. XVI., pp. 69, 70, Nos. 805–826.

Bankruptcy—Affidavit in support of petition.]—See BANKRUPTCY, Vol. IV., p. 139, Nos. 1283, 1286.

Proof of debt.]—See BANKRUPTCY, Vol. IV., p. 322, Nos. 3018, 3021.

Registration of composition deed.]—See BANKRUPTCY, Vol. V., p. 1074, Nos. 8790–8792.

Bills of exchange.]—See BILLS OF EXCHANGE, Vol. VI., p. 470, Nos. 2993, 2994.

Bills of sale.]—See BILLS OF SALE, Vol. VII., pp. 91–101, Nos. 516–609.

TRUSTEES (1876), 37 U. C. R. 534.—CAN.

Illegibility—Liability in costs of party filing.]—Where on a motion were badly written, scarcely legible & difficult to decipher, the ct. refused pltf. all costs connected with their preparation, although the costs of the suit were given him.—*GARVEY* (1879), 27 Gr. 80.—CAN.

b. Unnecessary matter—Liability in costs of party filing.]—Where pltf.

not only failed to establish his case by evidence, but also incumbered the suit with a body of very irrelevant depositions, he must pay the costs of the depositions.—*MOORE v. M'KAY* (1829), Beatt. 282.—IR.

c. ———.]—Held: the affidavit of deft.'s solr. being unnecessary it was allowable for solr. of pltf. to reply, & his affidavit might be used; but neither should be allowed in taxation.—*HARR v. CORE & BANDON RT. Co.* (1851), 3 Ir. Jur. 1.—IR.

—To remove indictment for trial.]—
PRACTICE, Vol. XVI., p. 452, Nos.

3214-3216.

—To quash.]—See CROWN PRACTICE, Vol. XVI., pp. 464-466, Nos. 3394-3434.

Companies—Winding up by court.]—See COMPANIES, Vol. X., pp. 849, 850, Nos. 5620, 5625, 5637-5639.

Discovery of documents.]—See DISCOVERY, Vol. XVIII., pp. 42 *et seq.*

Divorce proceeding.]—See HUSBAND & WIFE.

Distringas.]—See EXECUTION, Vol. XXI., p. 664, Nos. 2442, 2443.

Election petitions.]—See ELECTIONS, Vol. XX., p. 174, Nos. 1489-1491.

Execution.]—See EXECUTION, Vol. XXI., p. 428, Nos. 80-91.

Foreclosure proceedings.]—See MORTGAGE.

Garnishee proceedings.]—See EXECUTION, Vol. XXI., pp. 635-637, Nos. 2160-2166.

Habeas corpus.]—See CROWN PRACTICE, Vol. XVI., p. 258, Nos. 603-610.

Interpleader.]—See INTERPLEADER.

Judgment under R. S. C., Ord. 14.]—See JUDGMENTS; PRACTICE.

Mandamus.]—See CROWN PRACTICE, Vol. XVI., p. 328, Nos. 1412-1426.

New trial.]—See PRACTICE.

Proceedings in prize.]—See PRIZE LAW.

Quo warranto.]—See CROWN PRACTICE, Vol. XVI., p. 368, Nos. 2012-2019.

Security for costs.]—See PRACTICE.

Service of process generally.]—See PRACTICE.

Service of subpoena.]—See Part V., Sect. 3, sub-sect. 1, A. (c), *ante*.

Setting aside judgment—Affidavit of merits.]—See JUDGMENTS.

Setting aside service.]—See PRACTICE.

Service out of jurisdiction.]—See PRACTICE.

Writ of revivor.]—See LIMITATION OF ACTIONS.

SECT. 12.—WHO MAY TAKE AFFIDAVITS.

SUB-SECT. 1.—WITHIN JURISDICTION.

A. Officials and Commissioners.

See, now, R. S. C., Ord. 38, r. 4.

5997. Judge.]—An affidavit to show cause against a rule for an attachment against a witness, for disobeying a *subpoena*, in a cause in the Ct. of Exch., may be sworn before a judge of either of the other cts.—*PHILLIPS v. DRAKE* (1833), 2 Dowl. 45; 2 L. J. Ex. 232.

5998. — In open court.]—An affidavit will be permitted to be sworn in open ct. in case of urgency.—*MERCERS' CO. v. GREAT NORTHERN RY. CO.* (1851), 14 Beav. 20; 20 L. J. Ch. 557; 51 E. R. 194.

5999. Affidavit in Court of Exchequer—Not Master in Chancery.—Unless also commissioner in Court of Exchequer.]—An affidavit entitled in the Ct. of Exch. & purporting to be "sworn before L., master extraordinary in the Ct. of Ch.," is defective, for not showing that L. was a comr. for taking affidavits in the Ct. of Exch.—*FROST v. HAYWARD* (1842), 10 M. & W. 673; 2 Dowl. N. S. 566; 12 L. J. Ex. 84; 6 Jur. 1045; 152 E. R. 642. *Annotations:—**Reid*, Chancy v. Courtois (1863), 13 C. B. N. S. 634. *Mentd.* *Cobbett v. Oldfield* (1847), 8 L. T. O. S. 394.

See, now, R. S. C., Ord. 61, r. 5.

6000. Deputy registrar in bankruptcy.]—A deputy registrar of the Ct. of Bkcy. has authority to administer the oath to a party making an affidavit of debt under Judgments Act, 1838 (c. 110), s. 8.—*R. v. DUNN* (1847), 12 Q. B. 1026; 16 L. J. Q. B. 382; 9 L. T. O. S. 533; 11 J. P. 788; 11 Jur. 908; 2 Cox, C. C. 267; 116 E. R. 1155; *affd. sub nom.* *DUNN v. R.*, 12 Q. B. 1031, Ex. Ch.

*Annotations:—**Mentd.* *Re Higginson* (1848), 11 L. T. O. S. 455; *R. v. Trueman*, [1913] 3 K. B. 164.

6001. Chief clerk in Vice-Chancellor's Court.]—The chief clerks of the vice-chancellors have power to administer an oath under Winding-up Acts.—*RE NATIONAL ALLIANCE ASSURANCE CO.* (1850), 1 L. T. 131; 8 W. R. 75.

6002. Commissioner.—Within what area.]—A comr. may administer an oath at any place within

there, & not before the mayor or chief magistrate.—*BEARD v. STEELE* (1873), 34 U. C. R. 43.—CAN.

o. — Whether in accordance with statute.]—An affidavit was made in T. before a notary public for the province of Ontario.—*Held*: the affidavit was not made in accordance with the requirements of 5th R. S., c. 107, s. 5.—*Re HEDLEY* (1887), 20 N. S. R. 8 (R. & G.) 130; 8 C. L. T. 376.—CAN.

p. — Whether in action in Supreme Court.]—A notary public within the province of B. C. has not authority to take an affidavit in an action in the Supreme Ct.—*LATNEN v. TYNJALA* (1909), 14 B. C. R. 246.—CAN.

q. — Necessity for affixing notarial seal.]—When the notary public before whom the affidavit of attestation of the witness to a lessee's signature has been sworn has not affixed his notarial seal thereto, the affidavit is defective & useless.—*Re LAND TITLES ACT, Re NORTHERN CROWN BANK*, [1918] 1 W. W. R. 421.—CAN.

r. Statutory direction.]—An affidavit for review from a judgment in the Civil Ct. of the town of M. should be sworn before one of the parties mentioned in C. S. c. 58, s. 7.—*Ex p. STEVENSON* (1853), 22 N. B. R. 558.—CAN.

s. Whether clerk of court—Affidavit of witness to execution of land transfer.]—Affidavit of a subscribing witness to the execution of a transfer

PART VII. SECT. 12, SUB-SECT. 1.—A.

6002 l. Commissioner—Within what area.]—Where no comr. under statute for taking affidavits to be used in Upper Canada, resided nearer than 210 miles from a place in Lower Canada, where an affidavit of service was to be made, the affidavit was ordered to be sworn before one of the ordinary comrs. for taking affidavits in Lower Canada.—*GOULD v. HUTCHINSON* (circa 1861), 1 Ch. Ch. 188.—CAN.

d. — Jurisdiction.]—A comr. authorised to take affidavits to be read in the Supreme Ct. has no authority to take an affidavit of the service of an order for review of the proceedings on a trial before a justice of the peace.—*R. v. MCINTOSH* (1869), 1 Han. 372.—CAN.

e. — Affidavit of service of summons before sessions.]—Deft. was summoned to appear before the sessions to answer a complaint of selling liquor without licence. The affidavit of service of the summons was sworn before a comr.—*Held*: a commissioner had no power to take the affidavit.—*R. v. GOLDING* (1874), 2 Pug. 385.—CAN.

f. — —.]—An affidavit of debt for a *capias* to be issued out of the town of P. Civil ct. may be sworn before a comr. for taking affidavits to be read in the Supreme Ct.—*WATERBURY v. NIXON* (1878), 2 P. & B. 373.—CAN.

g. —.]—*HAIKAP BANKING CO. v. SMITH* (1886), 26 N. B. R. 206.—CAN.

h. — Mortgage—Affidavit of execution.]—Under R. S. M., c. 10, a mtgce. is not rendered invalid or void by reason of the affidavit of execution being sworn before the mtgcee, himself, he being a comr. for taking affidavits.—*INCH v. SIMON* (1897), 12 Man. L. R. 1.—CAN.

k. Where chief magistrate is a party—Person next in rank.]—Where the mayor or chief magistrate of a place to which a commission is sent is *plff.*, the due taking of the commission may be sworn before & certified by the person next in rank.—*THOMPSON v. CUMMINGS* (1841), 6 O. S. 106.—CAN.

l. Justice of the peace—Whether affidavit valid—When commissioner within three miles.]—Where the affidavit on which an attachment was grounded was made before a justice of the peace, & it appeared that a comr. for the county was, at the time, at his usual residence, & within three miles of the place where the affidavit was made, the proceedings were set aside.—*KNODEL v. BEST* (1857), 2 Thom. 149.—CAN.

m. — Affidavit for appeal.]—The affidavit for appeal from a justice of the peace, in civil cases, must be made before the justice who tried the cause.—*CURRY v. LECHAS* (1882), 16 N. S. R. 4 (R. & G.) 31.—CAN.

n. Notary public.]—*Held*: the due taking of a commission, executed in M., was sufficiently proved by an affidavit made before a notary public

Sect. 12.—Who may take affidavits: Sub-sect. 1, A.

ten miles of his residence.—*Re OATHS IN CHANCERY* | Act (1854), 2 Eq. Rep. 175; 22 L. T. O. S. 249; 2 W. R. 140, L. C.

Annotation:—*Reid. Hill v. Tollit* (1854), 2 W. R. 504.

6003. S. P. HILL v. TOLLIT (1854), 2 W. R. 504, L. C.

—*See, generally, SOLICITORS.*

Duration of commission—Solicitor struck off rolls.—*See S*

B. Solicitors in Cause.

See, now, R. S. C., Ord. 38, rr. 16, 17; Commissioners for Oaths Act, 1889 (c. 10), s. 1 (3); & generally, SOLICITORS.

6004. General rule—Not solicitor for deponent.]—Affidavits taken before a person who was a solr. in the cause cannot be read. The petition dismissed, & the costs directed to come out of the solr.'s pocket who took the affidavits.—*Re HOGAN* (1754), 3 Atk. 813; 26 E. R. 1264, L. C.

Annotations:—*Consd. Foster v. Harvey* (1863), 11 W. R. 899; *Bourke v. Davis* (1889), 44 Ch. D. 110. *Reid. Re Gregg, Re France* (1869), L. R. 9 Eq. 137. *Mentd. Re Commonwealth Land Building Estate & Auction Co., Ex p. Hollington* (1873), 29 L. T. 502.

6005. ———.]—Affidavits upon which an information is applied may not be sworn before the attorney in the prosecution.—*It. v. Ipswich* (1759), 2 Keny. 421; 96 E. R. 1231.

Annotation:—*Reid. Turner v. Bates* (1847), 10 Q. B. 292.

6006. ———.]—The ct. will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agents of prosecutor.—*R. v. WALLACE* (1789), 3 Term Rep. 403; 100 E. R. 644.

6007. ———.]—An affidavit to ground a motion for a rule nisi cannot be sworn before the attorney for the party, or his partner, & a rule obtained on such an affidavit will be discharged with costs.—*BATT v. VAINSEY* (1814), 1 Price, 116; 145 E. R. 1349.

Annotation:—*Consd. Turner v. Bates* (1847), 10 Q. B. 292.

6008. ———.]—The ct. will discharge with costs a rule obtained on affidavits of a party, which are sworn before his own attorney in the cause.—*HOPKINSON v. BUCKLEY* (1817), 8 Taunt. 74; 129 E. R. 310.

6009. ———.]—The ct. refused to order an affidavit to be taken off the file for irregularity on the objection of its having been sworn before the attorney for the party in the cause, where no circumstances of suspicion appeared because it has hitherto not been contrary to the practice on this side of the ct.; but in consideration of the propriety of such a rule being established the ct. would not order the party to pay the costs of his application. The ct. directed that in future affidavits were not to be sworn before the attorneys in the cause.—*SMITH v. WOODROFFE* (1818), 6 Price, 230; 146 E. R. 794.

Annotation:—*Consd. Turner v. Bates* (1847), 10 Q. B. 292.

6010. ———.]—An affidavit, stating that deft. had been discharged under an Insolvent Debtors' Act, cannot be sworn before his own

attorney in the cause.—*JENKINS v. MASON* (1819), 3 Moore, C. P. 325.

6011. ———.]—It is a rule as old as Lord Hardwicke's time, that an affidavit, sworn before the solr. of the party in the cause, cannot be used. The rule prevails in all the Cts. of Westminster Hall. The reason of it is sufficiently obvious (*LEACH, V.-C.*).—*ROSS v. SHEARMAN* (1820), 2 Coop. temp. Cott. 172; 47 E. R. 1109.

Annotation:—*Reid. Northumberland v. Todd* (1878), 7 Ch. D. 777.

—*]*—An affidavit made before a comr. who acts as the attorney of deft. before an appearance is entered cannot be used; but it must be clearly shown that he acted as such attorney at the time when the affidavit was made; it is not sufficient to show that he is so at the time of making the objection.—*KIDD v. DAVIS* (1837), 5 Dowl. 568; Will. Woll. & Dav. 189.

Annotation:—*Distd. Haddock v. Williams* (1838), 1 Will. Woll. & H. 415.

6013. ———.]—A writ of *ne exeat*, & the proceedings taken under it, discharged, with costs, on the ground that the affidavits had been taken before the solr. of pltf. in the cause, & the ct. refused to impose upon deft., as part of the terms of the dismissal, that an action should not be brought against pltf. in respect of the arrest.—*HOPKIN v. HOPKIN* (1853), 10 Harc. App. I. ii.; 1 Eq. Rep. 20; 22 L. J. Ch. 728; 21 L. T. O. S. 209; 17 Jur. 343; 1 W. R. 275; 68 E. R. 1113.

Annotations:—*Reid. Re Watkinson* (1854), 23 L. T. O. S. 270; *Northumberland v. Todd* (1878), 26 W. R. 350; *Bourke v. Davis* (1889), 44 Ch. D. 110.

6014. ———.]—The affidavits of petitioning creditors, sworn before their own solrs., are not receivable in evidence, but the ct. will, when necessary, direct them to be re-sworn.—*Re CHARLTON, Ex p. CHARLTON* (1877), as reported in 36 L. T. 561; *on appeal*, 6 Ch. D. 45, C. A.

Annotations:—*Mentd. Re Shiers, Ex p. Shiers* (1877), 7 Ch. D. 416; *Champlin v. Formby* (1878), 26 W. R. 391; *Re Kearley & Clayton's Contract* (1878), 7 Ch. D. 615; *Re Jones, Ex p. Jones* (1881), 18 Ch. D. 109; *Re McHenry, Ex p. Credit Co.* (1883), 32 W. R. 47; *Sharp v. McHenry, Sharp v. Brown* (1887), 38 Ch. D. 427; *Re McHenry, Ex p. McDermott* (1888), 21 Q. B. D. 580.

6015. ———.]—It has been the rule since the time of Lord Hardwicke that the ct. does not accept an affidavit sworn before the solr. in the cause nor his clerk although he may be a comr. (*KAY, J.*).—*BOURKE v. DAVIS* (1889), 41 Ch. D. 110; 62 L. T. 34; 38 W. R. 167; 6 T. L. R. 87.

Annotations:—*Mentd. Edwards v. Jenkins*, [1896] 1 Ch. 308; *A.-G. & London Property Investment Trust v. Richmond Corpn. & Gosling* (1903), 89 L. T. 700; *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

6016. Application of rule—Whether restricted to solicitors named on the record.]—If the agent in town is the attorney on the record it is no objection to an affidavit of the party that it is sworn before his own attorney in the country.—*READ v. COOPER* (1813), 5 Taunt. 89; 128 E. R. 920.

Annotations:—*Distd. Jenkins v. Mason* (1819), 3 Moore, C. P. 325. *Reid. Rayment v. Smith* (1843), 7 Jur. 674; *Foster v. Harvey* (1863), 2 New Rep. 443; *Re Gregg, Re France* (1869), L. R. 9 Eq. 137; *Northumberland v. Todd* (1878), 26 W. R. 350.

6017. ———.]—(1) Plea in abatement set aside for irregularity, on the objection that the

of land was sworn before the clerk of the ct.:—*Held*: bad, as such clerk is not one of the officers prescribed for this purpose.—*ANKELL ENGINE & MACHINE WORKS Co. v. SCOTT* (1907), 6 W. L. R. 272.—**CAN.**

PART VII. SECT. 12, SUB-SECT. 1.—B.

6004 I. General rule—Not solicitor for

deponent.—*KOYLE v. WILCOX* (1831), 2 O. S. 113.—**CAN.**

6004 II. ———.]—*DOED. WALKER v. ROE* (1839), 1 Ont. Dig. 2196.—**CAN.**

6004 III. ———.]—Affidavits used in applications on the Crown side of the ct. must not be sworn before the prosecutor or his attorney.—*It. v. DUNPHY* (1886), 25 N. B. R.

370.—**CAN.**

6016 I. Application of rule—Whether restricted to solicitors named on record.]—The affidavit of a party to a suit sworn before an *ante litem* solr. in his employ, acquainted with the facts of the case, although not the solr. on the record, is insufficient.—*DUNSMUIR v. KLONDIKE & COLUMBIAN GOLD FIELDS, LTD.* (1898), 6 B. C. R. 200.—**CAN.**

affidavit in support of it had been sworn before pltf.'s attorney, as a comr. for taking affidavits in the Ct. of Exch. in the country. The rule now adopted in this ct. that affidavits to be used in ct. shall not be sworn before the attorneys of the parties in the cause, is not to be construed literally, as applying only to the attorney whose name appears on the record in this ct. which must be one of the four attorneys of this ct.; but includes the immediate attorney or solr. for the party.

(2) A palpable mistake in an affidavit as the wrong year in the *jurat* used in support of an application to the ct. is not an insurmountable objection to the motion, as the ct. will permit the error to be amended by a supplemental affidavit; but where such negligence occurs, they will visit it on the party in the consideration of the question of costs.—COOPER v. ARCHER (1823), 12 Price, 149; 147 E. R. 682.

Annotation:—As to (2) **Consd.** Blackwell v. Allen (1840), 10 L. J. Ex. 65.

6018. ———.]—PARKER v. PERRY (1846), 7 L. T. O. S. 116.

6019. ———.]—In an action in the Ch. Div. pltf.'s London solrs., who were his only solrs. on the record, employed a firm who were his country solrs. in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of pltf. were sworn before the other partner:—**Held**: such affidavits were inadmissible.—NORTHUMBERLAND (DUKE) v. TODD (1878), 7 Ch. D. 777; 47 L. J. Ch. 313; 38 L. T. 746; 26 W. R. 350.

Annotation:—**Refd.** Bourke v. Davis (1889), 44 Ch. D. 110.

6020. ——— Not limited to proceedings in court.]—An affidavit cannot be used in support of an application to the ct. if it be sworn before a comr., who is acting in the matter as attorney of appt., though there be no action pending, & no attorney on the record.—*Re* GRAY (1852), Bail Ct. Cas. 93; 21 L. J. Q. B. 380; *sub nom.* *Re* GRAY, *Ex p.* CULLIMORE, 19 L. T. O. S. 207.

6021. ———.]—The disqualifying provision in Commissioners for Oaths Act, 1889 (c. 10), s. 1 (3), which prohibits a comr. for oaths from exercising any of the powers given by the sect. in any proceeding in which he is solr. to any of the parties to the proceeding, or clerk to any such solr. or in which he is interested, is not limited to proceedings in ct., but is co-extensive with the substantive provision in sub-sect. 2 which empowers a comr. for oaths to administer any oath or take any affidavit for the purposes of any ct. or matter in England, including *inter alia*, matters relating to the registration of any instrument.—*Re* BAGLEY, [1911] 1 K. B. 317; 80 L. J. K. B. 168; 103 L. T. 470; 55 Sol. Jo. 48; 18 Mans. 1, C. A.

Mentd. *Re* Wilson, [1916] 1 K. B. 382; *Re* Bankruptcy Notice, [1924] 2 Ch. 76.

6022 f. ——— *Partner included.*]—An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made cannot be read.—HADLEY v. HEARNS (1843), 1 U. C. R. 405.—CAN.

6022 h. ———.]—WHITE v. (1849), 6 U. C. R. 13.—CAN.

t. ——— *Whether agent included.*—*Notary public.*]—An affidavit sworn before a notary in M. who had been acting as agent for deft.'s solr., is insufficient.—MCLELLAN v. HARRIS (1898), 6 B. C. R. 257.—CAN.

a. *Affidavit in contested municipal election.*—*Relator's attorney.*]—*Semble*: the attorney of the relator in a contested municipal election may take the & affidavit.—*It. v.*

ROCHESTER (1855), 12 U. C. R. 630.—CAN.

b. *Affidavit to hold to bail.*—*Before action.*—*Plaintiff's attorney.*]—An affidavit to hold to bail before action commenced may be sworn before pltf.'s attorney.—BRETT v. SMITH (1855), 1 P. R. 309.—CAN.

c. ——— *After action commenced.*—*Before judgment.*—*Plaintiff's attorney.*]—An affidavit to hold to bail after the commencement of an action by writ of summons & before judgment, may be sworn before pltf.'s attorney.—McMANUS v. WELLS (1890), 29 N. B. R. 449.—CAN.

d. *Affidavit in proceedings against absconding debtor.*—*Attorney of petitioning creditor.*]—Affidavit, upon which a

6022. ——— *Partner included.*]—BATT v. VAISEY, No. 6007, *ante*.

6023. ——— *Whether agent included.*]—The rule against swearing an affidavit before the solr. conducting proceedings or his clerk, does not necessarily extend to his agent employed to get the affidavit sworn.—*Re* GREGG, *Re* PRANCE (1869), L. R. 9 Eq. 137; 39 L. J. Ch. 107; 23 L. T. 234; 34 J. P. 276; 18 W. R. 589.

Annotation:—**Refd.** Northumberland v. Todd (1878), 26 W. R. 350.

6024. ——— *Whether correspondent included.*]—PARKINSON v. CRAWSHAY, [1894] W. N. 85.

6025. ——— *Whether clerk included.*]—An affidavit may be taken before the clerk of the attorney in the cause, if the clerk be empowered to take affidavits at all.—GOODTITLE d. PVE v. BADTITLE (1800), 8 Term Rep. 638; 101 E. R. 1590.

6026. ———.]—An affidavit in support of a motion by which a person seeks to be made party to a cause sworn before a comr. who is clerk of his own attorney, is good.—DOE d. GRANT v. ROE (1837), 5 Dowl. 409; Will. Woll. & Dav. 68.

Annotations:—**Refd.** Parker v. Perry (1846), 7 L. T. O. S. 116; Turner v. Bates (1847), 10 Q. B. 292.

6027. ———.]—Affidavits sworn before a master extraordinary, who was the clerk of pltf.'s attorney, rejected.—WOOD v. HARPER (1810), 3 Beav. 290; 49 E. R. 113.

Annotations:—**Refd.** Northumberland v. Todd (1878), 26 W. R. 350; Bourke v. Davis (1889), 44 Ch. D. 110.

6028. ———.]—BOURKE v. DAVIS, No. 6015, *ante*.

6029. ———.]—*Solicitor not named on the record.*]—An affidavit is admissible in evidence though it has been sworn before the clerk of pltf. in the cause, pltf. not being himself the solr. on the record.—FOSTER v. HARVEY (1803), 4 De G. J. & Sm. 59; 3 New Rep. 98; 9 L. T. 401; 46 E. R. 837, L. J.J.

Annotations:—**Apld.** *Re* Gregg, *Re* Prance (1869), L. R. 9 Eq. 137. **Refd.** Northumberland v. Todd (1878), 26 W. R. 350.

6030. ——— *Affidavit of acknowledgment.*—*By married woman.*—*Fines & Recoveries Act, 1833 (c. 74).*]—The affidavit of the due taking of the acknowledgment of a married woman under the above Act may be made by one of the comrs. before whom it was taken, notwithstanding he is the attorney concerned in the transaction.—*Re* SCHOLFIELD (1836), 3 Bing. N. C. 293; 2 Hodg. 236; 3 Scott, 657; 6 L. J. C. P. 28; 132 E. R. 423.

Annotations:—**Refd.** *Re* Menhennitt (1869), 39 L. J. C. P. 40. **Mentd.** *Re* Ollerton (1855), 15 C. B. 796.

6031. ———.]—Where one of two comrs. who had taken the acknowledgment of a deed by a married woman was interested, & had taken no part in the examination, & in consequence of the death of the other comr., who was not interested, the affidavit required by Rule 3 of

warrant under Absconding Debtors Act is issued, may be sworn before the attorney of petitioning creditor.—*It. v.* STRADMAN (1868), 1 Han. ——— CAN.

a. *Affidavit where attachment with writ.*—*Attorney who issues writ.*]—Where an attachment issues with the writ in the cause the affidavit may be sworn before the attorney who issues the writ.—DAVIDSON v. O'CONNELL (1876), 3 Fug. 684.—CAN.

t. *Affidavit on motion to set aside judgment.*—*Attorney preparing it.*—*Not being attorney on record.*]—Affidavits used on a motion to set aside a judgment may be sworn before the attorney who prepares the affidavits, he not being the attorney on the record.—

Sect. 12.—Who may take affidavits: Sub-sect. 1, B.;

Hilary Term, 4 Wm. 4, could not be made; & the ct. refused to allow the certificate of acknowledgment to be filed.

Sect. 79 of the above Act requires the acknowledgment to be taken before a judge of one of the superior cts. or a master in ch. or before two comrs. (BOVILL, C.J.).—*Ex p. MENHENNET* (1869), L. R. 5 C. P. 16; *sub nom. Re MENHENNITT*, 39 L. J. C. P. 40; 21 L. T. 332; 18 W. R. 66.

6032. —Affidavit of execution of bill of sale.]—R. S. C., Ord. 38, r. 16, applies to affidavits of execution of bills of sale, & consequently if an of execution be sworn before the solr. acting for the grantee in the preparation of the bill, the bill of sale will be void.—*BAKER v. AMBROSE*, [1896] 2 Q. B. 372; 65 L. J. Q. B. 589; 12 T. L. R. 603.

Annotation:—*Apld. Re Bagley*, [1911] 1 K. B. 317.

6033. Effect of non-observance of rule—Costs against solicitor.]—*Re HOGAN*, No. 6004, *ante*.

6034. —Discharge of proceedings with costs.]—*BATT v. VAISEY*, No. 6007, *ante*.

6035. —[—Hopkinson v. BUCKLEY, No. 6008, *ante*.

6036. —[—Hopkin v. HOPKIN, No. 6013, *ante*.

6037. —Re-swearing.]—*Re CHARLTON, Ex p. CHARLTON*, No. 6014, *ante*.

6038. Operation of rule—Condition precedent—That solicitor was acting for party at time affidavit was sworn.]—An attorney, before whom, as a comr., an affidavit had been sworn in the country, had been the legal adviser of one of the deponents, & had, in London, told the party really interested in the cause for which the affidavit was sworn, that he intended to move the ct. in that cause, in which, however, he was not the attorney:—*Held*: this formed no objection to the affidavit, which was accordingly received.—*WILLIAMS v. HOCKIN* (1818), 8 Taunt. 435; 129 E. R. 452.

Annotations:—*Refd. Payment v. Smith* (1843), 7 Jur. 674; *Foster v. Harvey* (1863), 2 New Rep. 443; *Re Gregg, Re France* (1869), L. R. 9 Eq. 137; *Northumberland v. Todd* (1878), 26 W. R. 350.

6039. —[—It is no objection to an affidavit that it is sworn before the attorney in the cause, unless it expressly appears that he was the attorney at the time the affidavit was sworn.—*BEAUMONT v. DEAN* (1835), 4 Dowl. 351; Tyr. & Gr. 209.

Annotation:—*Distd. Haddock v. Williams* (1838), 1 Will. Woll. & H. 415.

6040. —[—KIDD v. DAVIS, No. 6012, *ante*.

6041. —Statement of party sufficient proof.]—An objection to an affidavit, that it was sworn before the attorney in the cause, is

made sufficiently to appear by the general declarations of the party himself, though it is not positively stated he was the attorney at the time the affidavit was sworn.—*HADDOCK v. WILLIAMS* (1838), 1 Will. Woll. & H. 415.

6042. —Solicitors of like name—No presumption that swearing of affidavit invalid.]—Where an affidavit has been sworn before plff.'s solr., it is necessary to have an affidavit of that fact; the ct. will not reject it, merely because it appears on the face of it to have been sworn before a person of the same name as plff.'s attorney.—*HODGSON v. WALKER* (1810), Wight. 62; 145 E. R. 1175.

SUB-SECT. 2.—OUT OF THE JURISDICTION OF THE ENGLISH COURTS.

6043. Execution before foreign magistrates—Properly authenticated.]—The ct. will take cognisance of affidavits sworn before foreign magistrates if properly authenticated to them.—*DAIMER v. BARNARD* (1797), 7 Term Rep. 248; 101 E. R. 957.

Annotations:—*Mentd. Glasse v. Mount* (1797), 7 Term Rep. 390; *Gorton v. Champneys* (1823), 1 Bing. 287.

6044. —Authenticated by seal of court.]—*COOPER v. MOON*, [1884] W. N. 78; Bitt. Rep. in Ch. 12.

6045. Execution before consul of foreign power.]—Affidavits having been sworn before the United States consul in Vera Cruz, as there was no English consul or diplomatic agent there:—*Held*: there was no power in the ct. to receive them.—*In the Goods of DE SALAZAR* (1873), 21 W. R. 776.

6046. Person must be authorised to take oaths by lex loci.]—An affidavit of debt made by plff. residing in a foreign country before a foreign magistrate, whose signature to the *jurat* & his authority in that country to administer oaths & take affidavits were verified by a proper affidavit in this country, is a sufficient foundation for a judge's order to hold debt. to special bail, & this, notwithstanding Frivolous Arrests Act, 1725 (c. 29), which requires an affidavit of the cause of action by plff., by which must be understood such an affidavit taken before a competent jurisdiction in this country whereon, if false, perjury might be assigned, for that branch of the statute is restrictive of the acts of plffs. only, & not of the cts. But any person making or knowingly using a false affidavit so made abroad for this purpose is guilty of a misdemeanour in attempting to pervert public justice, & is punishable by indict-

MARITIME BANK v. MCKEAN (1883), 29 N. B. R. 626.—CAN.

g. Affidavit of bona fides in chattel mortgage—Solicitor employed in office of mortgagee's solicitors.]—An affidavit of bona fides in a chattel mtge. may be made before a solr. employed in the office of the mtggee's solrs.—*CANADA PERMANENT LOAN & SAVINGS CO. v. TODD* (1895), 22 A. R. 515.—CAN.

h. —Solicitor for affiant.]—Affidavit of bona fides of a chattel mtge. may be sworn before the solicitor who acted for the affiant.—*AYERILL v. CASWELL & Co.* (1915), 31 W. L. R. 953; 23 D. L. R. 113; 8 Sask. L. R. 269.—CAN.

k. Affidavit to bill of sale—Attorney preparing bill.]—*Held*: The affidavit to a bill of sale was not bad because it had been sworn before the

solicitor by whom the bill of sale was prepared.—*MOSEYER v. O'BRIEN* (1905), 37 N. S. R. 286.—CAN.

l. Affidavit verifying mechanic's lien —Solicitor for claimant.]—Affidavit verifying a mechanic's lien may be sworn before the solicitor for the claimant.—*POITON v. THOMSON* (1916), 34 W. L. R. 745; 10 W. W. R. 865; 26 Man. L. R. 410.—CAN.

PART VII. SECT. 12, SUB-SECT. 2.—A.

6043 i. Execution before foreign magistrates —Properly authenticated.]—On motion for liberty to issue a *sci. fa.* to revive a judgment, plff.'s affidavit had been sworn before the President of the Civil Tribunal, & the signature of plff., attested by the mayor & sous-prefect of V., in France, with their respective seals attached thereto; & the French

consul resident in Dublin, by affidavit, stated that there was no resident British consul or notary public at V.; that the civil tribunal was a recognised ct. of justice. He also verified the seals attached to the affidavit, as well as the handwriting of plff. The ct. granted the usual order to revive.—*HOWZELLE v. WATSON* (1846), 9 I. L. R. 40.—IR.

6046 i. Person must be authorised to take oaths by lex loci.]—An affidavit purporting to be sworn before the mayor of a city in England is inadmissible in this ct., without proof of his signature & authority to administer oaths.—*GRAHAM v. MACPHERSON* (1860), 1 Ch. Ch. 85.—CAN.

6046 ii. —[—MURPHY v. Mc-MILLAN (1918), 43 D. L. R. 25.—CAN.

ment.—*OMEALY v. NEWELL* (1807), 8 East, 364; 103 E. R. 382.

Annotations:—Consol. Cole v. Sherard (1855), 11 Exch. 482. *Reid. French v. Bellew* (1813), 1 M. & S. 302; *Sharpe v. Johnston* (1835), 1 Hodg. 298. *Mentd. Molling v. Buckholtz* (1814), 2 M. & S. 563.

10071. ——]—Where an affidavit, in a proceeding in this ct., is made in a foreign country, it must distinctly appear that the functionary before whom it is sworn abroad is authorised by the laws of his own country to administer an oath.—*WARREN v. SWINBURNE* (1845), 9 Jur. 510; *previous proceedings*, 5 L. T. O. S. 100.

6048. ——]—*LEVITT v. LEVITT*, No. 6109, *post*.

6049. Whether British consul.]—*PICKARDO v. MACHADO*, No. 5929, *ante*.

6050. ——]—*Authority shown by notarial certificate.]—*This ct. will receive an affidavit sworn before a consul for Great Britain who, it appears by a notarial certificate, is duly authorised to administer oaths.—*Re CAMERON* (1848), 12 L. T. O. S. 174.

6051. ——]—*Ex p. HUTCHINSON*, No. 5841, *ante*.

See, now, R. S. C., Ord. 38, r. 5.

6052. Whether notary public.]—*HAGGITT v. INIFF*, No. 6103, *post*.

6053. ——]—*No British official available.]—*(1) Where an affidavit sworn before a notary in foreign parts is tendered, it must appear that none of the British authorities authorised by 18 & 19 Vict. c. 42, were resident in such place.

(2) Unless the addition of the person making an affidavit wheresoever is inserted, it cannot be read in the Ct. of Probate.—*In the Goods of BERNARD* (1862), 2 Sw. & Tr. 489; 31 L. J. P. M. & A. 89; 6 L. T. 726; 164 E. R. 1087.

Annotation:—As to (1) Reid. Kevan v. Crawford (1876), 45 L. J. Ch. 658.

6054. ——]—*Whether verification necessary—Where fund small.]—*The ct., on the personal undertaking of the solr., dispensed with the verification of the signature, to an affidavit abroad of a public notary, the fund only amounting to £35.—*MAYNE v. BUTLER* (1864), 11 L. T. 410; 13 W. R. 128.

Annotation:—N.F. Re Davis's Trusts (1869), L. R. 8 Eq. 98.

6055. ——]—Where an affidavit is sworn before a notary abroad the signature must

6046 iii. ——]—*ANON. (circa 1801)*, Rowe, 401.—*IR.*

*m. — Evidence of authority.]—*In the case of an affidavit sworn in Wis., in the U.S.A., a certificate of the clerk of the circuit ct. of W. county, state of Wis., was held sufficient evidence that the official before whom the affidavit was sworn had power to administer an oath.—*O'NEILL v. DORAN* (1876), 10 L. R. Eq. 187.—*IR.*

n. ——]—*In order that an instrument executed out of the British dominions should be receivable in evidence, it must be verified by an affidavit or declaration of its due execution, & the British consul or vice-consul must certify to the fact that the person taking the oath or declaration has power in accordance with the law of the foreign county to take the affidavit or declaration.—DILON v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY* (1901), 20 N. Z. L. R. 188.—*N.Z.*

*o. Whether notary public—Necessity for certificate under hand & official seal.]—*An affidavit sworn out of the province before a notary public & certified under his hand & official seal, is admissible.—*FIRST NATIONAL BANK v. RAYNES* (1893), 3 B. C. R. 87.—*CAN.*

p. ——]—*Affidavit by British sub. by certificate of*

be verified by affidavit before it can be received here, though the rule has been relaxed where the fund was very small.—*Re DAVIS's TRUSTS* (1869), L. R. 8 Eq. 98; 21 L. T. 137.

6056. ——]—It is not necessary that the notarial seal or signature mentioned in 15 & 16 Vict. c. 86, s. 22, should be verified, & the sect. applies to the notarial attestation of a power of attorney to be used in the Ct. of Ch.—*HAYWARD v. STEPHENS* (1866), 36 L. J. Ch. 135; 15 L. T. 173.

6057. ——]—Before & after 15 & 16 Vict. c. 86, affidavits sworn in foreign parts out of Her Majesty's dominions before a notary public might be filed, & that practice continued in force down to the time when the R. S. C., 1883, came into operation:—*Held*: this practice is not abrogated by R. S. C., Ord. 38, r. 6, & R. S. C., Ord. 72, r. 2, of the Rules of 1883, & may be followed at any rate in cases where the practice under the Rules of 1883 would be very inconsistent.—*COOKE v. WILBY* (1884), 25 Ch. D. 769; 53 L. J. Ch. 592; 50 L. T. 152; 32 W. R. 379.

6058. What amounts to verification—Not official seal.]—The mere fact of the appendage of an official seal to an affidavit, unsupported by confirmative evidence, will not admit a creditor residing abroad to proof of debt.—*Re BEATTIE, MACNAUGHTON & Co.* (1846), 7 L. T. O. S. 546.

B. In Particular Countries.

(a) Scotland.

See, now, R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (c. 10), s. 3.

6059. Judge.]—There is no instance of this ct. taking notice of an affidavit before a justice of the peace in Scotland; though the etc. of late have acted upon affidavits before judges of the superior etc. there.—*HYDE v. WHITEFIELD* (1815), 19 Ves. 342; 34 E. R. 544, L. C.

Annotation:—Reid. Lees v. Patterson (1878), 7 Ch. D. 806.

6060. ——]—Affidavit sworn before a baron of the Exch. in Scotland, admitted to be read.—*BRAHAM v. BOWES* (1820), 1 Jac. & W. 296; 37 E. R. 388, L. C.

6061. Magistrate—Subject to verification.]—*PINKERTON v. BAUNSELEY CANAL CO. OF PRO-*

*consul.]—*The ct. will receive an affidavit made by a British subject abroad if sworn before a notary public & attested by the certificate of the British consul.—*Re KENAH's TRUSTS* (1867), 15 W. R. 781.—*IR.*

*q. Judge—Necessity for verification of signature.]—*An affidavit sworn before a judge of the Supreme Ct. of N. S., whose signature is verified by an affidavit made in this province, may be read in this ct.—*KERR v. ANSLEY* (1841), 1 Kerr, 301.—*CAN.*

r. ——]—Where the affidavit of the due execution of a power of attorney to demand costs under a rule of ct., was made in N. S. before a judge of the Supreme Ct. there:—*Held*: the signature of the judge must be verified by an affidavit made here.—*PHARE v. HARDING* (1843), 2 Kerr, 290.—*CAN.*

*s. Commissioner—On separation of counties.]—*A commission was granted for the M. district, which then included the present county of Prince Edward & the united counties of F., L., & A. Prince Edward was afterwards set aside as a separate district, the comr. then being resident in the united counties of F., L., & A.—*Held*: his authority in such united counties would continue.—*McWHIRTER v. COXBETT* (1854), 4 C. P. 203.—*CAN.*

held a com-

mission for taking affidavits in the district of Wellington, issued in 1848:—Held: he might act under it in the county of Waterloo, where he was living, being part of the old district, & a junior county disunited from the union of Wellington, Waterloo, & Grey.—*GILCK v. DAVIDSON* (1858), 15 U. C. R. 591.—*CAN.*

McNAUGHTEN (1858), 16 U. C. R. 194.—*v. CAN.*

*b. Whether foreign mayor.]—*An affidavit of execution of a chattel sworn before the mayor of a foreign town, is useless.—*DE FORREKT v. BUNNELL* (1858), 15 U. C. R. 370.—*CAN.*

*c. British vice-consul.]—*An affidavit sworn before a British vice-consul will be admitted as cause against a conditional order for a receiver.—*WALSH v. I* 334.—*IR.*

*d. Scottish justice of peace—Locality within authority of Great Seal.]—*A Scottish justice of the peace may take an affidavit out of his jurisdiction, provided the locality be within the authority of the Great Seal of Gt. Britain. Hence an affidavit before a justice of the peace of the county of M. was held valid though taken in London.—*KERR v. AILEA* (1854), 1 Macq. 736.—*SCOT*

Sect. 12.—Who may take affidavits: Sub-sect. 2, B. (a), (b), (c) & (d).]

PRIETORS (1808), 3 Y. & J. 277, n.; 148 E. R. 1184.

Annotation:—*Reid*. *Kevan v. Crawford* (1876), 45 L. J. Ch. 658.

6062. ——[An affidavit made by deft., in a suit in the Exch. Ct., sworn before a magistrate in Scotland, permitted to be read.—*ELLIS v. SINCLAIR* (1829), 3 Y. & J. 273; 148 E. R. 1182.

Annotation:—*Reid*. *Sharpe v. Johnston* (1835), 1 Hodg. 298.

6063. Justice of the peace.—[*HYDE v. WHITFIELD*, No. 6059, *ante*.

6064. ——**Subject to handwriting being authenticated.**—[Affidavits sworn before a justice of the peace in Scotland are admissible in a cause in this ct. if the handwriting of the justice be authenticated.—*TURNBULL v. MORETON* (1819), 1 Chit. 721.

6065. ——[It is no objection to an affidavit sworn in Scotland, that it is taken before a justice of the peace, & not before a Lord of Session.—*WATSON v. WILLIAMSON* (1832), 1 Dowl. 607; 2 J. Ex. 81.

6066. Commissioner.—[An affidavit to hold to bail, not entitled in any ct., but sworn in Scotland before a comr., who states himself to be a comr. by virtue of a commission from the Cts. of Common Pleas & Exch. is sufficient.—*WHITE v. IRVING* (1836), 2 M. & W. 127; 5 Dowl. 289; 2 Gale, 230; 6 L. J. Ex. 15; 150 E. R. 697.

(b) Ireland.

See, now, R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (c. 10), s. 3.

6067. Judge.—[The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country must be attested by a notary public; but the ct. will dispense with such attestation in the case of an affidavit taken before a great judicial officer in Ireland.—*Ex p. WORSLEY* (1793), 2 Hy. Bl. 275; 126 E. R. 548.

Annotation:—*Reid*. *Cross v. Cheshire* (1851), 15 Jur. 993.

6068. Master extraordinary.—[1) An affidavit of bkpt. sworn before a master extraordinary in Cork was allowed to be read.

(2) Cts. of law will allow an affidavit sworn before a consul to be read.—*Ex p. RUDDOCK* (1728), Mos. 78; 25 E. R. 282, L. C.

6069. ——**Verification unnecessary.**—[An affidavit was sworn before a master extraordinary in Ireland, appointed under 6 & 7 Vict. c. 82:—*Held*: it was not necessary to verify by affidavit the fact that he filled that character.—*DAY v. DAY* (1848), 11 Beav. 35; 50 E. R. 729.

6070. Master.—[Affidavit sworn in Ireland before a master, to ground a writ of *ne exeat regno* admitted, after doubt & conference with the judges.—*JOHNSON v. SMITH* (1782), 2 Dick. 592; 21 E. R. 401, L. C.

6071. Examiner of Court of Chancery.—[An affidavit sworn before an examiner of the Ct. of Ch. in Ireland may be used in the Ct. of Ch. in England.—*HELY v. BLAKENEY* (1833), 2 L. J. Ch. 185.

6072. Commissioner.—[The ct. allowed an affidavit sworn before a comr. of the Ct. of Exch. in

Ireland to be read.—*KILBY v. STANTON* (1827), 2 Y. & J. 75; 148 E. R. 838.

Annotations:—*Mentd.* *Re Anderson* 1836), 1 Hodg. 418; *Money v. Jordan* (1850), 13 Beav. 229.

6073. ——**Subject to verification of signature.**—[*SHARP v. JOHNSTON*, No. 5757, *ante*.

6074. ——[An affidavit which by the *jurat* appears to have been sworn in Ireland before a comr. of the Irish Ct. of Q. B. cannot be read in the Ct. of Q. B. in England.—*GRIFFIN v. SMYTHE* (1840), 8 Dowl. 490; 4 Jur. 413.

(c) Dominions and Dependencies.

See R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (c. 10), s. 3.

6075. Justice of the peace—On proof of no notary public—India.—[The ct. permitted an acknowledgment of a married woman, made in India under Fines & Recoveries Act, 1833 (c. 74), to be received on producing a verified certificate of a superior military officer that the person before whom the affidavit of acknowledgment was made was a justice of the peace, there being no notary at the place of acknowledgment.—*Re DALEY* (1847), 5 Dow. & L. 333; 5 C. B. 128; 2 New Pract. Cas. 410; 17 L. J. C. P. 1; 10 L. T. O. S. 111; 136 E. R. 823.

6076. Judge—On proof of no notary public—Ionian Islands.—[The ct. dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu under Fines & Recoveries Act, 1833 (c. 74) [before the chief magistrate], it being sworn that there was an English notary in the island.—*Re HURST* (1854), 15 C. B. 410; 24 L. T. O. S. 134; 139 E. R. 484.

6077. ——**New South Wales.**—[*Re* — (1859), 7 W. R. 227.

6078. Deemster—On proof of authority Isle of Man.—[*Semble*: an affidavit sworn before the Deemster in the Isle of Man cannot be used, unless it be shown that he has power to administer an oath.—*Cross v. CHESHIRE* (1851), 7 Exch. 43; 21 L. J. Ex. 3; 15 Jur. 993; 155 E. R. 848.

6079. Magistrate—Canada—Authority must be certified by notary public.—[The ct. refused to allow a certificate of acknowledgment taken in Ontario, under Fines & Recoveries Act, 1833 (c. 74), to be filed, where the affidavit of verification purported to be sworn before "J. S., an attorney of the supreme ct." The affidavit must be sworn before a magistrate, & his authority to administer oaths certified by a notary public.—*Re WOODMAN* (1862), 11 C. B. N. S. 630; 142 E. R. 942.

6080. Commissioner.—[An affidavit sworn in a colony before an officer describing himself as "a comr. for taking affidavits," receivable, whether sworn antecedently to the act or not, on the ground that the ct. is to take judicial notice of the signature of any person lawfully authorised to administer oaths.—*ANON.* (1853), 1 W. R. 186, L. C.

6081. ——[Affidavits taken in the colonies previously to the passing of 15 & 16 Vict. c. 86, in the presence of a person lawfully authorised to administer oaths, are receivable in this country under sect. 22 of that Act, without verification of the signature of the person before whom they have

PART VII. SECT. 12, SUB-SECT. 2.—B. (a).

6066 i. Commissioner.—[An affidavit sworn before a comr. for taking affidavits in the Ct. of Ch. at Glasgow:—*Held*: insufficiently sworn.—*McEWAN v. BOULTON* (1870), 3 Ch. Ch. 63.—**CAN.**

PART VII. SECT. 12, SUB-SECT. 2.—B. (b).

6067 i. Judge.—[A judge sitting in the Criminal Ct. of Dublin under a commission of *oyer & terminer* & general goal delivery, has not jurisdiction to take the affidavits of £50 freeholders. *Semble*: a judge sitting at *nisi prius*

in Dublin, has jurisdiction to take such affidavits.—*Re GALLAGHER* *Craw. & D.* 345.—**IR.**

PART VII. SECT. 12, SUB-SECT. 2.—B. (c).

e. Magistrate — India — Authority must be certified by Secretary for India.]

been taken.—**BATEMAN v. COOK** (1853), 3 De G. M. & G. 39; 22 L. J. Ch. 744; 21 L. T. O. S. 1; 17 Jur. 170; 1 W. R. 242; 43 E. R. 16, L. C. & L. J. J. Annotat. :—**Folld. Ferguson v. Benyon** (1867), 16 W. R. 71.

6082. Registrar—Only on verification.—The certificate of a deed as registered in a registry office in one of the colonies by the registrar, who was not "a person lawfully authorised to administer oaths," is not, *per se*, evidence of the fact of such registration under 15 & 16 Vict. c. 86, s. 22, but the signature of the registrar requires verification.—**BAILLIE v. JACKSON** (1853), 3 De G. M. & G. 38; 21 L. T. O. S. 1; 17 Jur. 170; 1 W. R. 186; 43 E. R. 16, L. C. & L. J. J.

6083. Notary public.—Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary.—*Re Goff's Estate*, **SIDDAL v. NICHOLSON** (1860), 14 L. T. 727; *sub nom. Re Goss's Estate*, 12 Jur. N. S. 595.

6084. Bailiff & two jurats—Guernsey.—The affidavit verifying the certificate of the due taking of an acknowledgment of a married woman under Fines & Recoveries Act, 1833 (c. 74), may be sworn in Guernsey before the chief bailiff & two jurats of that island.—*Re MANN* (1875), L. R. 10 C. P. 473.

(d) Foreign Countries.

See, now, Commissioner for Oaths Act, 1889 (c. 10), ss. 3, 6.

6085. Belgium—Juge de Paix.—*Held*: affidavits in an English suit were properly sworn before a *Juge de Paix* & certain other officials in Belgium having limited jurisdiction within the district where such affidavits were sworn, & with power to administer oaths there only for certain purposes.—**KEVAN v. CRAWFORD** (1870), 45 L. J. Ch. 658, L. J. J.

6086. France—British consul.—A married woman, residing at Paris, acknowledged a deed before comrs. specially appointed under Fines & Recoveries Act, 1833 (c. 74), s. 83, who signed a memorandum & certificate of the taking of such acknowledgment as required by sect. 81. The affidavit verifying the certificate & signatures required by sect. 85 was made, not before the *Juge de Paix*, but before the English consul at Paris:—*Held*: such affidavit was irregular, as the consul was not authorised to take it by the Consular Advances Act, 1825 (c. 87), s. 20.—*Ex p. HENFAGE (LADY)* (1834), 3 L. J. C. P. 206.

6087. ————*Scmble*: an affidavit to be used on a motion in this ct. cannot be sworn before a British consul abroad under Consular Advances Act, 1825 (c. 87), s. 20.—**LE VEUX v. BERKELEY** (1844), 5 Q. B. 836; 2 Dow. & L. 31; 13 L. J. Q. B. 244; 6 L. T. 165; 8 Jur. 606; 114 E. R. 1464. Annotat. :—**Folld. Williams v. Welch** (1845), 15 L. J. Q. B. 7.

6088. ————*—*—An affidavit of service of a rule sworn before the British consul resident at Paris is not sufficient.—**WILLIAMS v. WELCH** (1845), 3 Dow. & L. 357; 15 L. J. Q. B. 7; 6 L. T. O. S. 159; 9 Jur. 1078.

6089. ————*—*—Prior to 18 & 19 Vict. c. 42, an affidavit sworn before the British consul at

Paris, was not admissible in our cts.—*Re COOPER* (1855), 16 C. B. 225; 139 E. R. 743; *sub nom. Ex p. COOPER*, 3 W. R. 405.

6090. ————**Notary public.**—*In the Goods of* LAMBERT, No. 5659, *ante*.

6091. Germany—British consul.—*Re BARBER'S TRUSTEES* (1836), 4 Dow. 640; 2 Bing. N. C. 268; 1 Hodg. 318; 5 L. J. C. P. 81; 132 E. R. 105. Annotat. :—*Refd. Lo Veux v. Berkeley* (1844), 5 Q. B. 836.

6092. ————*—*—*Re EADY*, No. 5795, *ante*.

6093. ————**Judge.**—*Re EADY*, No. 5795, *ante*.

6094. ————**Consul forbidden by German law.**—Where by German law a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge.—*In the Goods of FAWCUS* (1884), 9 P. D. 241; 54 L. J. P. 47; 48 J. P. 743; 33 W. R. 323.

6095. ————**Consul not available.**—In a suit in which infants were plffs. an affidavit made by defts. residing abroad before a foreign magistrate was allowed to be filed, it appearing that there was no English consul within reach.—**BELL v. TURNER** (1874), L. R. 17 Eq. 439; 22 W. R. 391.

6096. ————**Notary public—Verified by British consul.**—An affidavit made by a person resident in Germany & sworn before a notary was allowed to be used, the notary's signature having been attested by the seal of the British consul, though it was not stated that he was by German law qualified to administer oaths.—*Re LONDON ASPHALT CO., LTD. & REDUCED, Re COMPANIES ACTS 1867 & 1877* (1907), 23 T. L. R. 406.

6097. Russia—British consul—Magistrates without authority.—The affidavit verifying the notarial certificate of the due taking of an acknowledgment under Fines & Recoveries Act, 1833 (c. 74), s. 85, may in Russia be sworn before a British consul; no magistrate in that country having authority to administer oaths.—*Ex p. BAYLEY* (1841), 2 Scott, N. R. 523.

Annotat. :—**Apld. Re Pickersgill** (1843), 6 Scott, N. R. 831.

6098. ————*—*—An affidavit, verifying the due taking, in Russia, of the acknowledgment of a deed by a married woman was made before the British consul:—*Held*: sufficient, it having been stated in a notarial certificate, made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatsoever.—**DAVY v. MALTWOOD** (1841), 2 Man. & G. 424; 133 E. R. 811.

Annotat. :—**Apld. Re Pickersgill** (1843), 6 Man. & G. 250. *Refd. Williams v. Welch* (1845), 15 L. J. Q. B. 7.

6099. ————**British chaplain—No consul available.**—The ct. allowed an acknowledgment to be received & filed under Fines & Recoveries Act, 1833 (c. 74), s. 85, where the affidavit verifying the certificate was sworn before the minister of the British chapel at Moscow, it being sworn by the secretary of the Russia co. that that person was in the habit of administering oaths to British subjects there & certified by two merchants resident at Moscow that there is no English notary public or British consul or vice-consul within four hundred miles of that city.—*Re PICKERSGILL* (1843), 6 Man. & G. 250; 6 Scott, N. R. 831; 1 L. T. O. S. 288; 134 E. R. 885.

Annotat. :—**Apld. Re Darling** (1845), 2 C. B. 347. **Expld. Williams v. Welch (1845), 15 L. J. Q. B. 7.**

—Ch. (Ireland) Act, 1867, s. 81, which directs the ct. to take judicial notice of the seal or signature of any ct. judge, etc., abroad, is retrospective. But the ct. will require evidence that the person before whom an affidavit is sworn is authorised to administer oaths, e.g., a certificate from the Secretary for India, in case of a magistrate there.—

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PART VII. SECT. 12, SUB-SECT. 2.—B. (d).

I. United States—Mayor.—A commission issued to one G., of the city of H., in the U.S., to take evidence of one S. It was returned with an

affidavit by the comr. of due execution sworn at H. before the mayor, but the affidavit did not show that the witness was examined there:—*Held*: sufficient.—**STUBBINS v. ANDERSON** (1860), 20 U. C. R. 238.—CAN.

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O O

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6062. —[—An affidavit made by deft., in a suit in the Exch. Ct., sworn before a magistrate in Scotland, permitted to be read.—**ELLIS v. SINCLAIR** (1829), 3 Y. & J. 273; 148 E. R. 1182.

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6063. Justice of the peace.—[**HYDE v. WHITFIELD**, No. 6069, *ante*.

6064. —[—Subject to handwriting being authenticated.]—Affidavits sworn before a justice of the peace in Scotland are admissible in a cause in this ct. if the handwriting of the justice be authenticated.—**TURNBULL v. MORRISON** (1819), 1 Chit. 721.

6065. —[—It is no objection to an affidavit sworn in Scotland, that it is taken before a justice of the peace, & not before a Lord of Session.—**WATSON v. WILLIAMSON** (1832), 1 Dowl. 607; 2 L. J. Ex. 81.

6066. Commissioner.—[—An affidavit to hold to bail, not entitled in any ct., but sworn in Scotland before a comr., who states himself to be a comr. by virtue of a commission from the Cts. of Common Pleas & Exch. is sufficient.—**WHITE v. IRVING** (1830), 2 M. & W. 127; 5 Dowl. 289; 2 Gale, 230; 6 L. J. Ex. 15; 150 E. R. 697.

(b) Ireland.

See, now, R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (c. 10), s. 3.

6067. Judge.—[—The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country must be attested by a notary public; but the ct. will dispense with such attestation in the case of an affidavit taken before a great judicial officer in Ireland.—*Ex p. WORSLEY* (1793), 2 Hy. Bl. 275; 120 E. R. 548.

Annotation:—Reid. Cross v. Cheshire (1851), 15 Jur. 993.

6068. Master extraordinary.—[—(1) An affidavit of bkpt. sworn before a master extraordinary in Cork was allowed to be read.

(2) Cts. of law will allow an affidavit sworn before a consul to be read.—*Ex p. RUDDOCK* (1728), Mos. 78; 25 E. R. 282, L. C.

6069. —[—Verification unnecessary.]—An affidavit was sworn before a master extraordinary in Ireland, appointed under 6 & 7 Vict. c. 82:—*Held*: it was not necessary to verify by affidavit the fact that he filled that character.—**DAY v. DAY** (1848), 11 Beav. 35; 50 E. R. 729.

6070. Master.—[—Affidavit sworn in Ireland before a master, to ground a writ of *ne exeat regno* admitted, after doubt & conference with the judges.—**JOHNSON v. SMITH** (1782), 2 Dick. 592; 21 E. R. 401, L. C.

6071. Examiner of Court of Chancery.—[—An affidavit sworn before an examiner of the Ct. of Ch. in Ireland may be used in the Ct. of Ch. in England.—**HELY v. BLAKENEY** (1833), 2 L. J. Ch. 185.

6072. Commissioner.—[—The ct. allowed an affidavit sworn before a comr. of the Ct. of Exch. in

Ireland to be read.—**KILBY v. STANTON** (1827), 2 Y. & J. 75; 148 E. R. 838.

Annotations:—Mentl. Re Anderson 1836), 1 Hodg. 418; *Money v. Jordan* (1850), 13 Beav. 229.

6073. —[—Subject to verification of signature.]

—**SHARP v. JOHNSTON**, No. 5757, *ante*.

6074. —[—An affidavit which by the *jurat* appears to have been sworn in Ireland before a comr. of the Irish Ct. of Q. B. cannot be read in the Ct. of Q. B. in England.—**GRIFFIN v. SMYTHE** (1840), 8 Dowl. 490; 4 Jur. 413.

(c) Dominions and Dependencies.

See R. S. C., Ord. 38, r. 6; Commissioners for Oaths Act, 1889 (c. 10), s. 3.

6075. Justice of the peace—On proof of no notary public—India.—[—The ct. permitted an acknowledgment of a married woman, made in India under Fines & Recoveries Act, 1833 (c. 74), to be received on producing a verified certificate of a superior military officer that the person before whom the affidavit of acknowledgment was made was a justice of the peace, there being no notary at the place of acknowledgment.—*Re DALEY* (1847), 5 Dowl. & L. 333; 5 C. B. 128; 2 New Pract. Cas. 440; 17 L. J. C. P. 1; 10 L. T. O. S. 111; 136 E. R. 823.

6076. Judge—On proof of no notary public—Ionian Islands.—[—The ct. dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu under Fines & Recoveries Act, 1833 (c. 74) [before the chief magistrate], it being sworn that there was an English notary in the island.—*Re HURST* (1854), 15 C. B. 410; 24 L. T. O. S. 134; 130 E. R. 484.

6077. —[—New South Wales.]—*Re* — (1859), 7 W. R. 227.

6078. Deemster—On proof of authority—Isle of Man.—[—*Semble*: an affidavit sworn before the Deemster in the Isle of Man cannot be used, unless it be shown that he has power to administer an oath.—*Cross v. CHESHIRE* (1851), 7 Exch. 43; 21 L. J. Ex. 3; 15 Jur. 993; 155 E. R. 848.

6079. Magistrate—Canada—Authority must be certified by notary public.—[—The ct. refused to allow a certificate of acknowledgment taken in Ontario, under Fines & Recoveries Act, 1833 (c. 74), to be filed, where the affidavit of verification purported to be sworn before "J. S., an attorney of the supreme ct." The affidavit must be sworn before a magistrate, & his authority to administer oaths certified by a notary public.—*Re WOODMAN* (1862), 11 C. B. N. S. 630; 142 E. R. 942.

6080. Commissioner.—[—An affidavit sworn in a colony before an officer describing himself as "a comr. for taking affidavits," receivable, whether sworn antecedently to the act or not, on the ground that the ct. is to take judicial notice of the signature of any person lawfully authorised to administer oaths.—*ANON.* (1853), 1 W. R. 186, L. C.

6081. —[—Affidavits taken in the colonies previously to the passing of 15 & 16 Vict. c. 86, in the presence of a person lawfully authorised to administer oaths, are receivable in this country under sect. 22 of that Act, without verification of the signature of the person before whom they have

in Dublin, has jurisdiction to take such affidavits.—*Re GALLAGHER* (1845), 3 Craw. & D. 345.—*IR.*

PART VII. SECT. 12, SUB-SECT. 2.—B. (c).

a. Magistrate—India—Authority must be certified by Secretary for India.]

PART VII. SECT. 12, SUB-SECT. 2.—B. (a).

6066 i. Commissioner.—[—An affidavit sworn before a comr. for taking affidavits in the Ct. of Ch. at Glasgow.—*Held*: insufficiently sworn.—**MCEWAN v. BOULTON** (1870), 3 Ch. Ch. 63.—**CAN.**

PART VII. SECT. 12, SUB-SECT. 2.—B. (b).

6067 i. Judge.—[—A judge sitting in the Criminal Ct. of Dublin under a commission of *oyer & terminer* & general goal delivery, has not jurisdiction to take the affidavits of 250 freeholders. *Semble*: a judge sitting at nisi prius

been taken.—*BATEMAN v. COOK* (1853), 3 De G. M. & G. 39; 22 L. J. Ch. 744; 21 L. T. O. S. 1; 17 Jur. 170; 1 W. R. 242; 43 E. R. 16, L. C. & L. J. J.

Annotation.—*Folld. Ferguson v. Benyon* (1867), 16 W. R. 71

6082. Registrar—Only on verification.—The certificate of a deed as registered in a registry office in one of the colonies by the registrar, who was not "a person lawfully authorised to administer oaths," is not, *per se*, evidence of the fact of such registration under 15 & 16 Vict. c. 86, s. 22, but the signature of the registrar requires verification.—*BAILLIE v. JACKSON* (1853), 3 De G. M. & G. 38; 21 L. T. O. S. 1; 17 Jur. 170; 1 W. R. 186; 43 E. R. 16, L. C. & L. J. J.

6083. Notary public.—Where a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary.—*Re GOFF'S ESTATE, SIDDAL v. NICHOLSON* (1866), 14 L. T. 727; *sub nom. Re GOSS'S ESTATE*, 12 Jur. N. S. 595.

6084. Bailiff & two jurats—Guernsey.—The affidavit verifying the certificate of the due taking of an acknowledgment of a married woman under Fines & Recoveries Act, 1833 (c. 74), may be sworn in Guernsey before the chief bailiff & two jurats of that island.—*Re MANN* (1875), L. R. 10 C. P. 473.

(d) Foreign Countries.

now, Commissioner for Oaths Act, 1889 (c. 10), ss. 3, 6.

6085. Belgium—Juge de Paix.—*Held*: affidavits in an English suit were properly sworn before a *Juge de Paix* & certain other officials in Belgium having limited jurisdiction within the district where such affidavits were sworn, & with power to administer oaths there only for certain purposes.—*KEVAN v. CRAWFORD* (1876), 45 L. J. Ch. 658, L. J. J.

6086. France—British consul.—A married woman, residing at Paris, acknowledged a deed before comrs. specially appointed under Fines & Recoveries Act, 1833 (c. 74), s. 83, who signed a memorandum & certificate of the taking of such acknowledgment as required by sect. 84. The affidavit verifying the certificate & signatures required by sect. 85 was made, not before the *Juge de Paix*, but before the English consul at Paris:—*Held*: such affidavit was irregular, as the consul was not authorised to take it by the Consular Advances Act, 1825 (c. 87), s. 20.—*Ex p. HENEAGE (LADY)* (1834), 3 L. J. C. P. 206.

6087. ————*J. Semble*: an affidavit to be used on a motion in this ct. cannot be sworn before a British consul abroad under Consular Advances Act, 1825 (c. 87), s. 20.—*LE VEUX v. BERKELEY* (1844), 5 Q. B. 836; 2 Dow. & L. 31; 13 L. J. Q. B. 244; 6 L. T. 165; 8 Jur. 666; 114 E. R. 1464. *Annotation*.—*Folld. Williams v. Welch* (1845), 15 L. J. Q. B. 7.

6088. ————*J.*—An affidavit of service of a rule sworn before the British consul resident at Paris is not sufficient.—*WILLIAMS v. WELCH* (1845), 3 Dow. & L. 357; 15 L. J. Q. B. 7; 6 L. T. O. S. 159; 9 Jur. 1078.

6089. ————*J.*—Prior to 18 & 19 Vict. c. 42, an affidavit sworn before the British consul at

Paris, was not admissible in our cts.—*Re COOPER* (1855), 16 C. B. 225; 130 E. R. 743; *sub nom. Ex p. COOPER*, 3 W. R. 405.

6090. ————*Notary public.*—*In the Goods of LAMBERT*, No. 5659, *ante*.

6091. Germany—British consul.—*Re BARBER'S TRUSTEES* (1836), 4 Dow. 640; 2 Bing. N. C. 268; 1 Hodg. 318; 5 L. J. C. P. 81; 132 E. R. 105.

Annotation.—*Refd. Le Veux v. Berkeley* (1844), 5 Q. B. 836.

6092. ————*J.*—*Re EADY*, No. 5795, *ante*.

6093. ————*Judge.*—*Re EADY*, No. 5795, *ante*.

6094. ————*Consul forbidden by German law.*—Where by German law a British consul is not allowed to administer an oath, the affidavit may be sworn before a German judge.—*In the Goods of FAUCUS* (1884), 9 P. D. 241; 54 L. J. P. 47; 48 J. P. 743; 33 W. R. 323.

6095. ————*Consul not available.*—In a suit in which infants were p'ts, an affidavit made by defts. residing abroad before a foreign magistrate was allowed to be filed, it appearing that there was no English consul within reach.—*BELL v. TURNER* (1874), L. R. 17 Eq. 439; 22 W. R. 391.

6096. ————*Notary public—Verified by British consul.*—An affidavit made by a person resident in Germany & sworn before a notary was allowed to be used, the notary's signature having been attested by the seal of the British consul, though it was not stated that he was by German law qualified to administer oaths.—*Re LONDON ASPHALTE CO., LTD. & REDUCED, Re COMPANIES ACTS 1867 & 1877* (1907), 23 T. L. R. 406.

6097. Russia—British consul—Magistrates without authority.—The affidavit verifying the notarial certificate of the due taking of an acknowledgment under Fines & Recoveries Act, 1833 (c. 74), s. 85, may in Russia be sworn before a British consul; no magistrate in that country having authority to administer oaths.—*Ex p. BAYLEY* (1841), 2 Scott, N. R. 523.

Annotation.—*Apld. Re Pickersgill* (1843), 6 Scott, N. R. 831.

6098. ————*J.*—An affidavit, verifying the due taking, in Russia, of the acknowledgment of a deed by a married woman was made before the British consul:—*Held*: sufficient, it having been stated in a notarial certificate, made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatsoever.—*DAVY v. MALTWOOD* (1841), 2 Man. & G. 424; 133 E. R. 811.

Annotations.—*Apld. Re Pickersgill* (1843), 6 Man. & G. 250. *Refd. Williams v. Welch* (1845), 15 L. J. Q. B. 7.

6099. ————*British chaplain—No consul available.*—The ct. allowed an acknowledgment to be received & filed under Fines & Recoveries Act, 1833 (c. 74), s. 85, where the affidavit verifying the certificate was sworn before the minister of the British chapel at Moscow, it being sworn by the secretary of the Russia co. that that person was in the habit of administering oaths to British subjects there & certified by two merchants resident at Moscow that there is no English notary public or British consul or vice-consul within four hundred miles of that city.—*Re PICKERSGILL* (1843), 6 Man. & G. 250; 6 Scott, N. R. 831; 1 L. T. O. S. 288; 134 E. R. 885.

Annotations.—*Apld. Re Darling* (1845), 2 C. B. 347. *Williams v. Welch* (1845), 15 L. J. Q. B. 7.

—Ch. (Ireland) Act, 1867, s. 81, which directs the ct. to take judicial notice of the seal or signature of any ct. judge, etc., abroad, is retrospective. But the ct. will require evidence that the person before whom an affidavit is sworn is authorised to administer oaths, e.g., a certificate from the Secretary for India, in case of a magistrate there.—

FERGUSON v. BENYON (1867), 1 I. R. Eq. 475.—*IR.*

PART VII. SECT. 12, SUB-SECT. 2.—B. (d).

f. United States—Mayor.—A commission issued to one G., of the city of H., in the U.S., to take evidence of one S. It was returned with an

affidavit by the comr. of due execution sworn at H. before the mayor, but the affidavit did not show that the witness was examined there:—*Held*: sufficient.—*STERRINS v. ANDERSON* (1860), 29 U. C. R. 239.—*CAN.*

g. ————*Notary public—Certified under his hand & seal.*—Affidavits sworn before a notary public in the

Sect. 12.—Who may take affidavits: Sub-sect. 2, B. (d). Sect. 13: Sub-sects. 1 & 2.]

6100. Society Islands—Provisional British consul—No notary available.]—The ct. allowed an acknowledgment to be received & filed under Fines & Recoveries Act, 1833 (c. 74), s. 85, where the affidavits verifying the same was sworn before "The Provisional British Consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could have been sworn, within many hundred miles.—*Re DARIING* (1845), 2 C. B. 347; 135 E. R. 980.

6101. United States—Mayor—Subject to verification.]—(1) Money ordered to be paid under a power of attorney executed in North America attested by a notary public & verified by the Secretary of State of the country. (2) Affidavit of the execution of an instrument made before the mayor of a foreign town, not received without evidence of his holding that situation.—*GARVEY v. HIBBERT* (1820), 1 Jac. & W. 180; 37 E. R. 343.

6102. — Notary public.]—An affidavit of acknowledgment by a *feme covert*, taken before a notary public in Illinois.—*Held*: sufficient.—*Ex p. MANN* (1830), 5 Bing. N. C. 226; 7 Scott, 142; 132 E. R. 1092.
Annotation:—Folld. Re Cooper (1865), 18 C. B. N. S. 220.

6103. — Certified by British consul.]—An affidavit was sworn in the United States of America before a notary public, & the *jurat* stated that fact. Appended to the affidavit was a certificate of the British consul at New York, stating that the notary held such office & that his signature was entitled to credit. The United States consul in England was sworn to have alleged that notaries were entitled to swear affidavits:—*Held*: notwithstanding the words of 15 & 16 Vict. (c. 86), s. 22, the authentication was sufficient.—*HAGGITT v. INIFF* (1854), 5 De G. M. & G. 910; 3 Eq. Rep. 144; 24 L. J. Ch. 120; 24 L. T. O. S. 181; 1 Jur. N. S. 40; 3 W. R. 141, L. J.J.

Annotations:—Folld. Re Kenah's Trusts (1867), 15 W. R. 781. *Reid. Re Earl's Trust* (1858), 4 K. & J. 300; *Cooke v. Wilby* (1884), 25 Ch. D. 769.

6104. — Certified by foreign Secretary of State.]—An affidavit verifying the acknowledgment of a deed by a married woman, taken by special comrs. in Wisconsin, under Fines & Recoveries Act, 1833 (c. 74), is sufficient if sworn before a notary public, certified by the Secretary of State in Wisconsin to have authority to administer oaths in that State, as in substance complying with rule III. T. 14 Geo. 3, as to common recoveries, which required the affidavit to be sworn "before some magistrate of the place where such acknowledgment is taken, having authority to administer an oath."—*Re COOPER* (1865), 18 C. B. N. S. 220; 5 New Rep. 242; 34 L. J. C. P. 145; 11 L. T. 605; 11 Jur. N. S. 114; 13 W. R. 202.

6105. — — — — —]—The ct., on a petition under Trustees Relief Acts, 1847 (c. 96), & 1849 (c. 74), allowed an affidavit, sworn in the United States of America before a notary public instead of a consul, to be filed, on the solt. who acted for all parties giving a written consent in behalf of resp.—*LANE'S TRUSTS* (1873), 22 W. R. 39, L. C.

6106. — Necessity for verification.]—

U.S., & certified under his hand & official seal, can be used.—*MERCHANTS' UNION EXPRESS CO. v. MORTON* (1888), 15 Q. B. 274; 2 Ch. Ch. 319.—*CAN.*

h. — British consul.]—Where an affidavit verifying the execution of a power of attorney had been sworn

before the British consul in New York, & not before a Justice of the peace:—*Held*: sufficiently signed.—*Re HUTTON* (1844), 6 L. Eq. R. 522.—*IR.*

k. Italy — Chargé d'affaires.]—An sworn before the *chargé* at F., in Italy, although he

Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen the signature of the notary must be verified before the affidavit can be filed unless by consent & the ct. cannot take judicial cognisance of the notarial seal alone as a sufficient verification.—*Re EARL'S TRUST* (1858), 4 K. & J. 300; 70 E. R. 126, L. J.J.

Annotation:—Apld. Re Goss's Estate (1866), 12 Jur. N. S. 595.

6107. — — — — —]—*DE LEON v. HUBBARD*, [1883] W. N. 197; Bitt. Rep. in Ch. 10.

6108. — — — — —]—*SHARPE v. JACKSON* (1904), 39 L. Jo. 400.

6109. — Clerk of Supreme Court.]—(1) Depositions taken in a foreign country may be filed in this ct. if taken before persons duly authorised by the law of the country to administer oaths & take similar depositions in the cts. there.

(2) In the case of a deposition taken in the United States of America, a certificate by the clerk of the Supreme Ct., sealed with the seal of the ct., is sufficient evidence that such a deposition has been taken before a proper officer.—*LEVITT v. LEVITT* (1865), 2 Hem. & M. 626; 71 E. R. 606.

6110. — Judge of Probate Court.]—*LEES v. LEES*, [1868] W. N. 268.

6111. — Governor of state—Verified by Great Seal.]—Affidavits made by parties in United States of America, & attested by the governor as being sealed with the Great Seal of the state, will be received & ordered to be filed in this country.—*Re SCRIVEN* (1868), 17 L. T. 641.

6112. — Clerk of circuit court.]—An affidavit was sworn before the clerk of the circuit ct. of Monroe County in the state of Wisconsin, Chicago, distant about two hundred & fifty miles from Monroe County, being the nearest place where a British consul or vice-consul was resident. The British vice-consul at Chicago certified that the clerk of the circuit ct. had authority to administer oaths. On motion *ex p.* for leave to file the affidavit:—*Held*: the order would be made.—*BRITTEBANK v. SMITH* (1884), 50 L. T. 491; 32 W. R. 675.

SECT. 13.—FILING AFFIDAVITS.

SUB-SECT. 1.—IN GENERAL.

See, now, R. S. C., Ord. 38, rr. 10, 18, 19.

6113. General rule—All affidavits must be filed.]—All affidavits used in ct. must be filed.—*Ex p. ELDERTON & LUCENA* (1834), 2 Dowl. 568.

6114. Application of rule—In interlocutory proceedings.]—An affidavit made in support of an injunction bill will be ordered to be filed, although it is not in the course of practice to file such affidavits, if deft. require it, for the purpose of being afforded an opportunity of answering the matters contained in it.—*SCOTT v. BECHER* (1817), 4 Price, 346; 146 E. R. 485.

6115. — Whether successful or not.]—In all cases of applications to the ct. whether successful or not, the affidavits in support of them must be filed.—*JOHNS v. MILLS* (1832), 1 Dowl. 510.

6116. — — — — —]—Affidavits, used to ground a motion, ought always to be filed, whether

was not authorised to take affidavits, was received.—*NIMMO v. CODRINGTON* (1846), Bl. D. & Obs. 1.—*IR.*

PART VII. SECT. 13, SUB-SECT. 1.

1. Duty of party to file.]—It is the duty of a party obtaining a rule

the motion is granted or refused.—*Ex p. DICAS* (1833), 2 Dowl. 92.

6117. — To foreign affidavit.]—We cannot proceed upon these foreign affidavits until they are filed; if any difficulty should arise in filing them, they may be made exhibits to an affidavit made in this country by some persons who can swear that he has been informed of the matter contained in them, & believes it to be true (KNIGHT BRUCE, L.J.).—*Ex p. HEWITSON* (1852), 1 W. R. 58, L. J.

6118. Whether printing necessary.]—An affidavit of more than three folios may be filed without printing, by leave of judge.—ANON., [1875] W. N. 218; 1 Char. Cham. Cas. 83.

6119. For use on appeal.—Filed in division from which appeal comes.]—Affidavits which are intended to be used on appeal should be filed with the officer of the division of the High Ct. from which the appeal comes.—*WATTS v. WATTS* (1876), 45 L. J. Ch. 658; 3 Char. Pr. Cas. 451, C. A.

6120. Duty of solicitor to file.]—(1) Under R. S. C., Ord. 38, rr. 10, 15, it is the imperative duty of the solr. of any party to any proceedings to cause to be filed every affidavit sworn & used in the course of such proceedings.

(2) At chambers affidavits are frequently used before being filed, but that is on an undertaking express or implied that they shall be filed (LANDLEY, L.J.).—*TAYLOR v. GATES* (1895), 72 L. T. 436; 39 Sol. Jo. 318, C. A.

SUB-SECT. 2.—TIME FOR FILING.

See, now, R. S. C., Ord. 38, r. 18.

6121. Must be filed in time.]—Affidavits must be filed in time. They are records of the ct., & every subject has a right to a copy of them.—*R. v. DUFFIN* (1735), *Lee temp. Hard.* 158; 95 E. R. 100.

6122. — Except in case of lunatics or infants.]—In cases of lunatics & infants affidavits always looked at, no matter at what time filed.—*Re SOMBRE* (1846), 1 Coop. temp. Cott. 332; 47 E. R. 880.

6123. On interlocutory application.—Day before hearing.]—No objection to a motion, that the affidavit was filed only the day before if it is an affidavit that cannot be answered; as that pltf. cannot go to trial with safety, till the answer comes in.—*JONES v. —* (1802), 8 Ves. 46; 32 E. R. 267, L. C.

6124. — In time to be read at hearing.]—*WATSON v. FAIRLIE* (1825), 4 L. J. O. S. Ch. 53. Annotation:—*Mentd.* Woodward v. Twinalne (1839), 9 Sim. 301.

6125. — —.]—On the hearing of a motion it is open to the counsel for resp. to avail himself of any affidavit on behalf of his client which is filed at the time when he is called on to address the ct.—*MUNRO v. WIVENHOE & BRIGHTINGSEA RY. Co.* (1865), 4 De G. J. & Sm. 723; 12 L. T. 562, 655; 11 Jur. N. S. 612; 13 W. R. 880; 46 E. R. 1100, L. J.

Annotations:—*Mentd.* Garrett v. Salisbury & Dorset Junction Ry. (1866), L. R. 2 Eq. 358; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736.

6126. — On same day as answer.]—On an

application for a special injunction, the answer of deft. & the affidavits in support of the application were filed the same day:—*Held*: the affidavits were admissible in support of the motion.—*NICHOLSON v. KNAPP* (1838), 9 Sim. 326; 7 L. J. Ch. 219; 59 E. R. 383.

6127. — In reply to answer.]—A motion for an injunction & receiver being brought on, stood over at the request of deft., who filed his answer the next day:—*Held*: pltf. might use affidavits subsequently filed, in contradiction to the answer, & which, under these circumstances, must be treated as an affidavit.—*GIBSON v. NICOL* (1843), 6 Beav. 422; 40 E. R. 889.

6128. — —.]—Some of the *cestuis que trust* of a mining lease filed a bill against their trustees & the lessors, alleging that an agreement binding in equity had been entered into between defts. for a reduction in the royalties covenanted to be paid by the lessees; & that, in violation of this agreement, the lessors were suing the trustees at law on the covenant. The bill sought a specific performance, & an injunction against the proceedings at law. Notice of motion for the injunction was given, & affidavits filed verifying the statements in the bill. Before the day fixed by the notice the lessors put in their answer, but the trustees did not. Pltfs. filed further affidavits, denying certain misrepresentations which the answer stated to have been made:—*Held*: the affidavits might be read on the motion.—

v. WILLIAMS (1848), 2 De G. & Sm. 15; 64 E. R. 7.

6129. — Before service of notice of motion.—If filed on day of notice.]—Affidavits filed, so far back as the day of the date of the notice of motion may be used on the motion, although the notice was not served until some days after the day of its date.—*BOWDLER v. BOWDLER* (1840), 1 Coop. temp. Cott. 333; 9 L. J. Ch. 394; 4 Jur. 626; 47 E. R. 881.

6130. — Not after hearing begun.]—The ct. will, at any time previous to the hearing, postpone the hearing, in order to allow time for filing affidavits; but no affidavits filed after the hearing has begun may be read.—*ELECTRIC TELEGRAPH Co. v. NOTT* (1847), 11 Jur. 273.

6131. — —.]—It is only in very special cases, & not at the option of the parties, that affidavits are admitted on a motion, after it has been opened to the ct.—*EAST LANCASHIRE RY. Co. v. HATTERSLEY* (1849), 8 Harv. 72; 68 E. R. 278.

Annotation:—*Mentd.* Kirk v. R., A-G. v. Kirk (1872), L. R. 14 Eq. 558.

6132. — —.]—Affidavits filed while a case stands over part heard will not be admitted in evidence if objected to.—*Re GENERAL PROVIDENT ASSURANCE Co., LTD., CROSS'S CASE* (1869), 38 L. J. Ch. 583.

6133. — After summons adjourned into court.]—(1) This was a summons taken out in an action for the administration of the estate of C., for a declaration that the purchaser of a part of C.'s estate, at a sale under the direction of the ct., was entitled to compensation on the ground that a statement in the particulars that certain roads were "made up" was a misrepresentation. The

nisi for a *certiorari* from the judge at chambers to file in the clerk's office the affidavits on which the rule was granted.—*Ex p. RYAN* (1885), 24 N. B. R. 528.—CAN.

PART VII. SECT. 13, SUB-SECT. 2.

m. On interlocutory application.—Before service of notice of motion.]—Affidavit mentioned in notice to be

filed to be sued on motion, cannot be read unless actually filed before notice served.—*NOLAN v. LEWIS* (1825), 2 Mol. 369.—IR.

n. — — —.]—*v. NAGLE* (1844), 8 I. Eq. R. 521.—IR.

o. — After issue of rule.]—On the return of the rule to quash a bye-law, counsel for the corpn. desired to support it, & tendered affidavits for

that purpose:—*Held*: after the issue of the rule such affidavits could not be received from any party to strengthen the appt's case.—*Re GILCHRIST'S DULAVAT CORPN.* (1879), 44 U. C. R. 588.—CAN.

p. — Not after hearing & argument.]—An application was made after the hearing & argument of the cause but before judgment, that defts.

Sect. 13.—Filing affidavits: Sub-sects. 2, 3 & 4.]

conditions of sale provided that, if any error or mis-statement should appear to have been made to the particulars, the sale should not be annulled, but the purchaser should be entitled to compensation, the amount to be settled by the judge. The summons was taken out on Jan. 18 by the purchaser. On Mar. 19 the summons came on before the chief clerk, with affidavits on both sides, & on Mar. 20 he made a note that the purchaser was entitled to compensation, but at the request of defts. the matter was adjourned into ct. The adjournment was, however, delayed at deft.'s request. On May 15 defts. filed four fresh affidavits by surveyors as to the meaning of the term made up. On May 16 there was another appointment before the chief clerk to dispose of the question whether the matter should be adjourned into ct. The chief clerk refused to read the fresh affidavits, & adjourned the matter into ct. The purchaser then gave the vendor notice that he should read the new affidavits, & the vendor gave notice that he should object. On the summons coming on for hearing:—*Held*: no time having been fixed for the closing of evidence, the purchaser must be allowed to use the affidavits, but upon the terms of paying the costs of the day, & allowing the summons to stand over to give the vendor an opportunity of filing affidavits in reply.

(2) Where a time has been fixed by the chief clerk, special leave for filing any further evidence will be strictly required. *Re CHIFFERUEL, CHIFFERUEL v. WATSON* (1888), 58 L. J. Ch. 137; 58 L. T. 877; 56 W. R. 806.

Annotation:—*As to* (1) & (2) *Reid. Re Davies, Issard v. Lambert* (1890), 44 Ch. D. 253.

6134. Where time fixed—Whether time extended.—Affidavits which ought to have been filed a week before term may be read with leave of the ct. in showing cause on the second day of the term though filed only on the day before the term started. *HOAR v. HILL* (1819), 1 Chit. 27.

Annotations:—*N.F. Wright v. Lewis* (1840), 8 Dowl. 298. *Reid. Graham v. Beaumont* (1836), 5 Dowl. 49.

6135. —————Affidavits, which were required by an enlarged rule to be filed a week before the commencement of the Term may, under circumstances, be used by leave of the ct., although they were not filed within the time specified in such rule. *HARDING v. AUSTEN* (1824), 8 Moore, C. P. 523.

Annotation:—*N.F. Wright v. Lewis* (1840), 8 Dowl. 298.

6136. ———— Omission to file through accident.—Where an enlarged rule requires affidavits to be filed within a limited time, the ct. will not allow them to be filed afterwards, unless it is clearly shown that the not filing them arose from inevitable accident. *WRIGHT v. LEWIS* (1840), 8 Dowl. 298; 4 Jur. 124.

Annotations:—*Distd. R. v. Keen* (1847), 11 Jur. 308.

6137. —————Affidavits in answer to a rule enlarged from one term to another which requires the affidavits to be filed a certain time before the term must in all cases, notwithstanding

a contrary practice has prevailed, be filed within the time prescribed, unless the party is prevented filing them by inevitable accident. *TURNER v. UNWIN* (1835), 4 Dowl. 16; 1 Har. & W. 186.

Annotations:—*Folld. Wright v. Lewis* (1840), 4 Jur. 124. *Distd. R. v. Keen* (1847), 11 J. P. Jo. 37. *Reid. Francis v. Webb* (1849), 7 C. B. 731.

6138. —————Where a party is under terms to file his affidavits by a certain day, & by reason of some excusable accident, he omits to do so, the rule for permission to use an affidavit subsequently filed, is a rule *nisi* only, in the first instance. *PRYOR v. SWAINE* (1844), as reported in 2 Dowl. & L. 37; 13 L. J. Q. B. 214.

Annotations:—*Distd. R. v. Keen* (1847), 11 Jur. 308. *Mentd. Levinson v. Syer* (1851), 18 L. T. O. S. 80.

6139. —————Where a rule *nisi* has been obtained which requires the affidavits to be used on showing cause to be filed by a certain day the ct. will, even after that day has expired, grant further time for filing, upon a reasonable excuse being offered, provided the rule is not an enlarged rule. *R. v. KEEN* (1847), 2 New Pract. Cas. 66; 2 New Mag. Cas. 79; 8 L. T. O. S. 321; 11 Jur. 308; 11 J. P. Jo. 37.

6140. ———— In interest of justice.—Where a time has been appointed for filing affidavits, *prima facie* those filed after the time must be rejected, though the ct. has a discretion to admit them in case failure of justice or great inconvenience would be occasioned by their rejection. *ANDEFTON v. YATES* (1859), 17 L. T. O. S. 37; 15 Jur. 833.

6141. —————(1) After the time for closing the evidence in a cause has expired the ct. will not under 15 & 16 Vict. (c. 86), s. 36, extend it except under special circumstances.

(2) Both parties may abstain from filing their affidavits till immediately before the expiration of the time fixed for closing the evidence. *THOMPSON v. PARTRIDGE* (1853), 4 De G. M. & G. 794; 2 Eq. Rep. 73; 23 L. J. Ch. 158; 22 L. T. O. S. 181; 17 Jur. 1108; 2 W. R. 69; 43 E. R. 718, 1st J.J.

Annotations:—*As to* (1) *Expld. Bayley v. Cass, Cass v. Bayley* (1862), 10 W. R. 379. *Reid. Scott v. Liverpool Corp.* (1857), 1 De G. & J. 369.

6142. ———— Leave given to cross-examine upon affidavits already filed.—Upon a motion for an injunction deft. asking for time to answer affidavits, was put upon terms to file his affidavits in two days, an *interim* injunction being granted until the next seal. He then applied for an order appointing a special examiner, & directing pltf., who had made an affidavit in support of the motion, to attend on the next day without further notice before such special examiner, to be cross-examined upon his affidavit:—*Held*: (1) pltf. upon an interlocutory motion for injunction was under control of the ct. & the indulgence which was asked only to enable deft. to do what he could have done without any order, if the examiner had been at liberty.

(2) Pltf. should have the like liberty of cross-examining deft. upon an affidavit by him, denying a simple fact alleged by pltf. & made for the pur-

be allowed to file as part of the record certain affidavits to support defts.

by additional evidence in: of a matter upon which evidence had been given by both sides:—*Held*: the application must be refused. *GENERAL ENGINEERING CO. v. DOMINION COTTON MILLS* (1899), 6 Exch. C. R. 306. **CAN.**

6136 l. Where time fixed—Whether time extended. *Omission to file through accident.*—When pltf. applies for leave to use, at the hearing of a cause,

affidavits & depositions, most of which had been made within the proper time, but through misapprehension none of them filed till after it, the court, on being satisfied as to *bona fides*, & that no injury could result to the deft., granted the application. *ARMSTRONG v. ARMSTRONG* (1872), 7 L. R. Eq. 81.—**IR.**

q. Affidavit to hold to bail.—It is sufficient that affidavits to hold to bail be filed within thirty days after

the term in which the writ is returnable. —*HEAD v. McLELLAN* (1818), 1 All. 3.—**CAN.**

r. — Not filed within time prescribed.—It is no ground for setting aside proceedings against bail, that the writ & affidavit to hold to bail have not been filed within the time prescribed by rule of ct. *GILMOUR v.* (1861), 5 All. 213. **CAN.**

s. —————*Deft. was arrested & gave bail in an action in the*

pose of gaining time; & deft. would not be prevented by such cross-examination & his own re-examination from afterwards filing further affidavits.—*BESEMERES v. BESEMERES* (1853), Kay, App. xvii; 2 Eq. Rep. 668; 23 L. J. Ch. 198; 22 L. T. O. S. 197; 2 W. R. 124; 69 E. R. 320.

6143. — *Reply to charges made in affidavits filed just before close of evidence.*—Where plffs. by affidavits filed immediately before the time for closing evidence, made specific charges against two of defts.' witnesses, with a view to discredit their testimony, the bill not clearly raising any issue which could prepare defts. to meet such charges, though the persons against whom they were made were named in the bill in connection with the transactions as to which their evidence was given:—*Held*: an order allowing defts. to file affidavits as to these charges, after the time for closing the evidence, had been properly made.—*SCOTT v. LIVERPOOL CORPN.* (1857), 1 De G. & J. 369; 26 L. J. Ch. 651; 29 L. T. O. S. 256; 3 Jur. N. S. 832; 5 W. R. 669; 44 E. R. 766, L. J. J.

Annotation:—*Reid*. *Threxton v. Edmonston* (1868) 37 L. J. Ch. 329.

6144. — *—*—*Affidavits to show cause against an enlarged rule must be filed a week before the term to which it is enlarged.*—*GILSON v. CARR* (1836), 4 Dowl. 618.

6145. — *Any time before time fixed.*—*THOMPSON v. PARTRIDGE*, No. 6141, *ante*.

6146. — *Special leave required to file further evidence.*—*Re CHIFFERIEL*, *CHIFFERIEL v. WATSON*, No. 6133, *ante*.

SUB-SECT. 3.—USE OF AFFIDAVITS BEFORE FILING. *See, now*, R. S. C., Ord. 38, r. 19.

6147. Whether permitted—In case of urgency.—In the long vacation, when a matter presses, the ct. will sometimes take the original affidavits into its custody, & act on them as if they had been filed; but when the ct. is sitting, office copies alone can be used.—*A-G. v. LEWIS* (1845), as reported in 8 Beav. 179; 50 E. R. 71.

Annotation:—*Apld.* *Elsey v. Adams* (1863), 32 L. J. Ch. 616.

6148. — *—*—*NIEMANN v. HARRIS*, [1870] W. N. 6.

6149. — *—*—*Injunction obtained ex p. dissolved with costs it appearing that when the order for it was made the office copy of the affidavits in support of it had not been delivered out of the*

office of the clerk of records & writs.—*ELSEY v. ADAMS* (1863), 4 Giff. 398; 2 New Rep. 263; 32 L. J. Ch. 616; 8 L. T. 451; 9 Jur. N. S. 788; 66 E. R. 702.

6150. — *On ex parte applications—Affidavit of service of notice of motion—Respondent not appearing.*—Although unfiled affidavits may be read on an *ex p.* application they cannot be read when resp. has been served but does not appear, & the application is made on an affidavit of service on him of the notice of motion.—*FARRER v. SYKES* (1874), 43 L. J. Ch. 392.

6151. Undertaking by solicitor to file.—*NIEMANN v. HARRIS*, [1870] W. N. 6.

6152. — *Implied from use in court.*—*TAYLOR v. GATES*, No. 6120, *ante*.

6153. May be entered as read—If filed same day.—An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the ct., provided it does not interfere with the date of the order, as where the filing is on the same day.—*Re KING & CO.'S TRADE MARK*, [1892] 2 Ch. 462; 62 L. J. Ch. 153; 66 L. T. 491; 9 R. P. C. 350, C. A.

Annotations:—*Mentd.* *Re Kay's Patent* (1894), 70 L. T. 756; *Re Cliff, Edwards v. Brown*, [1895] 2 Ch. 21; *Bayer v. Council* (1897), 14 R. P. C. 275; *Raymont v. Raymont & Stuart*, *Chapman v. Chapman & Bulst.*, [1910] P. 271; *De Gasquet James v. Mecklenburg-Schwerin*, [1914] P. 53.

SUB-SECT. 4.—TAKING AFFIDAVITS OFF FILE.

6154. By order of court—Deponent convicted of subornation of perjury.—Where an affidavit was made by deponent, who had been convicted of subornation of perjury, the ct. made a rule absolute to take it off the file of the ct.—*Re SAWYER* (1842), 2 Q. B. 721; 2 Gal. & Dav. 141; 11 L. J. Q. B. 234; 114 E. R. 281.

6155. — *For destruction.*—*Re F—(AN INFANT)*, [1913] W. N. 4.

6156. — *—*—*Where by an order of ct., made in settlement of an action affidavits have been ordered to be taken off the file & an exhibited letter destroyed, but no reference has been made to copies thereof, the subsequent use against the then deft. of copies of the affidavits & a photograph of the letter is not illegal & cannot be restrained by injunction.*—*JONES v. TRINDER, CAPRON & CO.*, [1918] 2 Ch. 7; 87 L. J. Ch. 330; 119 L. T. 100; 32 Sol. Jo. 486, C. A.

county ct., & an attaching order was issued at the same time. Plff. neglected to file the affidavit to hold to bail:—*Held*: in a matter of this kind, where it did not appear that deft. had suffered any wrong by the affidavit not being on file, & the judge had ordered it to be filed, the ct. should not be disposed to interfere with his order.—*LEWIS v. WELDON* (1878), 2 P. & B. 145.—*CAN.*

t. — *—*—*Plff. allowed seven months to elapse after special bail was put in before entering the cause & filing the affidavit to hold to bail; alleging as an excuse, that deft.'s attorney had offered but failed, to give a confession of judgment:—Held*: the delay was unnecessary, the excuse insufficient, & the bail were entitled to be discharged.—*RITCHIE v. LAWLOR* (1895), 33 N. B. R. 381.—*CAN.*

PART VII. SECT. 13, SUB-SECT. 3.

a. Whether permitted—Showing cause on rule nisi for new trial.—Where a rule nisi for a new trial is granted on affidavits, the opposite side

is not bound to file his affidavits in reply before producing & reading them on the argument.—*SEELY v. PURDY* (1858), 2 Thom. 414.—*CAN.*

b. — *Affidavit in support of application for discharge from custody—Attachment for non-payment of costs.*—Where a party was arrested under an attachment, for non-payment of costs, on the last day on which the ct. was to sit, an application was permitted to be made for his discharge before the filing of the affidavit, on which the motion was grounded.—*NAPIER v. NAPIER* (1838), 6 Ir. L. Rec. N. S. 216.—*IR.*

PART VII. SECT. 13, SUB-SECT. 4.

c. By order of court—To prosecute deponent for perjury—Motive of prosecutor immaterial.—An application to take an answer off the file in order to prosecute deft. for perjury granted as a matter of right being in furtherance of public justice. The Ct. has no jurisdiction to enquire whether there be probable grounds for the prosecution or what may be the motives of the prosecutor, it being only interested

to see that the record be not defaced.—*STRATFORD v. GREENE* (1810), 1 Ball. & B. 291.—*IR.*

d. — *—*—*DALY v. —* (1834), 2 Ir. L. Rec. N. S. 142.—*IR.*

e. — *—*—*SWIFT v. QUINLAN* (1824), 1 Hog. 132.—*IR.*

f. — *—*—*IR.*

g. — *Affidavit as to facts—By whom sworn.*—On a motion to take an answer off the file in order to prosecute the person who swore it for perjury:—*Held*: the affidavit as to facts must be sworn by the party on whose behalf the application is made.—*ANON.* (1830), 3 Ir. L. Rec. 1st ser. 188.—*IR.*

h. — *Necessity for notice.*—Notice must be given of an application to take an affidavit off the file, for the purpose of prosecuting for perjury.—*ANON.* (1830), 3 Ir. L. Rec. 1st ser. 354.—*IR.*

k. — *Right of Attorney-General.*—It is the right of the A.-G.,

SECT. 13.—Filing affidavits: Sub-sect. 4. Sect. 14. Part VIII. Sect. 1: Sub-sect. 1.]

6157. For reswearing.—When unsigned.—On undertaking to re-file without other alteration.]—An affidavit inadvertently filed without signature will be allowed to be taken off the file, for the purpose of being signed & re-sworn, upon an undertaking by appct.'s solr. that it shall be re-filled in the same state in all other respects.—*Re* ROBINSON, *Ex p.* NORTON (1817), 9 L. T. O. S. 314; 11 Jur. 699.

6158. Not after consent order made.]—Where a rule calling on an attorney to answer the matters of an affidavit is discharged by consent, the ct. will not allow the affidavits filed in support of the rule to be taken off the file.—*Re* — (AN ATTORNEY) (1864), 12 W. R. 1012.

Withdrawal to avoid cross-examination.]—See Sect. 7, ante.

SECT. 14.—OFFICE COPIES OF AFFIDAVITS.

See, now, R. S. C., Ord. 38, r. 15; Ord. 65, r. 27 (53), (54).

6159. Evidence of filing.]—An office copy is the only evidence the ct. will admit of the filing of the affidavit.—*Re* COLMAN, *Ex p.* NORTH (1819), Buck, 396.

6160. —.]—The Six Clerks are not responsible for the correctness of the office copies. Their signature is affixed as a certificate that the original is filed.—BROWNE v. BARNARD (1821), Jac. 57; 37 E. R. 771.

6161. —.]—An office copy of an affidavit admitted as good & sufficient evidence.—BATH v.

SUTTON (1858), as reported in 27 L. J. Ex. 388; 31 L. T. O. S. 186.

Annotations:—Mentd. Morewood v. South Yorkshire Ry. & Silver Dun Co. (1858), 3 H. & N. 798; Smith v. Cheese (1875), 1 C. P. D. 60; Castle v. Downton (1879), 5 C. P. D. 56.

6162. Correctness of—Responsibility for.]—BROWNE v. BARNARD, No. 6160, *ante*.

6163. —.]—COLEMAN v. COLEMAN (1905), 50 Sol. Jo. 43.

6164. By whom taken—Party showing cause.]—Cause cannot be shown till an office copy is taken of the affidavit on which the rule *nisi* was obtained.—BROWN v. PROBERT (1833), 1 Dowl. 659; 2 L. J. Ex. 162.

6165. —.]—The ct. will in no case dispense with the practice which requires a party showing cause against a rule to take office copies of the affidavits upon which it is moved.—*Re* CHAFFERS (1873), L. R. 8 C. P. 376.

6166. — Party filing affidavit.]—The duty of producing the office copy of the affidavit in answer to pltf.'s interrogatories lies on deft., the party on whose behalf the affidavit is filed.—MARSHALL v. NATIONAL PROVINCIAL BANK OF ENGLAND (1892), as reported in 61 L. J. Ch. 465.

Annotation:—Reid. Levi v. Taylor, [1903] W. N. 183.

6167. —.]—LEVI v. TAYLOR, [1903] W. N. 183.

6168. May be dispensed with—To save expense.]—Office copies of affidavits were dispensed with on the hearing of an appeal, on the ground of expense, & an order was made that the officer having the custody of the original affidavits should attend with them upon the hearing of the appeal.—SICKLES v. NORDIS (1875), 45 L. J. Q. B. 148; 24 W. R. 102; 1 Char. Pr. Cas. 174, C. A.

6169. — In urgent cases.]—COLEMAN v. COLEMAN (1905), 50 Sol. Jo. 43.

Part VIII.—Evidence out of Court.

SECT. 1.—EXAMINATION OF WITNESSES.

SUB-SECT. 1.—DISCRETION OF COURT TO

See, now, R. S. C., Ord. 37, r. 5.

6170. General rule.]—The ground for granting a commission beyond sea to examine witnesses must depend upon the special circumstances of the case. Those circumstances may be disclosed upon affidavit, or else they may arise from the nature of the case itself (LORD HARDWICKE, C.).—JESSUP v. DUPONT (1740), Barn. Ch. 102; 27 E. R. 609, L. C. *Annotation:—Reid.* Mendizabal v. Machado (1826), 4 L. J. O. S. Ch. 142.

6171. —.]—LOUSADA v. TEMPLER, No. 6219,

6172. —.]—RUCCO v. PEARCE, No. 6265, *post*.

6173. —.]—A commission may be granted

under Evidence on Commission Act, 1831 (c. 22), s. 4, to examine a party to a suit, resident abroad, on his own behalf. But the ct. may, in its discretion, refuse such commission, if sufficient ground be not shown for requiring it. The ct. refused a commission where the only specific ground assigned was that the parties were resident, & one carrying on business, in distant places abroad, Leghorn & Constantinople, & that they made the application *bonâ fide*.—CASTELL v. GROOM (1852), 18 Q. B. 490; 21 L. J. Q. B. 308; 19 L. T. O. S. 121; 16 Jur. 888; 118 E. R. 185.

Annotation:—Reid. Brown v. Mollett (1855), 24 L. J. C. P. 213.

6174. —.]—A-G. v. CONSTABLE (1886), 3 T. L. R. 226, D. C.

on behalf of the Crown, to have an affidavit taken off the file of the ct., in order that the deponent may be prosecuted for perjury. Therefore, though the case be such that the application would not be granted in the case of a private prosecutor, it will be granted on the application of the A-G.—GREENE v. HOGAN (1837), 2 Jo. Ex. r. 573.—IR.

1. — When court will order.]—The ct. would not order an affidavit to be taken off the file on the ground of perjury, when it was only contradicted by the oath of one person, & when it did not appear that there were sufficient materials for a prosecution. *Semble:* in applications of the kind, a *bonâ fide* intention to prosecute should be sworn to.—MCARTHY v.

MAULIFFE (1841), 2 Leg. Rep. 138.—IR.

PART VIII. SECT. 1, SUB-SECT. 1.

6170 i. General rule.]—It is not imperative upon the ct. to grant a commission to examine witnesses out of the jurisdiction.—MAIR v. ANDERSON (1854), 11 U. C. R. 160.—CAN.

6170 ii. —.]—WASHBURN & MOEN MANUFACTURING Co. v. BROOKS (1885), 2 Man. L. R. 44.—CAN.

6170 iii. —.]—Before a commission is granted to take evidence, extraordinary circumstances must be shown.—GWILLIM v. DAWSON ELECTRIC LIGHT & POWER Co. (1907), 6 W. L. R. 437.—CAN.

6170 iv. —.]—Discretion should be based upon whether the judge thinks that a full & fair examination may be held in a foreign country, with full opportunity to examine the parties.—CLEVELAND v. ASAM (1908), 8 W. L. R. 970.—CAN.

6170 v. —.]—The granting of a commission to examine witnesses abroad is more freely granted in the case of a mere witness than in the case of a party & more freely for the examination of deft. than for that of pltf. The nature of the issue upon which the evidence is to be given is an important consideration, & the ct. may impose conditions.—LAING v. NORTHERN LIFE ASSURANCE Co. (1918), 14 Alta. L. R. 140.—CAN.

6175. —.]—*COCH v. ALLCOCK*, No. 6362, *post*.
6176. *Review by Court of Appeal.*]—*ADAMS v. CORFIELD*, No. 6240, *post*.

6177. —.]—(1) It was said that the matter is one purely for the discretion of the ct. or the judge to whom the application is made & that the exercise of that discretion should not be interfered with by the Ct. of Appeal. In a sense no doubt it is a matter of discretion, & so it is in almost every case where a judge is called upon to give his decision. He must weigh all the circumstances of the case & come to a conclusion upon them. But there being in that sense only a discretion the exercise of it is clearly subject to review (*BAGGALLAY, L.J.*).
 (2) What, therefore, the ct. or the judge is called upon to consider is whether it appears necessary for the purposes of justice that the commission should be issued. Of course "for the purposes of justice" does not mean in the interest of either party to the litigation, but in the interest of all the parties to the litigation (*BAGGALLAY, L.J.*).—*BERDAN v. GREENWOOD* (1880), 20 Ch. D. 764, n.; 40 L. T. 524, n., C. A.

Annotations.—As to (1) *Refd.* *Langen v. Tate* (1883), 24 Ch. D. 522; *Coch v. Allcock* (1883), 21 Q. B. D. 1. As to (2) *Refd.* *Armour v. Walker* (1883), 25 Ch. D. 673; *Lawson v. Vacuum Brake Co.* (1884), 51 L. T. 275. *Generally, Mentd.* *Warner v. Mosses* (1880), 43 L. T. 401; *West v. Sackville* (1903), 72 L. J. Ch. 649.

6178. —.]—*Of decision of judge of assize—Only exercised in extreme cases.*]—The Ct. of Appeal has jurisdiction to hear an appeal from an order of a judge at assizes, granting or refusing a commission to obtain evidence abroad, but the jurisdiction will only be exercised in extreme cases.—*MELLOR, CUNNINGHAM & Co. v. ROYAL EXCHANGE SHIPPING Co.* (1885), 1 T. L. R. 663, C. A.

6178 i. *Review by Court of Appeal.*]—Where *pltf.* had a good cause of action against *def.*, but was unable to frame his statement of claim unless he could examine *def.* & his employer who was not a party to the suit.—*Held*: an order for such examination by a local judge of the High Ct. had been properly made.—*GORDON v. PHILLIPS* (1886), 11 P. R. 640.—*CAN.*

6178 ii. —.]—In an action by creditors of *def.* R. to set aside conveyances by him to *def.* G. as fraudulent, *pltf.* swore that it was necessary to have an examination of *def.* before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which he had no personal knowledge; a local judge, upon the application of *pltf.* *ex p.* made an order for such examination.—*Held*: the order should not at any rate have been made *ex p.*, & in this case the order should not have been made at all, the position of a *def.* resisting a claim as to which he has no personal knowledge, & of a *pltf.* advancing such a claim, being vastly different.—*HOVEY v. GILBERT* (1887), 12 P. R. 114.—*CAN.*

6178 iii. —.]—An order for examination of witnesses is a discretionary one, & where the witnesses have been examined under it, will not be reversed on appeal unless a strong case of error appears.—*DELAIR v. CHARLEBOIS* (1893), 15 P. R. 142.—*CAN.*

6178 iv. —.]—Where strong reasons are shown why the commission should not be granted, as failure to exercise due diligence on the part of the party applying or unreasonable delay caused to the opposite party, the discretion of the judge allowing the commission will be reviewed on appeal.—*MCLEOD v. INSURANCE COMPANIES* (1900), 32 N. S. R. 481.—*CAN.*

6178 v. —.]—During the progress of the trial, & after a number of witnesses on behalf of *pltf.* had been

examined, *def.*'s counsel applied for a commission for the examination of a witness who was absent in B. C. The witness in question was a son of one of *def.*, who was aware of his absence, but the fact was not brought to the attention of *def.*'s counsel until the day on which the trial was commenced. The judge having refused the commission.—*Held*: there was no reason for interfering with his discretion.—*STRAKEN v. THOMPSON* (1902), 35 N. S. R. 390.—*CAN.*

6178 vi. —.]—Where, upon an application by *def.* for leave to examine his co-*def.* abroad for the purpose of obtaining evidence for use at the trial, *appet.* did not show that his co-*def.* could not be induced to come at any other time, or that he would not come to give evidence at the trial, & did not show circumstances which would satisfy the master, to whom the application was made, that the co-*def.* could not be induced to come, or that *appet.* could not reasonably be expected to produce him at the trial, & where, moreover, it was not shown that it was in the interest of justice that co-*def.* should be examined abroad, but the contrary might be inferred from the circumstances of the case, fraud being charged against *def.*, on appeal.—*Held*: the order of the master granting the application must be reversed.—*MURRAY v. PLUMMER* (1913), 2 W. L. R. 371; 4 W. W. R. 717; 11 D. L. R. 764; 6 Sask. L. R. 84.—*CAN.*

6178 vii. —.]—In an action by nine *pltf.*, all resident in England, each of whom asked for a cancellation of shares & a return of price paid on ground of misrepresentation, an application was made to take their evidence on commission.—*Held*: the discretion of the master in ordering the evidence to be taken on commission would not be interfered with on appeal.—*KAYE v. BURNSLAND ADDITION, LTD.*

6179. —.]—The grant of a commission to take evidence is in some degree a matter of discretion. The master & the judge at chambers exercised their discretion & decided in favour of the application, & the Divisional Ct. upheld their decision. In such a case there ought not to have been an appeal. The appeal, therefore, will be dismissed with costs (*LORD ESHER, M.R.*).—*BUTTERFIELD v. FINANCIAL NEWS* (1889), 5 T. L. R. 279, C. A.

6180. —.]—The ct. had to exercise its discretion as to granting a commission, & this ct. [C. A.] would be very unwilling to interfere with the exercise of that discretion by the ct. below. Each case must depend upon its own circumstances & no rule as to the exercise of that discretion could be laid down. The ct. below seemed to have treated the matter as if it was merely a commission to examine witnesses. They seemed to have taken no notice in their judgment that it was a commission to examine *def.* himself. Considering the nature of the case & the fact that *def.* was a Russian subject living in Russia & all the circumstances . . . a commission ought to be ordered to issue (*LORD ESHER, M.R.*).—*EMANUEL v. SOLTYKOFF* (1892), 8 T. L. R. 331, C. A.

6181. *To grant application ex parte.*]—The ct. will not grant a rule absolute in the first instance for the examination of a witness, although he be at the point of death.

Semble: Common Law Procedure Act, 1851 (c. 125), s. 46, does not give the ct. the power of doing so.—*THOMAS v. VON STUTTERHEIM* (1850), 28 L. T. O. S. 64; 5 W. R. 6.

Annotation.—*Consd.* *Morgan v. Alexander* (1875), L. R. 10 C. P. 184.

6182. —.]—*BIDDER v. BRIDGES*, No. 6357, *post*.

(1915), 31 W. L. R. 689; 8 W. W. R. 1064; 24 D. L. R. 232.—*CAN.*

6178 viii. —.]—The Ct. of Appeal is loth to interfere with the discretion exercised by the ct. below in granting a commission. Each must depend upon its own circumstances & no general rule as to the exercise of that discretion can be laid down.—*GIBBSON & BROWN v. ATKINS (E. C.) & Co.* (1917), 24 B. C. R. 19.—*CAN.*

6178 ix. —.]—*VEERABADRAN CHETTY v. NATARAJA DESAIKAR* (1904), 1 L. R. 28 Mad. 28.—*IND.*

6181 i. *To grant application ex parte.*]—An application to examine a witness *de bene esse*, on the ground that he is about to leave the jurisdiction will not be granted *ex p.*—*EARLY v. McHILL* (circa 1862), 1 Ch. Ch. 257.—*CAN.*

6181 ii. —.]—The master cannot *ex p.* issue a certificate for a foreign commission. *MCLENNAN v. HELPS* (1871), 3 Ch. Ch. 193.—*CAN.*

6181 iii. —.]—An order for the preliminary examination of a party will not be made *ex p.*—*DEWALT v. HUGHITT* (1878), 7 P. R. 323.—*CAN.*

6181 iv. —.]—Application to set aside an order made *ex p.* for the examination of B. as a witness on behalf of *pltf.* *ex p.*—*Held*: according to the established practice, the order should not have been made *ex p.*—*HOLMES v. CANADIAN PACIFIC RY. Co.* (1888), 5 Man. L. R. 346.—*CAN.*

6181 v. —.]—On an application *ex p.* for leave to examine a witness abroad to leave the colony the ct. has power to make the order, the order being taken by *appet.* at his peril & subject to the risk of being discharged upon sufficient grounds being shown.—*THOMPSON v. FICTON BOROUGH COUNCIL* (1907), 26 N. Z. L. R. 668.—*N.Z.*

m. Witness's veracity impeached.]—A commission will issue to examine a witness, notwithstanding that his character for veracity is impeached.

Sect. 1.—*Examination of witnesses: Sub-sects. 1,*

6183. —[.]—Where, in an affidavit filed on behalf of plffs. on a motion, which by consent stood over, statements were deposed to as having been made by a person to deponent, & which were material for the purpose of plffs.' case, leave was, on an *ex parte* application, given to plffs. to examine such person before an examiner, the deposition to be given in evidence as if it were an affidavit.—*TURNER PNEUMATIC TYRE CO., LTD. v. DUNLOP PNEUMATIC TYRE CO., LTD.* (1897), 75 L. T. 651.

SUB-SECT. 2.—*BY WHOM ORDERED.*

6184. Court of common law—By virtue of original jurisdiction.—[.]—*JENKINS v. LARWOOD* (1717), Bumb. 13; 145 E. R. 578.

*Annotations:—*Consd. *Scott v. A'Chez* (1743), Park. 21. *Reid. A.-G. v. Laragotly* (1815), 2 Price, 186; *Laragotly v. A.-G.* (1815), 2 Price, 172; *A.-G. v. Reilly* (1845), 2 Dow. & L. 690; *A.-G. v. Boyet* (1846), 10 J. P. 392.

6185. —[.]—*For use in proceedings pending at sessions.*—[.]—Where there are proceedings pending at sessions on a removal order, & a material witness is unable to travel, but in a fit state to be examined, this ct. has no power to make an order for his examination to be taken for the purpose of being used in such proceedings.—*Ex p. KIMBOLTON (INHABITANTS)* (1861), 5 L. T. 347; 25 J. P. 759.

6186. Master in Chancery.—[.]—*BOLINGBROKE v. WENCH* (1704), cited in 2 Hare, 643, n.; 13 L. J. Ch. 26; 8 Jur. 734; 67 E. R. 265.

*Annotation:—**Reid. Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

6187. —[.]—*FOLKES v. BERNEY* (1732), cited in 2 Hare, 613, n.; 13 L. J. Ch. 26; 67 E. R. 265; *sub nom. FALKES v. BERNEY*, 8 Jur. 734.

*Annotation:—**Reid. Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

6188. —[.]—*RICHARDSON v. HAMILTON* (1735), cited in 2 Hare, 613, n.; 13 L. J. Ch. 26; 8 Jur. 734; 67 E. R. 265.

*Annotations:—**Reid. Bamford v. Bamford* (1844), 13 L. J. Ch. 25. *Mentd. Penn v. Baltimore* (1750), 1 Ves. Sen. 444; *Black Point Syndicate v. Eastern Concessions* (1898), 79 L. T. 658.

6189. —[.]—*CHREUZE v. MITCHELL* (1787), cited in 2 Hare, 613, n.; 13 L. J. Ch. 26; 8 Jur. 734; 67 E. R. 265.

*Annotation:—**Reid. Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

6190. —[.]—*NEWTON v. BRADSHAW* (1803), cited in 2 Hare, 613, n.; 13 L. J. Ch. 26; 8 Jur. 734; 67 E. R. 265.

*Annotation:—**Reid. Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

6191. —[.]—The old practice to insert in the decree a direction that the master is to be armed with power to examine witnesses, which still prevails in the Exchequer & other cts. of equity, has been long disused in Chancery. By the present

course the master may certify that a commission is necessary, which then issues as of course.—*SANFORD v. BIDDULPH* (1803), 9 Ves. 36; E. R. 513, L. C.

6192. —[.]—*COX v. COX* (1831), cited in 2 Hare, 613, n.; 13 L. J. Ch. 26; 8 Jur. 734; 67 E. R. 265.

*Annotation:—**Reid. Bamford v. Bamford* (1843), 13 L. J. Ch. 25.

6193. —[.]—*NELSON (EARL) v. BRIDPORT (LORD)*, No. 6512, *post*.

6194. —[.]—Where upon a reference to the master a commission to examine witnesses abroad is required, the master's certificate as to the necessity of the commission must be obtained before any application is made to the ct. *Semble*: the commission will go as of course upon the certificate.—*BAMFORD v. BAMFORD* (1843), 2 Hare, 642; 13 L. J. Ch. 25; 8 Jur. 733; 67 E. R. 265.

6195. —[.]—The master in the course of the investigation of facts in his office may, upon sufficient ground laid, grant a certificate for the examination of witnesses abroad. *Semble*: the place or places where the commission is to be executed ought to be stated in the certificate, & a country, as Germany, is too extensive.—*BAUER v. MITFORD* (1845), 2 Coll. 188; 14 L. J. Ch. 374; 63 E. R. 693.

6196. Court in which trial to be had.—[.]—*LOWTHER v. WHORWOOD* (1722), Bumb. 120; 145 E. R. 617.

6197. —[.]—A motion for a commission to examine witnesses upon an issue out of Chancery is properly made to the ct. in which the trial is to be had.—*BOURDEAUX v. ROWE* (1835), 1 Bing. N. C. 721; 1 Hodg. 93; 131 E. R. 1295; *sub nom. BORDIEU v. ROWE*, 1 Scott, 608.

*Annotation:—**Reid. Hargrave v. Hargrave* (1847), 4 C. B. 648.

6198. Mayor's Court, London.—[.]—Deft. instructed plff., an attorney, to take proceedings on his behalf to recover a percentage which he claimed to be due to him from underwriters on certain policies of assurance. From the circumstances of the case it was clear that to establish his claim it would be necessary to take the evidence of witnesses at Calcutta. Plff. first wrote letters demanding payment from the underwriters, & this being refused, he issued writs against them in the Mayor's Ct., which ct. he afterwards discovered had no power to issue a commission to examine witnesses & so the proceedings were useless.—*Held*: plff. had been guilty of such negligence in suing in the Mayor's Ct. without first ascertaining whether that ct. had power to issue a commission, as to disentitle him from recovering his charges.—*COX v. LEECH* (1857), 1 C. B. N. S. 617; 26 L. J. C. P. 125; 28 L. T. O. S. 370; 3 Jur. N. S. 442; 5 W. R. 199; 140 E. R. 251.

See Mayor's Court of London Procedure Act, 1857 (c. clvii.), s. 26.

The proper course in such case is to at the trial for that purpose.—*NORDHEIMER v. MCKILLOP* (1884), 10 P. R. 246.—*CAN.*

Parly refusing to make affidavit.—[.]—An order for the examination of a person who refuses to make an affidavit is discretionary.—*BROWN v. HOOPER* (1885), 3 Man. L. R. 86.—*CAN.*

o. Expert witnesses—Special circumstances necessary.—[.]—Expert evidence will not be permitted to be taken abroad except in special circumstances.—*WASHBURN & MORN MANUFACTURING CO. v. BROOKS* (1885), 2 Man. L. R. 44.—*CAN.*

p. Attendance of witness not en-

forceable.—[.]—Where the attendance of a witness cannot be enforced the ct. will as a rule allow his evidence to be taken on commission unless it appear that the other side is likely to be prejudiced thereby or that a mis- of justice may possibly *ESTATES GOLD MINING CO., LTD.* (1918), T. P. D. 420.—*S. AF.*

PART VIII. SECT. 1, SUB-SECT. 2.

q. Judge of division court.—[.]—*MAC NEK v. ONTARIO BANK*, 3 C. L. T. 360.—*CAN.*

r. Master in chambers.—[.]—The master has jurisdiction to direct evidence proposed to be used on an inquiry

before him to be taken before a master in an outer county, though not consented to.—*Re CASEY, BIDEELL v. CASEY* (circa 1862), 1 Ch. Ch. 198.—*CAN.*

s. —[.]—The master in chambers has power to direct evidence to be taken at any stage of the proceedings in a cause. In this case a witness about to leave the country was examined before a special examiner, under a chambers order, during a reference in the master's office, on which his evidence was to be used.—*DUNSFORD v. DUNSFORD* (1881), 9 P. R. 172.—*CAN.*

t. Judge in chambers.—[.]—A judge in chambers has no power to order

6199. Official referee.]—An official referee, to whom an action is referred for trial, has jurisdiction to make an order granting a commission to examine witnesses abroad, & a judge at chambers has jurisdiction to review the decision of the official referee granting or refusing such an order.—*HAYWARD v. MUTUAL RESERVE ASSOCN.*, [1891] 2 Q. B. 236; 65 L. T. 491; 39 W. R. 624; 7 T. L. R. 575, D. C. —*Mentd.* Macalpine v. Calder, [1893] 1 Q. B.

545.

6200. Privy council.]—The evidence as to the parties' respective compliance with such condition precedent being in London, the ct. directed it to be taken on commission instead of remitting the case to Shanghai.—*BANK OF CHINA, JAPAN & THE STRAITS, LTD. v. AMERICAN TRADING CO.*, [1894] A. C. 266; 63 L. J. P. C. 92; 70 L. T. 849; 6 R. 494, P. C.

6201. County court judge—Sitting as arbitrator.]—In a claim under Workmen's Compensation Act, 1906 (c. 58), it appeared that appet. was employed by resp. as an errand boy & was injured by an accident as a result of which his leg had to be amputated. He filed a request for arbn. & applied for an order that he should be examined forthwith before an officer of the ct. at the hospital in which he was being treated. The county ct. judge made an order that he should be examined before the registrar on notice to resp., & that a copy of the examination should be used as evidence at the trial of the arbn. The examination was taken accordingly, but, owing to a misunderstanding, resp. was not represented at it:—*Held*: the judge was sitting as arbitrator & had not all the powers which he exercised as county ct. judge; & he had no power to order evidence to be taken by commission.—*TAYLOR v. CRIPPS*, [1914] 3 K. B. 989; 83 L. J. K. B. 1538; 111 L. T. 780; 30 T. L. R. 616; 7 B. W. C. C. 623, C. A. *Annotation*:—*Reid*. Turner v. Kingsbury Collieries, [1921] 3 K. B. 169.

SUB-SECT. 3.—IN WHAT PROCEEDINGS ORDERED.

6202. Question of legitimacy.]—*CHESSEY v. HULL* (1570), Toth. 38; 21 E. R. 116.

6203. —.]—*HOBBY v. SMITH* (1624), Toth. 38; 21 E. R. 116.

6204. Suits by Crown—To examine witness against Crown.]—*LARAGOTY v. A.-G.*, No. 6366, *post*.

6205. —.]—In an action at the suit of the Crown, the ct. has no power, under Evidence on Commission Act, 1831 (c. 22), at deft.'s instance, to direct a commission for the examination of witnesses.—*R. v. WOOD* (1811), 7 M. & W. 571;

9 Dowl. 310; 10 L. J. Ex. 108; 5 Jur. 295; 151 E. R. 893.

Annotations:—*Consd.* A.-G. v. Boyet (1846), 3 Dow. & L. 492. *Reid*. R. v. Upton St. Leonard's (1847), 10 Q. B. 827.

6206. —.]—In an information by the A.-G. for penalties for a breach of the revenue laws, this ct. has no jurisdiction, on motion by deft. either at common law or by statute, to direct a commission to issue for the examination of witnesses abroad, nor will it stay the proceedings until the A.-G. consent to the issuing of such commission.—*A.-G. v. BOYET* (1846), 15 M. & W. 60; 3 Dow. & L. 492; 15 L. J. Ex. 155; 6 L. T. O. S. 375; 10 J. P. 392; 153 E. R. 761. *Annotation*:—*Reid*. R. v. Upton St. Leonard's (1847), 10 Q. B. 827.

6207. — To examine Crown's witnesses.]—*A.-G. v. REILLY*, No. 6340, *post*.

6208. In company winding up.]—On an application for an order directing a commission to be issued to examine witnesses abroad with a view of testing the accuracy of accounts rendered by the liquidator of a co., in respect of a charge in which appets. were largely interested:—*Held*: the application ought to be granted. Appets. were, in substance, mtge. creditors of the co., & the commission was a mere incident to the prosecution of the accounts.—*Re IMPERIAL LAND CO. OF MARSEILLES* (1877), 37 L. T. 588, C. A. *Annotation*:—*Reid*. Spiller v. Paris Skating Rink Co. (1878), 27 W. R. 225.

6209. —.]—Where a co. is in voluntary liquidation & a dispute has arisen as to the price to be paid for the purchase of the interest of a dissentient member which under Companies Act, 1862 (c. 89), s. 162, has been referred to arbn., the ct. on the application of the liquidators has jurisdiction under R. S. C., Ord. 38, r. 5, to order a commission to issue for the examination of witnesses abroad, the matter being one arising in the winding up within sect. 138 of the Act & the reference to arbitration being compulsory under the Act.—*Re MYSORE WEST GOLD MINING CO.* (1889), 42 Ch. D. 535; 58 L. J. Ch. 731; 61 L. T. 453; 37 W. R. 794; 5 T. L. R. 695; 1 Meg. 347. *Annotation*:—*Mentd.* Taylor v. Cripps (1914), 7 B. W. C. C. 623.

6210. Probate proceedings.]—Under sect. 26 of Ct. of Probate Act, 1857 (c. 77), the ct. ordered deft., who was prevented by illness from attending the ct., to be examined under a commission as to her knowledge of a testamentary paper.—*BANFIELD v. PICKARD* (1881), 6 P. D. 33; 29 W. R. 613; *sub nom.* In the Goods of PICKARD, BANFIELD v. PICKARD, 50 L. J. P. 72; 45 J. P. 508.

Admiralty.]—*See* ADMIRALTY, Vol. I., pp. 193, 194, Nos. 1078–1083.

third voce examination of a witness *de bene esse*.—*HOPKINSON v. DAWSON* (1869), 1 P. E. I. 281.—*CAN.*

a. Judge of Appeal Court.]—A judge of the Ct. of Appeal has no power to order the issue of a commission to take evidence abroad for use upon a compulsory arbn. pending before an arbitrator named by a judge of that ct.—*Re MATHURSON & CITY OF TORONTO* (1894), 16 P. R. 230.—*CAN.*

PART VIII. SECT. 1, SUB-SECT. 3.

b. Administration action.]—After notice of motion served for an order to administer the estate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate.—*FARRELL v. CRITCHANK* (circa 1857), 1 Ch. Ch. 12.—*CAN.*

c. Assessment of damages.]—Rule for commission granted, when no appearance, to obtain evidence in order to assess damages.—*WILSON v. LYLE* (1854), James, 183.—*CAN.*

d. Breach of promise action.]—Since the passing of 45 Vict., c. 10, s. 3 (O), the parties to an action for breach of promise of marriage are both competent & compellable witnesses, & may be examined under C. L. P. Act.—*JONES v. GALLON* (1881), 9 P. R. 236.—*CAN.*

e. —.]—*McLAUGHLIN v. MOORE* (1884), 10 P. R. 326.—*CAN.*

f. On election petition.]—A commission to examine witnesses in a foreign country may be issued in the case of the trial of an election petition.—*CORNWALL ELECTION CASE* (3), *McLENNAN v. BROWN* (1879), H. E. C. 803.—*CAN.*

g. —.]—*Re GLENGARRY ELECTION*,

CHISHOLM v. McLENNAN, 11 C. L. T. Occ. N. 321.—*CAN.*

h. Under Administration of Justice Act, 1873 (c. 8).]—An order may be granted for the examination of a party under the above Act, although such party resides beyond the jurisdiction of the ct.—*MORRELL v. MORRISON* (1874), 6 P. R. 210.—*CAN.*

k. — Interpleader issue.]—An order to examine deft. in an interpleader issue may be granted under the above Act, the words "action at law" including an interpleader proceeding.—*CANADA PERMANENT BUILDING SOCIETY v. FOREST* (1874), 6 P. R. 254.—*CAN.*

l. Where motion pending.]—Upon a motion pending, witnesses may be examined under a subpoena & appointment.—*McMILLAN v. WANABROUKE* (1884), 10 P. R. 377.—*CAN.*

m. —.]—Where an affidavit used

6224. ———.]—A demurrer to a bill for a discovery & a commission in aid of the defence of an action for libel, being overruled, a commission to examine witnesses abroad will be granted, before answer, though deft. in equity denies, by affidavit, the truth of the justification pleaded at law.

Qu.: whether, according to the strict practice of the ct., affidavits can be read in opposition to the motion for a commission.—**SHACKELL v. MACAULAY** (1821), 3 L. J. O. S. Ch. 40, L. C.; *affd.*, *sub nom.* **MACAULAY v. SHACKELL** (1827), 1 Hll. N. S. 96, H. L.

Annotations:—**Mentd.** Glyn v. Soares (1836), 1 Y. & C. Ex. 644; Mills v. Campbell (1836), 2 Y. & C. Ex. 389; Stewart v. Nugent (1836), 1 Keen, 201; It. v. Upton St. Leonard's (1847), 2 New Pract. Cas. 272; Metropolitan Saloon Omnibus Co. v. Hawkins (1858), 1 P. & F. 413; Metropolitan Saloon Omnibus Co. v. Hawkins (1859), 4 H. & N. 146; Bartlett v. Lewis (1862), 12 C. B. N. S. 249; Stern v. Sevastopulo (1863), 14 C. B. N. S. 737; The Mary (otherwise Alexandra) (1868), 38 L. J. Adm. 29; Springhead Spinning Co. v. Riley (1868), L. R. 6 Eq. 551; Hill v. Campbell (1875), L. R. 10 C. P. 222; Arnold & Butler v. Bottomley, [1908] 2 K. B. 151.

6225. ——— **Witness going abroad.**—The ct. will grant a commission to examine a witness who is in this country, on an affidavit of his being under a necessity of going abroad, before the day when the cause will be tried, & although the cause be not at issue, & the answer has not come in.—**DELIUS v. ROUGEMONT** (1815), 1 Price, 449; 145 E. R. 1459.

6226. ———.]—**TEYNIHAM (LORD) v. TYLER** (1828), cited in 3 Sim. at p. 457; 57 E. R. 1070.

Annotation:—**Fold.** Bown v. Child (1830), 3 Sim. 457.

6227. ——— **Defendant obtaining order for time.**—Pltf. is not entitled to a commission to exercise witnesses abroad if deft. is not in contempt, although his time for answering has expired & an order for time has been obtained by him.—**COOK v. STEPHENS** (1825), 2 Russ. 543, n.; 3 L. J. O. S. Ch. 226; 38 E. R. 443.

6228. ———.]—(1) Pltf. is entitled to move for a commission to examine witnesses abroad as soon as deft. has obtained an order for time, though he has neither filed his answer nor is in contempt.

(2) *Qu.*: whether it is necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, in aid of an action at law, should state the names of the witnesses or the points to which they are to be examined.—**MENDIZARAT v. MACHADO** (1827), 2 Russ. 540; 38 E. R. 438, L. C.; *affg.* (1825), 4 L. J. O. S. Ch. 62. *Annotation*:—*As to* (2) **Consd.** Carbonell v. Bessell (1833), 5 Sim. 636.

6229. ———.]—A motion by a deft., before

6225 i. ——— **Witness going abroad.**—Liberty to examine *de bene esse* a witness about to leave the country, may be granted upon application made before answer; but, when the answer is come in, except in a very special case, this cannot be done.—**BYRNE v. BYRNE** (1827), 2 Mol. 440.—**IR.**

c. ——— **Defendant without knowledge of material facts.**—An application to examine is in the discretion of the ct., & that discretion cannot be said to have been wrongly exercised in allowing deft. to examine pltf. & three witnesses before delivering the defence, in order to obtain a knowledge of material facts which deft. could not otherwise get.—**BOULTON v. BLAKES** (1885), 11 P. R. 196.—**CAN.**

p. **Before issue joined.**—**Necessity to disclose nature of evidence to be** ———.]—Where an application for a foreign commission is made before issue joined, & it is not certain what the issues will be, the party applying must disclose the nature of the evidence to be given by the foreign witness,

that the ct. may gauge whether it is likely to be material & necessary.—**MORROW v. McDONALD** (1894), 16 P. R. 129.—**CAN.**

q. **After cause set down.**—An order was made for a commission on the application of pltf., after he had himself set the case down for trial, had prepared for trial.—**JONES v. HUTCHINSON** (1899), 18 N. Z. L. R. 867.—**N.Z.**

r. **Not before declaration filed.**—The ct. will not, under the provincial statute for issuing commissions to examine witnesses about to leave the province, order such commission before declaration filed.—**SAUNDERS v. PLAYTER** (1823), Tay. 37.—**CAN.**

s. ———.]—Pltf. was seeking damages for breach of a contract made with persons whom he alleged to be ——— of deft. Before delivering statement of claim, & after many months had elapsed since appearance, pltf. obtained an order to examine deft. under a foreign commission at C.:—**Held**: the

answer, to examine a witness *de bene esse* was granted.—**BOWN v. CHILD** (1830), 3 Sim. 457; 57 E. R. 1069.

6230. **Before issue joined.**—**Witness going abroad.**—Witnesses cannot be examined under Evidence on Commission Act, 1831 (c. 22), before issue is joined, but where such an application to examine witnesses on behalf of a pltf. was made before issue was joined, & it was sworn that the witnesses whom it was proposed to examine were about to sail in a few days for South Australia, & would not return for two years, the ct. made a rule absolute to have their examination taken *via voce* before the master, pltf. undertaking not to proceed with the examination until after issue should be joined in fact.—**MONDEL v. STERLE** (1841), 8 M. & W. 300; 9 Dowl. 812; 10 L. J. Ex. 314; 5 Jur. 511; 151 E. R. 1052.

Annotation:—**Refd.** Clutterbuck v. Jones (1848), 13 Jur. 152.

6231. ———.]—**FINNEY v. BEESLEY**, No. 6212, *ante*.

6232. ———.]—**BRAUN v. MOLLETT**, No. 6333, *post*.

6233. ———.]—An application was made on behalf of pltf. under Ord. 37, r. 4 (6), for a commission to examine a witness, who was material to pltf.'s case, & who was about to go abroad, having taken his passage to Australia. The Statements of Claim & Defence had been delivered in the action, but issue had not been joined:—**Held**: Ord. 37, r. 4 (6), applied, though issue had not been joined, & the commission should issue.—**ELAN v. WILSON** (1883), 75 L. T. Jo. 47, D. O.

6234. ——— **Witness old & infirm.**—**A.-G. v. CONSTABLE** (1880), 3 T. L. R. 226, D. C.

6235. **After peremptory order to speed.**—Commission order to speed. It is as of course, that a pltf., even after the peremptory order to speed his cause, should have an order for a commission to examine witnesses, with liberty to execute the same in term time.—**FIELD v. SOWLE** (1826), 1 Russ. 82; 38 E. R. 32.

6236. **After cause set down.**—**Unless for purpose of delay.**—Though a cause is set down for trial the ct. will grant a commission to examine witnesses abroad unless it be sworn & distinctly appear that it is for the purpose of fraud or delay.—**v. RAWSON** (1839), 3 Jur. 288.

6237. **Pending appeal.**—**Evidence rejected at hearing.**—**Witness seriously ill.**—Where the evidence of a witness had been rejected at the hearing of an action, & there was an appeal against that decision, the witness being dangerously ill, the Ct.

not such as justified the order.—**THOMSON v. GYE** (1889), 13 P. R. 273.—**CAN.**

t. **Not before amendment of pleadings.**—A demurrer had been argued, & the ct. instead of allowing the demurrer, gave pltf. liberty to amend on payment of costs. An application by pltf. for a commission to examine deft. in Lower Canada before amendment was refused with costs.—**CHANCE v. HENDERSON** (1859), 1 Ch. Ch. 30.—**CAN.**

a. **After replication.**—A commission to take evidence cannot regularly be issued until after replication filed.—**ROYAL CANADIAN BANK v. CUMMER** (1869), 2 Ch. Ch. 388.—**CAN.**

b. **Before delivering particulars.**—Pltf. alleged that at a certain city, in a certain month & year, deft. falsely & maliciously spoke & published of pltf. certain specified words:—**Held**: deft. was entitled to some particulars as to the times when & the places where the defamatory words were used, & as to some of the persons in whose hearing they were alleged to

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of Appeal allowed his evidence to be taken *de bene esse* before a special examiner pending the appeal, applt. undertaking to abide by any order which the ct. might hereafter make as to the costs of the application & the costs of the examination.—**TREASURY SOLICITOR v. WHITE** (1880), 55 L. J. P. 79; 2 T. L. R. 847, C. A.

6238. Where account must be directed at hearing.—Not granted till hearing.]—The course of the ct. is, that where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission will delay the directing the account. The proper time to apply for such commission is after the account is directed.

If there had been a stated account, & a bill brought, in order to open that account, on particular errors suggested, there might have been reason for granting the commission in question, provided the witness that is beyond sea was the only person that could depose in relation to those errors, but no such stated account is pretended to be in the present case (**LORD HARDWICKE, C.**).—**ADAMS v. BOHUN** (1740), Barn. Ch. 270; 27 E. R. 641.

In matrimonial causes.]—See HUSBAND & WIFE.

SUB-SECT. 5.—(GROUNDS FOR GRANTING OR REFUSING ORDER.

A. In General.

6239. Evidence already obtained.—Under commission from foreign government.]—A married woman, living in America, being entitled to a legacy, a commission to examine her would have been directed, but as she had been examined under a commission, issued by the American Govt., that was considered sufficient.—**CAMPBELL v. FRENCH** (1797), 3 Ves. 321; 30 E. R. 1033, L. C.

Annotations:—Mentd. **Wallace v. Seymour** (1872), 20 W. R. 634; **Thomas v. Howell** (1874), L. R. 18 Eq. 198; **Nickall v. Fawkes** (1905), 50 Sol. Jo. 126; *Re Churchill, Taylor v. Manchester University*, [1917] 1 Ch. 206.

6240. Evidence obtainable in this country.]—

have been spoken, & pltt. should have leave to examine deft. before delivering particulars, in order to enable him to furnish them.—**ROBINSON v. SUGARMAN** (1897), 17 P. R. 419.—**CAN.**

a. After trial.—Before judgment.—If evidence material.]—On an application for a commission the ct. suggested that the action should go to trial reserving to deft. the right to have the commission before judgment was pronounced if the facts developed at hearing show that the evidence appears to be material.—**NORTHERN CROWN BANK v. NATIONAL MIZZO & BISCUIT CO.** (1912), 20 O. W. R. 897; 3 O. W. N. 516; 1 D. L. R. 22.—**CAN.**

d. After cause entered on peremptory board of day.]—A commission for the examination of witnesses will be issued, even though the cause is entered upon the peremptory board of the day, if the issuing of such commission is not calculated to prejudice defts., or to subject them to loss or inconvenience.—**JANSEN v. DUNDAS** (1863), 1 Hyde, 269.—**IND.**

PART VIII. SECT. 1, SUB-SECT. 5.—A.

a. General rule.]—Every application for a commission must be made in good faith, & the evidence sought to be obtained must be such as to warrant a reasonable belief that it may be material & necessary for the purposes

of justice; but it is safer where any injustice to other parties, in the way of delay or expense or otherwise, can be provided against, to favour the granting rather than the refusing of the application. The main considerations are a full & fair trial & the saving of expense.

In this case the order for a commission to take the evidence of pltt. & his witnesses abroad was granted upon pltt. securing defts. for their costs of the execution of the commission & undertaking to speed the proceedings & not delay the trial. It was contended by defts. that the evidence expected from the witnesses was unnecessary by reason of the implied admissions in the statement of defence.—**Held:** It was for defts. to make the evidence unquestionably unnecessary, either by amending their pleadings so as to expressly make the admissions or by undertaking to do so at the trial.—**ROBINS v. EMPIRE PRINTING & PUBLISHING CO.** (1892), 14 P. R. 488.—**CAN.**

f. —.]—The cts. should not allow witnesses to be examined on commission without adequate reasons.—**PANACHAND CHHOTALAL v. MANOHARLAL NANDEAL** (1917), 1 L. R. 42 Bom. 136.—**IND.**

6243]. Delay in application.]—Applications for commission by deft. must

It is no answer to an application for a commission to examine witnesses abroad, supported by the ordinary affidavit, that the opposite party deposes that there are persons in this country, & documents accessible to applt., which would supply him with any information he could obtain from the witnesses he proposes to examine. After a judge has exercised his discretion on such an application, the ct. will not disturb his decision, unless it is manifestly wrong.—**ADAMS v. CORFIELD** (1858), 28 L. J. Ex. 31.

6241. —.]—Two interlocutory applications were made, one by plttfs. for a commission to the United States to take evidence especially as to the circulation in England of American papers & magazines in which plttfs. had advertised "Absorbine." This application was granted by the judge, but the order for a commission was on appeal discharged.—**CHRISTY & CO. v. TIPPER & SON** (1903), as reported in 21 P. C. 97.

Annotation:—Mentd. *Re Yalding Manufacturing Co. Appln.* (1916), 33 P. C. 285.

6242. Defendant keeping away.]—Upon a question of legitimacy, depending upon a chain of distinct circumstances, in the knowledge of different individuals, & deft., an infant, kept out of the way, an examination *de bene esse* would have been granted, though not within any of the three cases, viz. witnesses of the age of seventy, or quitting the kingdom, or a fact depending on a single witness.—**SHELLEY v. —** (1806), 13 Ves. 56; 33 E. R. 215. **Annotation:—Consd.** **McKenna v. Everitt** (1839), 2 Beav. 188.

6243. Delay in application.]—A commission to examine witnesses abroad was refused, on the ground of the delay of the party who made the application.—**HART v. STRONG** (1826), 2 Russ. 559; 38 E. R. 445, L. C.

6244. —.]—The fact of a pltt. not proceeding promptly in a cause is no answer to a rule for examining a material witness on interrogatories who is going abroad.—**WEEKES v. PALL** (1838), 6 Dowl. 462; 5 Scott, 713.

6245. —.]—The ct. refused to disallow a commission for examining pltt.'s witnesses abroad, though there had been great delay on his part, but they referred it to the master to say whether or not the security pltt. had given for costs should

be made without unnecessary delay.—**JONES v. WILLIAMS** (1854), James, 303.—**CAN.**

6243 ii. —.]—Deft. was father of D., who absconded, having assigned his property to deft. as trustee, who claimed to be a creditor for a large sum. The trial had already been postponed one term, & now deft. applied for a commission to examine his son abroad, alleging that he had not done so before because he did not know where his son was, but this was not positively stated, but left to be inferred argumentatively from the affidavits. He & his attorney admitted having been all along in communication with the son, but through a third person. To grant the commission would cause the trial to be put off for another term.—**Held:** there was no valid reason for the delay, & the rule must be refused.—**UNION BANK v. DAWSON** (1868), 1 P. E. I. 279.—**CAN.**

6243 iii. —.]—There is not the same objection, on the ground of delay, to the issue of a commission for the examination of witnesses, where the application is by pltt., as there is where the application is by deft.—**JONES v. HUTCHINSON** (1899), 18 N. Z. L. R. 867.—**N.Z.**

6243 iv. —.]—**McELDOWNEY v. BUTTICKOR** (1914), 33 N. Z. L. R. 1419.—**N.Z.**

not be increased.—*DE ROSSI v. POLHILL* (1839), 7 Scott, 836.

6246. —[—]—*BUTLER v. FOX* (1850), 9 C. B. 109; 14 L. T. O. S. 398; 137 E. R. 868.

6247. —[—]—An application for a commission to examine witnesses may be refused on the ground of unreasonable delay.—*STONE v. STONE* (1864), 34 L. J. P. M. & A. 33; 13 W. R. 414.

6248. —[—]—A cause in the paper for hearing was ordered to stand over, on application on behalf of *ptff.*, who was at Calcutta, & sixteen days after he took out a summons to have evidence taken abroad, but the *ct.* on the ground of such delay & former delay on *ptff.*'s part refused his application with costs.—*STUART v. GLADSTONE* (1877), 7 Ch. D. 394; 47 L. J. Ch. 154; 37 L. T. 575; 26 W. R. 277.

Annotation :—*Reld*. *Butterfield v. Financial News* (1889), 5 T. L. R. 279.

See, also, No. 6320, *post*.

6249. Defence alleged not legal defence.—I will not grant commissions in aid of a defence to an action when I am not satisfied that the facts alleged as a defence will constitute a legal defence to the legal demand. The *ct.* ought never to grant a commission without examining strictly what is the state of the pleadings at law (*LORD ELDON, C.*).—*LOUSADA v. TEMPLER* (1827), 2 Russ. 501; 38 E. R. 416.

Annotation :—*Reld*. *Macaulay v. Shackell* (1827), 1 Bll. N. S. 96.

6250. Application made *bonâ fide*—& not for delay.—The *ct.* will grant an application for a commission to examine witnesses in support of a plea of infancy, although *deft.* does not swear that there is a good defence upon the merits, or that he believes he was an infant, as the plea alleges, if it appear that the application is *bonâ fide*, & not made for the purposes of delay.—*WEST-MORLAND v. HUGGINS* (1812), 11 L. J. Q. B. 273; 6 Jur. 731.

6251. Claim made in suspicious circumstances.—An alleged marriage was set up between C., an Englishman in India, & a native woman. C., after the time alleged, married another person in the

English form, & had children reputed legitimate, & no claim of such prior marriage was set up till seventeen years after C.'s death in the country :—*Held*: the evidence being suspicious & weak, no commission ought to be sent to India to procure further evidence, as such a proposal would only tend to encourage perjury.—*MOORHOUSE v. LORD* (1863), as reported in 10 H. L. Cas. 272; 8 L. T. 212; 9 Jur. N. S. 677; 11 E. R. 1030, H. L.

Annotations :—*Reld*. *Douglas v. Douglas*, *Douglas v. Webster* (1871), 25 L. T. 530. *Mentd.* *Re Mitchell* (1863), 33 L. J. Ch. 187; *Allardice v. Onslow* (1864), 33 L. J. Ch. 434; *A.-G. v. Blucher De Wahlstatt* (1864), 3 H. & C. 374; *Re Capdevielle* (1864), 2 H. & C. 985; *Drevon v. Drevon* (1864), 4 New Rep. 316; *Pitt v. Pitt* (1864), 10 L. T. 626; *Jopp v. Wood* (1865), 4 De G. J. & Sm. 616; *Re Lord's Estate, Lord v. Lord* (1867), 17 L. T. 105; *Haldane v. Kerkford* (1869), L. R. 8 Eq. 631; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611; *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 441; *Brund v. Brund* (1871), L. R. 12 Eq. 298; *King v. Foxwell* (1876), 45 L. J. Ch. 693; *Winans v. A.-G.* (1901) A. C. 287; *Huntly v. Gaskell*, [1906] A. C. 56; *Re James, James v. James* (1908), 98 L. T. 438; *Castagli v. Castagli*, [1919] A. C. 145.

6252. —[—]—Upon an application for a commission to take the evidence of a witness who is abroad, the *ct.* ought to be satisfied that the application is made *bonâ fide*, & that the claim in support of which the evidence is desired is one which the *ct.* ought to try, but it ought not to go any further into the merits of the claim. In a case in which a claim was made under very suspicious circumstances, & the *ct.* was of opinion that a person resident abroad, whose evidence was desired in support of it, ought to be subjected to a drastic cross-examination :—*Held*: a commission ought not to be issued to a foreign *ct.* for the examination of the witness abroad, because it appeared that under the procedure of that *ct.* he would not be cross-examined in the ordinary way.—*Re BOYSE, CROFTON v. CROFTON* (1882), 20 Ch. D. 760; 51 L. J. Ch. 660; 46 L. T. 522; 30 W. R. 812.

Annotations :—*Reld*. *De Mora v. Concha* (1886), 32 Ch. D. 133; *Coch v. Allcock* (1888), 21 Q. B. D. 1.

6253. Necessary in interests of justice.—*BERDAN v. GREENWOOD*, No. 6177, *ante*.

6254. —[—]—(1) Where the parties to an action

6253i. Necessary in interests of justice.—A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shown that the commission would, in any circumstances, be conducive to the ends of justice.—*PRICE v. BAILEY* (1875), 6 P. R. 256.—*CAN.*

6253 ii. —[—]—The issue of such commission should be the exception & should only be resorted to when the inconvenience or expense caused by requiring *ptff.*'s personal attendance at the trial would pretty nearly thwart the ends of justice.—*CANADIAN INV. ACCIDENT INSURANCE CO. v. KELLY* (1908), 17 Man. L. R. 645.—*CAN.*

6253 iii. —[—]—*Ptffs.* applied for an order to examine as witnesses, officers of their *co.* out of the jurisdiction. It was a question whether *ptffs.* were holders in due course of certain notes which admittedly had been obtained from the makers by fraud :—*Held*: as justice would not be obtained unless the witnesses were examined in open *ct.* the application must be refused.—*UNION INVESTMENT CO. v. PERRAS* (1909), 12 W. L. R. 76.—*CAN.*

6253 iv. —[—]—A commission to take the evidence in Toronto of *ptff.*'s general manager for use at the trial was refused where it was shown that he would be the chief witness for *ptff.* to meet defences denying the sale of the goods sued for & setting up that *ptff.* had agreed to accept shares in *deft. co.* in satisfaction of the debt guaranteed by the individual *deft.* & that shares had been accordingly

allotted to & accepted by *ptff.*, & when the only material in support of the application was an affidavit of the witness saying that he was a material witness to prove the account & to disprove the various defences, & that it would entail great loss & expense for him to attend a trial at Winnipeg, as his duties as general manager of *ptff. co.* required his continued presence in Toronto.—*TORONTO CARPET MANUFACTURING CO. v. IDEAL HOUSE FURNISHERS* (1911), 20 Man. L. R. 571.—*CAN.*

6253 v. —[—]—Upon an application by *ptffs.* for a commission to take the evidence of witnesses on their behalf in another province or another country, it must be determined whether or not a particular case is one in which it shall appear necessary for the purposes of justice that an order should be made; & it is not sufficient to consider what *ptffs.*' case requires. What justice to *defts.* as well as *ptffs.* requires must be considered. On such application, an order will not be made in favour of *ptffs.* unless special circumstances are shown. There must be some good reason why the witnesses cannot be examined within the jurisdiction.—*RICHARD BELIVEAU CO. v. TYERMAN* (1911), 16 W. L. R. 492; 4 Sask. L. R. 39.—*CAN.*

6253 vi. —[—]—Where *ptff.* applies for a commission to take his own testimony abroad or for leave to adduce his depositions taken abroad as evidence at the trial, the principle upon which the application should be granted or refused is that of justice to

deft. as well as *ptff.*, & the *ct.* should consider what would be the result of allowing or refusing.—*PARK v. SCHNEIDER* (1912), 22 W. L. R. 70; 6 D. L. R. 451; 2 W. W. R. 1022; 5 Alta. L. R. 423.—*CAN.*

6253 vii. —[—]—A party litigant is not entitled to a commission *ex debito iustitie*; grounds must be shown that the commission is necessary for the purposes of justice.—*URMAN v. HOLINS* (1913), 12 E. L. R. 520.—*CAN.*

6253 viii. —[—]—*Deft.* is *prima facie* entitled to have *ptff.* & her witnesses before the *ct.*, in order that they may be orally cross-examined, & that their demeanour may be observed by the *ct.* or jury; the burden is on *ptff.* to show that the purposes of justice will be better served by having the witnesses examined abroad. The same rules apply to *ptff.* as to any other witness, but will be more strictly enforced.—*MCGOWAN v. HUNTER* (1913), 23 W. L. R. 139; 3 W. W. R. 869; 9 D. L. R. 532.—*CAN.*

6253 ix. —[—]—Where a party makes an application under Rule 395 for an order to have the evidence of himself or those under his control taken on commission, the master should not make an order until the party discloses such facts as would satisfy him that it was necessary for the purposes of justice, & leave should be given to both parties to file affidavits as on ordinary motions.—*McQUAID v. PRUDENTIAL TRUST CO.* (1915), 30 W. L. R. 394; 7 W. W. R. 1177; 22 D. L. R. 877.—*CAN.*

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agree under Ord. 38 to take the evidence in the action by affidavit, & either party subsequently finds himself unable to procure affidavit evidence, either by reason of the refusal of witnesses to make affidavits or other good cause, the ct., on his application for leave to be relieved from the agreement, will, on good cause shown, direct the reluctant witnesses, who must be named, to be examined *viva voce*, or, at the option of the other party, discharge the agreement & order all the evidence to be taken *viva voce* at the trial.

(2) Whenever it is shown that a necessary witness is either going abroad, or is from illness, age, or other infirmity likely to be unable to attend the trial, an order can be obtained under Ord. 37, r. 4, for his examination before an officer of the ct. A like order can be obtained whenever it shall appear to the ct. necessary for the purposes of justice.—**WARNER v. MOSES** (1880), 10 Ch. D. 100; 50 L. J. Ch. 28; 43 L. T. 401; 29 W. R. 201, C. A.

Annotations:—*As to (2) Consol. Re Hewitt* (1885), 15 Q. B. D. 159. *Ayld. Re Bradbrook, Ex p. Hawkins* (1889), 23 Q. B. D. 226. *Reid. O'Shea v. Wood*, [1891] P. 286.

6255. —[—]—It is the duty of appet., whether pltf. or deft., for the examination of a witness abroad, when making the application, to bring such evidence as will satisfy the ct. that it is in the interest of justice that the witness should be examined abroad, & inconvenient for him to attend to be examined in this country, or improbable that such attendance could be procured. Pltf. alleged that a witness abroad had been a party to a scheme by which pltf. had been defrauded. A clerk of pltf.'s solrs. deposed that he was informed & believed that the witness abroad was employed by a co. in Chicago, & that he believed he could not come over to England to give evidence at the trial, & that deft. derived his knowledge from letters to his principals written by pltf. from America. Pltf.'s solr. (by affidavit) deposed that the witness was not under the control or influence of pltf., & that it would not be possible by any means so far as deponent was aware, to procure his attendance in England. It was also sworn that the application was made *bona fide*, & not for the purpose of delay:—**Held**: this evidence was

not sufficient to induce the ct. to order the examination of the witness abroad.

There is a great difference between a pltf. & a mere witness as to being examined abroad. If a pltf. wishes to be examined as a witness on his own behalf, unless there are very strong positive reasons for his not coming over here, leave will not be given to examine him abroad, but he must come here (**COTTON, L.J.**).—**LAWSON v. VACUUM BRAKE Co.** (1884), 27 Ch. D. 137; 54 L. J. Ch. 10; 51 L. T. 275; 33 W. R. 186, C. A.

Annotations:—*Exptd. & Distd. Kemp v. Tennant* (1886), 2 T. L. R. 304. *Exptd. Coch v. Alcock* (1888), 21 Q. B. D. 1. *Fold. Light v. Anticost Island* (1888), 4 T. L. R. 430.

6256. Witness in attendance on dying relative.]—The ct. has power under Probate Act, s. 32, to issue a commission to examine a witness who is not prevented by illness or by reason of being without the jurisdiction of the ct. from attending the trial, but who is in attendance on a near relative supposed to be dying, but will not make such an order without the consent of the other side.—**JONES v. WILLIAMS** (1865), 13 W. R. 696.

6257. Hearing postponed for long time.]—In Apr. 1909, a city corpn. commenced an action against a railway co. to determine rights with regard to the abstraction of water from a river, both pltf's. & defts. being riparian owners. Negotiations for a settlement continued until Dec. 1913, & no step was taken in the action from that time until Mar. 1915. Defts. had, owing to the outbreak of the war, become engaged on important govt. work, & immediately applied for the trial of the action to be postponed until after the declaration of peace. Defts. admitted that they were using water in excess of their rights as riparian owners, but justified themselves on the ground of (a) prescription, & (b) agreement:—**Held**: the trial must be postponed until after the declaration of peace, with liberty to apply to examine *de bene esse* any witness who was aged or infirm or who was going abroad.—**CARDIFF CORPN. v. BARRY RY. Co.** (1916), 85 L. J. Ch. 316; 114 L. T. 229; 80 J. P. 261; 60 Sol. Jo. 354; 14 L. G. R. 535.

B. Materiality.

6258. Evidence must be material.]—In order to obtain a commission to examine an evidence

6253 x. —[—]—An examination of a person as a witness was ordered under Rule 478 of King's Bench Act as necessary for the purposes of justice although he could be called at the trial, it being urged by defts. that, by leaving him to be called as a witness at the trial, they would be at the mercy of what he might swear to & would run risk of not being able to prove their defence, the circumstances of the case & difficulties of the defence being in the ct.'s opinion of such an extraordinary nature as to justify the order.—**MANITOBA SECURITIES Co. v. CANADIAN NATIONAL RY. Co.**, [1921] 2 W. W. R. 585.—**CAN.**

6253 xi. —[—]—**MOWJIB. NEMCHAND** (1899), 1 L. R. 23 Bom. 626.—**IND.**

6253 xii. —[—]—The ct. will make an order for an examination *de bene esse* whenever the justice of the case may appear to require it.—**BLACKWOOD v. HURNOWS** (1842), 7 L. & C. 630; 4 L. Eq. R. 609.—**IR.**

g. Witness acting as agent — To sign contract.]—When the bill alleged that the contract in question was entered into by the agent of the bank on its behalf, an order was made for his examination.—**CONSOLIDATED BANK v. NELSON** (1877), 7 P. R. 951.—**CAN.**

h. —To accept bill of exchange.]—A clerk in a Toronto warehouse accepted a bill of exchange on behalf

of his employer, who resided in Philadelphia. In an action on the bill the employer denied the authority of his clerk to accept:—**Held**: the clerk could not be examined under Rule 285, O. J. Act. *Semble*: neither could the Toronto manager of the business be examined under the rule.—**ROSENTHAL v. SILLIMAN** (1885), 11 P. R. 7.—**CAN.**

k. Convenience of party applying.]—An order for the examination of a witness before trial will not be made where no greater necessity for it can be shown than the convenience of the party who applies for it in preparing & presenting his case for trial.—**CARNegie v. FEDERAL BANK** (1883), 10 P. R. 69.—**CAN.**

l. Two previous commissions — No new facts alleged.]—In a case which had been twice tried, & was coming on for a third trial, where it appeared that two commissions had already been obtained, & evidence taken under each; that the facts sought to be established had been previously known to, or their existence suspected by, the party applying; where it was not alleged that the evidence sought to be obtained was material & necessary, & that the party could not safely proceed to trial without it, but only that the examination would be effectual; & where no defence based upon the fact

sought to be established had been set up, & no application had been made to amend the pleadings so as to enable it to be set up:—**Held**: the order for the commission must be set aside with costs.—**MCLEOD v. INSURANCE COMPANIES** (1900), 32 N. S. R. 481; *reversd.* 29 S. C. R. 449.—**CAN.**

m. Inability to compel witness to attend trial—Want of bona fides.]—**FIRST NATIONAL BANK OF PALO ALTO, CALIFORNIA v. KRUSE** (1915), 8 W. W. R. 556; 23 D. L. R. 684; 8 Sask. L. R. 168.—**CAN.**

n. Application made bona fide — Evidence material.]—An order was made on behalf of pltf. in an action for false arrest for examination of a witness on commission notwithstanding that it appeared there would be a direct conflict of evidence between such witness & deft.; the ct. being satisfied that the application was made *bona fide*, that the issue in respect of which the evidence was required was one which the ct. ought to try, that the witness could give material evidence, & that his attendance at the trial could not be procured.—**SMITH v. REVELLON WHOLESALE, LTD.**, [1920] 2 W. W. R. 347.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 5.—B.

6258 l. Evidence must be material.]—Where the evidence is material, & the

abroad, it is sufficient to state the name of the witness, that his evidence is material, & that he is abroad.—*OLDHAM v. CARLETON* (1792), 4 Bro. C. C. 88; 29 E. R. 792.

Annotation.—*Consd. Mendizabel v. Machado* (1836), 2 Sim. & St. 483.

6259. —[—]—If the bill had been for relief, you clearly must have moved this upon affidavits of materiality, for a *plff.* may often have a desire to delay his own suit. The same principle applies to this case (*per Cur.*).—*— v. —* (1793), 1 Anst. 201; 145 E. R. 844.

6260. —[—]—On a bill for an injunction the *ct.* will not grant a commission to examine a witness in India without a full affidavit of materiality.—*MOODY v. STEELE* (1794), 2 Anst. 386; 145 E. R. 911.

Annotation.—*Refd. Mendizabel v. Machado* (1826), 2 Sim. & St. 483.

6261. —[—]—(1) Affidavit for issuing a commission to examine a witness out of the jurisdiction of the *ct.*, need only state the name of the witness, that he is a material witness, & out of the jurisdiction of the *ct.*

(2) It is not necessary to show the nature of the attempts which have been made to obtain his attendance.—*NORTON v. MELBOURNE (LORD)* (1836), 3 Bing. N. C. 67; 2 Hodg. 114; 3 Scott. 308; 5 L. J. C. P. 343; 132 E. R. 335.

6262. —[—]—*& necessary.*—*BADDELEY v. CHILMORE*, No. 6301, *post*.

6263. —[—]—Upon a motion, on the part of defts., for a commission to examine witnesses abroad, it was required that it should appear, to the satisfaction of the *ct.*, upon an affidavit from their attorney, that the evidence of the witnesses proposed to be examined was material & necessary to the defence of the action.—*HEALY v. YOUNG* (1846), 2 C. B. 702; 135 E. R. 1122.

6264. —[—]—*—*—*AMESON v. LIDYATT* (1855), 3 C. L. R. 926, n.

6265. —[—]—(1) The granting of a commission under Evidence on Commission Act, 1831 (c. 22), as well as the costs of such commission, is in the discretion of the *ct.*, & the *ct.* will exercise that discretion in granting a commission to examine a witness at Paris, though the expense may be greater than the bringing over of the individual to England.

(2) Where an affidavit in support of an application for a commission to examine a witness abroad stated that in the judgment & belief of deponent

the witness resided in the family of deft., & was a material & necessary witness, & that deft. could not safely proceed to trial without having previously had the witness examined on interrogatories:—*Held*: sufficient.—*RUCCO v. PEARCE* (1839), 3 Jur. 978.

6266. —[—]—*& application not made to delay.*—The general rule of practice is not to require the affidavit of the party or of his solr. in support of a motion for a commission to examine witnesses abroad; it is sufficient if it be sworn by the solr.'s clerk. Nor is it necessarily the general rule of practice now in use that the names of the witnesses be set out; it being sufficient merely that it be stated that the evidence of the witnesses out of the jurisdiction is material, & that the application is not made for the purpose of creating delay.—*M'HARDY v. HITCHCOCK* (1818), 11 Beav. 93; 17 L. J. Ch. 256; 11 L. T. O. S. 170; 12 Jur. 367; 50 E. R. 752.

6267. —[—]—*Not probably useful.*—On an application for a commission to examine a party abroad as a witness for deft., it must appear to the *ct.* that there is a reasonable ground for believing that the evidence will be material on behalf of deft. Where, therefore, it did not appear that there was any defence to the action, or that if there were, the party whom it was proposed to examine would be likely to support it, the *ct.* refused the application.

It is not enough to entitle a *plff.* to a *mandamus* to examine a witness in Australia, to show a mere probability that he can give useful evidence.—*LANE v. BAGSHAW* (1855), 10 C. B. 576; 3 C. L. R. 919; 139 E. R. 885; *sub nom. LAING v. BRADSHAW*, 25 L. T. O. S. 182.

6268. —[—]—*—*—*L.* applied to have a commission to examine M. in America:—*Held*: if it appeared that the evidence of M. would be material, the commission ought to be granted, there being nothing to show that M. was keeping out of the way to avoid cross-examination. *Berdan v. Greenwood* (No. 6177, *ante*) turned on the fact that the *ct.* was convinced that *plff.* there was so keeping out of the way. But, on the materials before the *ct.*, the commission was rightly refused, there being nothing to show that M. had taken such part in the negotiations as to make his evidence material. The *ct.*, however, as an indulgence, gave *plff.* an opportunity of adducing evidence to show that M. could give material evidence.—*LANGEN v. TATIE*

witness is out of the jurisdiction & cannot be compelled to attend the trial, the commission must issue unless the other side satisfy him that the witness will be present.—*WILLIAMS v. MUTUAL LIFE ASSOC. OF AUSTRALIA* (1904), 4 S. R. N. S. W. 677; 21 N. S. W. W. N. 277.—*AUS.*

6258 ii. —[—]—*Re ATTORNEYS* (1876), 7 P. R. 2.—*CAN.*

6258 iii. —[—]—In an action for a commission on the sale of land:—*Held*: *plff.*'s affidavit, stating that certain named persons, residing in the United States of America, were material & necessary witnesses on his behalf, & without their testimony he could not safely proceed to trial, & that they could prove facts & circumstances which would show that the sale of the land was made through *plff.*'s instrumentality, was sufficient to show the materiality of the evidence sought; & an order for a foreign commission was properly granted.—*SMITH v. MURRAY* (1912), 20 W. L. R. 9; 1 W. W. R. 764.—*CAN.*

6258 iv. —[—]—*R. v. MURRAY* (1912), 21 O. W. R. 544; 3 O. W. N. 734; 2 D. L. R. 113.—*CAN.*

6258 v. —[—]—In an action upon a written contract for the sale of rice, *plff.* sought to show a custom of the trade at variance with the provision in the contract as to the date of shipment, & with that object applied for leave to take the evidence on commission of certain persons alleged to be familiar with the trade customs of such business:—*Held*: the material fact was insufficient to justify the making of the order; & that the evidence sought to be obtained was immaterial & inadmissible.—*IMPERIAL GRAIN & MILLING CO. v. SLOBINSKY BROTHERS & SONS*, [1922] 1 W. W. R. 1246; 86 D. L. R. 765; 32 Man. L. R. 91.—*CAN.*

6258 vi. —[—]—To obtain an order for commission in aid of an inquiry in relation to a receiver's securities, there must be an affidavit that the witnesses intended to be examined were expected to give material evidence.—*DONOVAN v. THOMPSON* (1824), 1 Hog. 150.—*IR.*

6262 i. —[—]—*& necessary.*—*CARTER v. ROGERS*, 19 C. L. T. Occ. N. 410.—*CAN.*

6262 ii. —[—]—In an action for a libel published in defts.' newspaper *plff.* applied for the issue of a commis-

sion to take his own evidence & that of other witnesses in England where he & they lived. *Plff.*'s affidavit stated only that the witnesses were material & necessary for him on the trial of the action & that he was advised & verily believed that he could not safely proceed to trial without their evidence:—*Held*: sufficient to entitle *plff.* *prima facie* to a commission.—*ROBIN v. EMPIRE PRINTING & PUBLISHING CO.* (1892), 14 P. R. 488.—*CAN.*

6262 iii. —[—]—Where issue had been joined two months before the sittings for which *plff.* gave notice of trial, & deft. applied five days before the sittings for a commission to examine a foreign witness, upon an affidavit simply stating that the witness was necessary & material, & he was advised & believed he could not safely proceed to trial without his evidence, a judge in chambers refused to interfere with a master's order for a commission & a stay of the trial, except by directing that the trial should take place, on the return of commission, in an adjoining county.—*MORROW v. McDUGGALL* (1894), 16 P. R. 129.—*CAN.*

Sect. 1.—Examination of witnesses: Sub-sect. 5, B., C., D. & E.]

(1883), 24 Ch. D. 522; 53 L. J. Ch. 361; 49 L. T. 758; 32 W. R. 189, C. A.

6269. — *Not only corroborative of other evidence.*—A commission or letters of request for the examination of witnesses abroad ought not to be issued unless the evidence which it is proposed to obtain is evidence directly material to an issue in the cause, & not merely evidence which may be incidentally useful in corroboration of other evidence.—*EHRMANN v. EHLMANN*, [1896] 2 Ch. 611; 65 L. J. Ch. 745; 75 L. T. 37; 45 W. R. 149; 40 Sol. Jo. 635, C. A.

C. Sole Witness.

6270. Sole witness to material fact.—Pltf. may examine a person *de bene esse*, though neither old or infirm, or going abroad, upon affidavit of his being the only person who has any knowledge of the forgery of a deed, or other material fact, for otherwise if he dies before he is examined in chief, the proof of the fact is gone.—*SHIRLEY v. FERRARS* (1730), Mos. 389; 3 P. Wms. 77; 25 E. R. 456, L. C.

*Annotations:—***Fold.** *Brydges v. Hatch* (1788), 1 Cox, Eq. Cas. 423 c. **Refd.** *Hope v. Hope* (1840), 3 Beav. 317.

6271. — *It is a ground for examining a witness de bene esse, that he is the only witness to some material fact in the ct., although he be neither aged nor infirm. But the affidavit should state the particular points to which his evidence is meant to apply.*—*PEARSON v. WARD* (1785), 1 Cox, Eq. Cas. 177; 2 Dick. 648; 29 E. R. 1116, L. C.

*Annotation:—***Refd.** *Hope v. Hope* (1840), 3 Beav. 317.

6272. — *A witness was examined de bene esse upon the sole ground of his being the only person in whose knowledge a material fact was.*—*BRYDGES v. HATCH* (1788), 1 Cox, Eq. Cas. 423; 29 E. R. 1231, L. C.

*Annotation:—***Refd.** *Hope v. Hope* (1840), 10 L. J. Ch. 70.

6273. — *A motion that a witness be examined de bene esse, he being the only witness to a material fact, was granted.*—*HANKIN v. MIDDLEDITCH* (1789), 2 Bro. C. C. 641; 29 E. R. 355.

*Annotation:—***Consd.** *Hope v. Hope* (1840), 3 Beav. 317.

6274. — *Two witnesses were ordered to be examined de bene esse, being the only persons who knew material facts.*—*CHOLMONDELY (EARL) v. OXFORD (EARL)* (1792), 4 Bro. C. C. 157; 29 E. R. 828.

6275. — *SHIRLEY v. —*, No. 6242, *ante*.

6276. — *Motion as of course to examine de bene esse a witness above seventy, or in a dangerous state, or the only witness, was granted.*—*TOMKINS v. HARRISON* (1822), 6 Madd. 315; 56 E. R. 1111.

*Annotations:—***Refd.** *Hope v. Hope* (1840), 3 Beav. 317; *McIntosh v. G. W. Ry.* (1842), 1 Haro. 328.

6277. — *Order not made ex parte.*—(1) An application for an order to examine a witness *de*

bene esse, on the ground that he is the only witness to a material fact, ought to be made upon notice, & not *ex p.*

(2) The affidavit in support of such an application ought to show the facts on which it is proposed to examine the witness.

(3) An affidavit in support of such an application on belief only, that the witness is the sole witness to a particular fact, is not sufficient. It ought to state the reasons for such belief.—*HOPE v. HOPE* (1840), 3 Beav. 317; 10 L. J. Ch. 70; 4 Jur. 1124; 49 E. R. 125.

*Annotation:—**As to* (1) **Refd.** *McIntosh v. G. W. Ry.* (1855), 26 L. T. O. S. 102.

D. Facts arising Abroad.

6278. General rule.—*JESSUP v. DUPOUT* (1740), Barn. Ch. 192; 27 E. R. 609, L. C.

*Annotation:—***Refd.** *Mendizabal v. Machado* (1826), 4 L. J. O. S. Ch. 142.

6279. — *A commission prayed for examining witnesses in the West Indies, as the facts arose there, & to stay deft.'s proceeding at law on a policy was granted.*—*CHITTY v. SELWYN* (1742), 2 Atk. 359; 26 E. R. 617, L. C.

6280. — *McFADDEN v. GIDDES* (1850), 15 L. T. O. S. 209, 234.

6281. As to jurisdiction of foreign court.—A commission was granted to examine at Paris, as to the extent of jurisdiction of a particular ct. erected there, but not as to the original constitution of it.—*GAGE v. STAFFORD (LADY)* (1751), 2 Ves. Sen. 556; 28 E. R. 354, L. C.

*Annotations:—***Mentd.** *Orville v. Herne* (1805), 11 Ves. 598; *Balley v. Gundry* (1836), 1 Keen, 53; *New Fenix Compagnie Anon. D'Assurances De Madrid v. General Accident Fire & Life Assurance Corp.*, [1911] 2 K. B. 619.

6282. As to foreign law.—An English co. possessed of a pier in a port in Spain instituted a cause of damage against an English ship for negligently injuring the pier. A commission was taken evidence in Spain as to the law of Spain was refused.—*THE M. MOXHAM* (1876), 1 P. D. 107; 24 W. R. 597, C. A.

*Annotations:—***Mentd.** *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.* (1883), 10 Q. B. D. 521; *British South African Co. v. Companhia de Moçambique*, [1893] A. C. 602; *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35; *Machado v. Fontes*, [1897] 2 Q. B. 231; *Carr v. Francis Times*, [1902] A. C. 176.

6283. — *ARMOUR v. WALKER*, No. 6292, *post*.

6284. — *WESTERN NATIONAL BANK OF NEW YORK v. KOPPEL*, (1892), 8 T. L. R. 286, C. A.

Colonial & foreign law generally.—*See* Part XI., *post*.

E. Parties resident or going Abroad.

6285. Both parties resident abroad.—*CASTELLI v. GROOM*, No. 6173, *ante*.

6286. Plaintiff going abroad.—*BRAUN v. MOLLETT*, No. 6333, *post*.

6287. — *FISCHER v. HAHN*, No. 6214, *ante*.

6288. Plaintiff resident abroad—Substantial plaintiff within jurisdiction.—Where some of pltf's.,

PART VIII. SECT. 1, SUB-SECT. 5.—C.

6270 i. Sole witness of material fact.—In an action under Lord Campbell's Act, an order was made for the examination before the trial *de bene esse*, on behalf of pltf., of the only witness to the accident which occasioned the death of deceased. It was provided that the examination should not be used at the trial unless pltf. was unable to procure the attendance of the witness.—*ELLIOTT v. CANADIAN PACIFIC RY. CO.* (1888), 12 P. R. 593, CAN.

PART VIII. SECT. 1, SUB-SECT. 5.—D.

o. As to foreign marriage.—Pltf.,

E. W., brought an action against deft. co. claiming damages in respect of the death of her son, who was killed in a collision between two of deft. co.'s cars. Amongst other defences to the action deft. co. pleaded that pltf. was not the mother of the person killed, within Deaths by Accident Compensation Act, 1908. Pltf. admitted in answer to interrogatories, that the first wife of G. W., the father of the person killed, was pltf.'s sister, & that after the latter's death she went through a ceremony of marriage with G. W., on June 10, 1855, at the office of the Registrar of Marriages in Middlesex, near London; that she came with him to New Zealand in

Dec. 1855; & that she cohabited with him until his death on Aug. 18, 1881. Twelve children were born of the union, of whom one was the person killed by the accident which was the ground of action.—*Held*: defts. were entitled to a commission for the purpose of endeavouring to establish that no such ceremony as alleged by pltf. had taken place.—*WILLIAMSON v. AUCKLAND ELECTRIC TRAMWAY CO.* (1911), 31 N. Z. L. R. 161.—N.Z.

PART VIII. SECT. 1, SUB-SECT. 5.—E.

6286 i. Plaintiff going abroad.—*WILLIS v. BEUTE*, 22 C. L. T. 439.—CAN.

whose interest in an action was comparatively small, were resident abroad, & they were unwilling to prosecute their claim, the et., on the application of the substantial pltf., appointed a special examiner to take their evidence abroad.—*BANQUE FRANCO-EGYPTIENNE v. LUTSCHER* (1870), 41 L. T. 468; 28 W. R. 133.

6289. —[.]—*BERDAN v. GREENWOOD* (1880), 20 Ch. D. 761, n.; 46 L. T. 524, n., C. A.

Annotations:—*Distd.* Langen v. Tate (1883), 24 Ch. D. 522. *Consd.* Lawson v. Vacuum Brake Co. (1884), 51 L. T. 275; Coch v. Alcock (1888), 21 Q. B. D. 1. *Refd.* Warner v. Mosses (1880), 43 L. T. 401; Armour v. Walker (1883), 25 Ch. D. 673; West v. Sackville (1903), 72 L. J. Ch. 649.

6290. — Subject to being required to attend trial.]—Pltf. residing in New Zealand brought an action for redemption, alleging himself to be heir-at-law of a person who had died intestate entitled to a remainder in fee in the equity of redemption which had fallen into possession since his death. Pltf. applied for a commission to examine himself, two persons named, & others residing in New Zealand. KAY, J., made the order, & directed that the depositions might be given in evidence at the trial without prejudice to the right of deft. to cross-examine pltf. at the trial in the presence of witnesses in England who could speak to his identity: *Held:* (1) there was jurisdiction to appoint examiners for the examination of a party to the cause as well as of a mere witness; (2) the deposition of pltf. ought not to be admitted at the trial if deft. required him to appear at the trial to be examined & cross-examined, it not being shown that there was any practical impossibility of his attending; (3) the order need not be confined to witnesses mentioned in it by name, but pltf. must give notice to the other side in New Zealand of the witnesses he proposed to call. *NADIN v. BASSETT* (1883), 25 Ch. D. 21; 53 L. J. Ch. 253; 49 L. T. 154; 32 W. R. 70, C. A.

Annotations:—*As to (1)* *Consd.* Armour v. Walker (1883), 25 Ch. D. 673. *As to (3)* *Refd.* Armour v. Walker (1883), 25 Ch. D. 673.

6289 i. Plaintiff resident abroad.—When an application is made by pltf. in person to examine witnesses out of the jurisdiction of the et., the application is only granted with reluctance. When, however, it is sought to examine pltf. himself abroad the rule is more strictly applied. *BOVENIE v. CLARK* (1907), 6 W. L. R. 133. *CAN.*

6289 ii. —[.] The rules as to granting a commission to examine pltf. abroad in an action are applied with greater strictness than in the case of an ordinary witness. *ORMAN v. HOLLINS* (1913), 12 E. L. R. 529. *CAN.*

6289 iii. —[.] Pltf. was granted an order to take his evidence & that of other witnesses on his behalf outside the jurisdiction. *HASTON v. SIMMONS*, [1921] 1 W. W. R. 757. *CAN.*

6296 i. Defendant resident abroad.—Deft. resident outside the jurisdiction has a *prima facie* right to a commission to take his own evidence for use at the trial. An affidavit that such deft. was resident in Australia & manager of a woollen factory:—*Held:* sufficient to support an order for a commission to examine him though it did not state that he could not personally attend at the trial. The fact that he could not do so without great inconvenience was a reasonable inference from the facts deposited to. *CRANSTON v. BIRD* (1896), 5 B. C. R. 140. *CAN.*

6296 ii. —[.]—*LAWTON v. WILCOX* (1904), 7 Terr. L. R. 213.—*CAN.*

p. Defendant going abroad.—An application for a commission to examine witnesses should be regarded almost as of right if made *bona fide*,

but where deft. was served with the bill in the Colony & before leaving put in his answer but left the Colony after express notice from pltf. that any application for a commission to examine him abroad would be opposed:

Held: such deft. was not entitled to a commission to examine him in England as a witness on his own behalf. *BRICE v. LUGAR* (1869), 6 W. W. & A. B. 240. *AUS.*

q. —[.] Deft. about to leave the province may be examined *de bene esse*. *BARRETT v. FAIR* (1858), 2 Thom. 231. *CAN.*

r. —[.]—Defts., a solr. practising his profession in Ontario & his wife, were still in Ontario when two actions were brought, one against both of them by a former client of the husband, & the other against the husband alone. Shortly afterwards they removed to the North-West Territories to take up their permanent residence there. The actions were respectively for an account of money entrusted to the solr. for investment & to set aside assignments of life insurance policies:—*Held:* defts. should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to pltf. as to the expense of executing the commission. *FERGUSON v. MILLICAN* (1905), 11 O. L. R. 35; 6 O. W. R. 661. *CAN.*

s. —[.]—*Complicated accounts.*—Application for a foreign commission to take deft.'s evidence on his own behalf in England refused, where the matters in question were complicated accounts between the parties arising

6291. —[.]—(1) Pltf. who desires to be examined on commission, must make out by affidavit a strong *prima facie* case why he should not attend & be examined at the trial; & the onus is not on deft. in the first instance to show why he should attend to be examined at the trial.

(2) Pltf. is not entitled to be examined on commission in the absence of any affidavit by himself, showing strong & positive reasons for his not attending to be examined at the trial.—*LIGHT v. ANTICOSTI ISLAND (GOVERNOR & Co.)* (1888), 58 L. T. 25; *affd.*, 1 T. L. R. 430, C. A.

Annotation:—*As to (1)* *Refd.* Coch v. Alcock (1888), 57 L. J. Q. B. 489.

6292. —[.]—Where pltf. was a merchant residing in New York, & he had brought his action against defts. who resided in England:—*Held:* no special reason being shown by defts. why pltf. should come to England to be examined, a commission ought to issue to take his evidence in New York.

Evidence as to foreign law may also be taken by commission. *ARMOUR v. WALKER* (1883), 25 Ch. D. 673; 53 L. J. Ch. 413; 50 L. T. 292; 32 W. R. 214, C. A.

6293. —[.]—*LAWSON v. VACUUM BRAKE CO.*, No. 6255, *ante*.

6294. —[.]—*Action for libel.*—*KEELEY v. WAKLEY* (1893), 9 T. L. R. 571, D. C.

6295. —[.]—*MACAULAY v. GLASS* (1902), 47 Sol. Jo. 71.

6296. Defendant resident abroad.—*LEWIS v. KINGSBURY* (1888), 4 T. L. R. 639, C. A.

6297. —[.]—*EMANUEL v. SOLTYKOFF*, No. 6180, *ante*.

6298. —[.]—On application of deft., an order granted for a commission to take his evidence abroad. *HUNT v. ROBERTS* (1892), 9 T. L. R. 92.

6299. —[.]—Where a person resident abroad is sued in this country he has *prima facie* a right to a commission to take his evidence in the country where he lives. *NEW v. BURNS* (1891), 61

out of transactions between them in Ontario at a time when both were resident there; where it seemed that the expense of executing the commission would exceed the cost of deft. travelling from England to attend the trial; & where the only reasons given by deft. for his alleged inability to attend the trial were engagements in England & want of time & money. *POURCE v. BOLLTON* (1893), 15 E. L. R. 318. *CAN.*

t. Party or employer resident abroad.—A commission to examine a party to the suit or his employee when abroad will not be ordered, if opposed, no special circumstances being shown. *WASHINGTON & MOEN MANUFACTURING CO. v. BROOKS* (1885), 2 Man. L. R. 14. *CAN.*

u. —[.]—There is no hard & fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in the case of the examination of a party being sought the et. will be more circumspect than in the case of an ordinary witness. *MILLS v. MILLS* (1889), 12 P. R. 473. *CAN.*

v. —[.]—An application for a commission to examine witnesses out of the jurisdiction is one going to the discretion of the et., & this discretion will be more strictly exercised where the proposal is to examine an absent party on his own behalf. *KING v. PRYER* (1892), 14 P. R. 361. *CAN.*

w. —[.]—Application by a party to have his evidence taken in New York on the ground that he was busy organising or promoting a co. was refused. *Re COLONIAL DEVELOPMENT*

Sec. 1.—Examination of witnesses: Sub-sect. 5, E., F. & G.]

1. J. Q. B. 104; 71 L. T. 681; 43 W. R. 182; 11 T. L. R. 53; 39 Sol. Jo. 58; 14 R. 339, C. A.

6300. —[In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the ct. will not regard the case of a deft. with the same strictness as the case of a pltf. who has chosen his own forum.—*ROSS v. WOODFORD*, [1894] 1 Ch. 38; 63 L. J. Ch. 191; 70 L. T. 22; 42 W. R. 188; 38 Sol. Jo. 42; 8 R. 20.

Annotation:—*Apprvd.* New r. Burns (1894), 64 L. J. Q. B. 104.

6301. —[*HARTMONT v. DALY* (1896), 12 T. L. R. 170.

F. Witnesses Abroad.

6302. Whether commission ordered.—[*WARD v. WILLET*, *WILLET v. WARD* (1699), 2 Price, 178, n.; 146 E. R. 60.

Annotation:—*Consd.* *Laragot v. A-G.* (1816), 2 Price, 172.

6303. —[—*MOORE v. LONGUIT* (1730), 2 Price, 180, n.; 146 E. R. 61.

6304. —[—*LONGMAN v. KEMBLE* (1735), 2 Price, 181, n.; 146 E. R. 62.

Annotation:—*Refd.* *A-G. v. Boyet* (1846), 15 M. & W. 60.

6305. —[—*SCHWARTZ v. SCOTT* (1737), 2 Price, 181, n.; 146 E. R. 62.

6306. —[—*MANBY v. HALLOWAY* (1755), 2 Price, 183, n.; 146 E. R. 63.

6307. —[—*A-G. v. STOCKTON* (1755), 2 Price, 182, n.; 146 E. R. 63.

6308. —[—*BUTTS v. HART* (1756), 2 Price, 184, n.; 146 E. R. 63.

6309. —[—*COLGROVE v. HOLDING* (1758), 2 Price, 181, n.; 146 E. R. 64.

6310. —[—*LARAGOT v. A-G.*, No. 6360, *post*.

6311. —[**Action for libel.**—On a bill for a discovery, & a commission abroad in aid of a defence

to an action for a libel; a demurrer was overruled, with liberty to amend the same, pltf. being entitled to a commission abroad, though not to a discovery from deft.—*THORPE v. MACAULEY* (1820), 5 Madd. 218; 56 E. R. 877.

Annotations:—*Refd.* *Shackell v. Macaulay* (1824), 3 L. J. O. S. Ch. 30; *Morris v. Morgan* (1839), 10 Sim. 341; *Re Mysore West Gold Mining Co.* (1889), 37 W. R. 794; *Mentid. Small v. Attwood* (1834), 1 Y. & C. Ex. 37; *Glynn v. Houston* (1836), 1 Keen, 329; *Bartlett v. Lewis* (1862), 12 C. B. N. S. 249; *Bowden v. Allen* (1870), 39 L. J. C. P. 217; *Hill v. Campbell* (1875), L. R. 10 C. P. 222; *Atherley v. Harvey* (1877), 2 Q. B. D. 524.

6312. Witnesses in England at commencement of suit.—[An action having been brought against pltf.s, whose witnesses were about to leave England for New York, they applied to the Chief Justice of the King's Bench for a commission to examine their witnesses before the trial. But his Lordship ordered them to be examined *visà voce* before a barrister, with liberty to defts. to attend & cross-examine them. Pltf.s. took no proceedings under that order, but their witnesses having shortly afterwards gone to New York, they filed a bill in this ct., & afterwards moved for a commission to examine their witnesses there. Motion granted.—*GRINNELL v. COBBOLD* (1831), 4 Sim. 546; 58 E. R. 204.

6313. Right of other side to cross-examine.—[Where a commission was granted for the purpose of examining witnesses out of this country, the opposite party will be allowed to cross-examine them *visà voce* at the same time; & if foreign witnesses are here, waiting the trial, which it is not probable will be heard for some time, they may be examined here at once in order to their return home, on giving the opposite side their names, addition, & address.—*BURON v. DENMAN* (1847), 2 New Pract. Cas. 223; 9 L. T. O. S. 104.

6314. —[—*DIXON v. MALCOLM* (1853), 20 L. T. O. S. 238.

SYNDICATE & MITCHELL (1909), M. M. Cas. 331.—CAN.

d. —[—*LOGAN v. VIENNEAU* (1923), 51 N. B. R. 178.—CAN.

e. —[—A commission will not be granted, at the instance of either party, to enable him to give evidence himself under a commission, except under very strong circumstances indeed, such as where he is seriously ill.—*DOUGETT v. WISE* (1860), 1 Ind. Jur. N. S. 357.—IND.

f. —[—The ct. has the same jurisdiction to issue a commission to examine the parties to the suit resident out of the jurisdiction, as in the case of other witnesses.—*CODD v. DONNELLY* (1859), 9 L. C. L. R. 465; 11 R. Jur. 241.—IR.

PART VIII. SECT. 1, SUB-SECT. 5. F.

g. General rule.—[Where on an application for a commission to examine a witness abroad, the judge is satisfied that the evidence is material, that the witness is out of the jurisdiction, & cannot be compelled to attend the trial, he is bound to direct the commission to issue unless the other side satisfying him that the witness will be present.—*WILLIAMS v. MUTUAL LIFE ASSOC. OF AUSTRALASIA* (1904), 4 S. R. N. S. W. 677; 21 N. S. W. W. N. 247.—AUS.

h. —[**Witness a party.**—The ct. will not hesitate to make an order for a foreign commission for the examination of a witness who is abroad, & whose presence cannot be procured for the purpose of giving evidence in ct., because such witness is a co-pltf. or co-deft. of the person applying.—*WILSON v. McDONALD* (1889), 13 P. R. 6.—CAN.

k. —[—Where pltf. has selected

British Columbia as the place where the action should be brought, it is his duty, *prima facie*, to bring his witnesses to this Province or to show that it would not be in the interests of justice that he should be compelled to do so. Where pltf. seeks to have a material witness examined abroad & the nature of the case is such that it is important he should be examined here, the party asking must show that he cannot bring him to this province to be examined on the trial.—*STEWART IRON WORKS CO. v. BRITISH COLUMBIA IRON, WIRE & FENCE CO.* (1914), 20 B. C. R. 515.—CAN.

l. —[—Where a party depends upon the evidence of certain witnesses residing abroad to make out his case & the witnesses refuse to attend the trial, the party being powerless to compel their attendance, their evidence may be taken on commission. Where material witnesses are resident abroad the fact that such witnesses are in the employment or under the control of the party who desires to obtain their evidence does not disentitle such party to an order for a commission.—*CORISTINE & CO. v. HADDAD* (1915), 30 W. L. R. 849; 8 W. W. R. 445; 21 D. L. R. 350.—CAN.

m. —[—A commission will be granted merely as a matter of course to examine a material witness who is out of the jurisdiction of the ct., if the witness cannot be brought into ct. by its ordinary process.—*DOUGETT v. WISE* (1860), 1 Ind. Jur. N. S. 357.—IND.

n. Whether commission ordered—Before question of jurisdiction decided.—[*SMITH v. SMITH & CASHION* (1877), 3 V. L. R. 65.—AUS.

o. —[**Witness temporarily within jurisdiction—After action commenced.**]

—The ct. will grant a commission to examine a witness who was out of the Province when the suit commenced, but returned after action commenced, & left again secretly without the knowledge of the party requiring his testimony.—*BANK OF BRITISH NORTH AMERICA v. KEITH* (1853), James, 56.—CAN.

p. —[—Where witnesses residing out of Ontario come within the jurisdiction & are about to return to their homes, an order may be made for their examination here before their departure.—*DELAPE v. CHARLENOIS* (1893), 15 P. R. 142.—CAN.

q. —[—In an action attacking the right of a bank to hold as against the liquidator & creditors of a co. certain securities deposited or pledged with the bank by the co. previous to its winding up, an order was made & upheld by the Ct. of Appeal allowing deft. bank to examine *de bene esse*, while temporarily in British Columbia, its superintendent of branches, who had been its local manager at the time the facts at issue arose, & allowing the use of the examination at the trial without further proof of the absence of the witness than the affidavit of the party using it as to his belief.—*DOMINION TRUST CO. v. ROYAL BANK OF CANADA*, [1920] 2 W. W. R. 576.—CAN.

r. —[**Application by plaintiff in person.**—When an application is made by pltf. in person to examine witnesses out of the jurisdiction of the ct., the application is only granted with reluctance.—*BOWCHER v. CLARK* (1907), 6 W. L. R. 433.—CAN.

s. —[—Pltf. was granted an order to take his evidence & that of other witnesses on his behalf outside

6315. —.]—*ARMOUR v. WALKER*, No. 6292, *ante*.

6316. —.]—Where an affidavit is filed in which it is sworn that a material witness is out of the jurisdiction an order to examine him on commission will be made almost *ex debito justitia*.—*KEMP v. TENNANT* (1886), 2 T. L. R. 304, D. C. Annotation:—*Ex pld. Coch v. Allcock* (1888), 21 Q. B. D. 178.

6317. —.]—*COCH v. ALLCOCK*, No. 6362, *post*.

G. Witnesses going Abroad.

6318. **Whether examination ordered.**—*Witnesses in service of applicant.*—Motion to examine witnesses *de bene esse* refused, because they were pltf.'s servants, & they might keep them at home, if they pleased.—*EAST-INDIA CO. v. NAISH* (1732), Bunb. 320; 145 E. R. 687.

6319. —.]—*LEE DICIER v. POWER* (1716), 1 Dick. 112; 21 E. R. 211.

6320. —.]—**Witness going to Scotland.**—*BOTTS v. VERELST* (1771), 2 Dick. 454; 21 E. R. 346, L. C.

6321. —.]—*WEBSTER v. PAWSON* (1777), 2 Dick. 540; 21 E. R. 380, L. C.

6322. —.]—*SHIELLEY v. —*, No. 6242, *ante*.

6323. —.]—Where pltfs. filed a bill in Chancery for the examination of a witness *de bene esse*, to which deft. did not put in any answer, & pltfs. afterwards obtained an order of the ct. for the examination of the witness, & gave notice thereof to deft., & of the interrogatories intended to be put, & on the same evening examined the witness, who left London the next day for a foreign country, & never returned; & pltfs. afterwards obtained a further order that the deposition of the witness should be published in order that it might be read in evidence at the trial:—*Held*: the deposition was admissible evidence at the trial, for as deft. had notice of the time of the examination, he might have cross-examined at that time, or applied for further time for that purpose, & it must be presumed from his not having done either, that he did not wish to cross-examine.—*CAZENOVE v. VAUGHAN* (1813), 1 M. & S. 4; 105 E. R. 2.

Annotation:—*Consd. Delius v. Rougemont* (1815), 1 Price, 449.

6324. —.]—*DELIUS v. ROUGEMONT*, No. 6225, *ante*.

6325. —.]—**Liberty to other party to cross-examine.**—*GRINNELL v. COBBOLD*, No. 6312, *ante*.

6326. —.]—**Effect of delay in application.**—*PIRIE v. IRON* (1832), 8 Bing. 143; 1 Moo. & S. 223; 131 E. R. 355.

6327. —.]—*WEEKES v. PALL*, No. 6244, *ante*.

6328. —.]—(1) An *ex parte* order for the examination, *de bene esse*, of a witness "in her

seventieth year, & very weak & infirm, & from her advanced years not likely to live long," discharged for irregularity, on the ground that she did not come within the rule, not being "seventy years of age," & not being in a "dangerous state of health."

(2) *Ex parte* order for the examination, *de bene esse*, of a soldier under military orders to proceed abroad in about six days for six or seven years held regular.—*M'KENNA v. EVERITT* (1839), 2 Beav. 188; 9 L. J. Ch. 98; 3 Jur. 1166; 48 E. R. 1152.

Annotations:—*As to* (2) *Consd. McIntosh v. G. W. Ry.* (1842), 1 Harv. 328. *Generally, Refd. Hope v. Hope* (1840), 3 Beav. 317.

6329. —.]—**No necessity for leaving.**—In an action by a bkpt. against his assignees, to try the validity of the commission, an affidavit by pltf.'s solr., stating that pltf.'s son, a material witness, had informed him that he intended quitting England five days before the trial was likely to take place, & that deponent verily believed that such was his intention:—*Held*: sufficient to support an application on the part of pltf. to examine the witness *vivâ voce* before the master, although it did not appear that there was any absolute necessity for the witness leaving this country previous to the trial; & the affidavits, on the part of defts., stated that upon the examination of the witness, before a cour. in bkpy., it was observed, that he could not stand a cross-examination in open ct., & a belief was also deposed to, that he was going abroad, & wished to be examined before the master merely to avoid such cross-examination.—*CARRUTHERS v. GRAHAM* (1841), 10 L. J. Q. B. 361.

6330. —.]—*MONDEL v. STEELE*, No. 6230, *ante*.

6331. —.]—*BURON v. DENMAN*, No. 6313, *ante*.

6332. —.]—*FINNEY v. BEESLEY*, No. 6212, *ante*.

6333. —.]—The ct. declined to set aside a judge's order for the *vivâ voce* examination of pltf., before issue joined, which had been made upon an affidavit merely stating that he was a master mariner, that his evidence was material & necessary, & that he was about to sail for Stettin, & was not likely to be back in time for the trial.—*BRAUN v. MOLLETT* (1855), 10 C. B. 514; 139 E. R. 860; *sub nom. BROWN v. MOLLETT*, 3 C. L. R. 925; 24 L. J. C. P. 213; 25 L. T. O. S. 147.

Annotation:—*Consd. Fischer v. Hahn* (1863), 13 C. B. N. S. 659.

6334. —.]—The surrogate had admitted A.'s libel in a cause of collision, & allowed witnesses to be examined thereon *de bene esse*, on affidavit that the ship was about to sail for Syria. She

the jurisdiction.—*HANTON v. SIMMONS*, [1921] 1 W. W. R. 757.—*CAN.*

1. *Witness in custody.*—Defts. applied for a commission to take the evidence abroad of a witness, a former agent of defts., professing himself an accomplice in fraud of pltf., & at the time of the application in custody awaiting his trial on a criminal charge. The ct. granted a commission, & refused to impose a condition that the evidence to be taken on the commission should not be read at the trial unless it should be shown that the witness was then still in custody, but imposed a condition that it should not be read unless it should be shown at the trial that the attendance of the witness could not reasonably have been expected to be procured.—*TURNER v. MUTUAL ASSURANCE SOCIETY OF VICTORIA, LTD.* (1889), 7 N. Z. L. R. 658.—*N.Z.*

a. — *Other witnesses available.*]

—The ct. refused to grant a warrant to cite certain persons in England to attend as witnesses at a jury trial to prove a general fact, the knowledge of which was not confined to the individuals whose attendance was desired; but the ct. expressed its willingness to grant a commission to take their evidence, under the reservation of all objections to its admissibility, if it proved to be merely the evidence of skilled witnesses.—*GELFATLY v. LAW* (1865), 4 Macph. (Ct. of Sess.) 267; 38 Sc. Jur. 143.—*SCOT.*

b. *Whether consent necessary.*—Commission to examine witnesses abroad can only issue by consent. *Semble*: where such consent is refused, the ct. will stay proceedings, so as to enable the party to examine.—*BRADLEY v. GRATTAN* (1833), 1 Ir. L. Rec. N. S. 33.—*IR.*

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c. *Whether examination ordered.*—*Before declaration filed.* The ct. will not, under the Provincial statute for issuing commissions to leave the Province, order such commission before declaration filed.—*SAUNDERS v. PLAYTER* (1823), Tay. 37.—*CAN.*

d. — *Absence only temporary.*—An order to examine a witness *de bene esse* will be made where the witness is going abroad; it is not necessary to show that he is going away permanently, or that he is the only witness to the facts to be proved by him.—*SEAFORD v. WADEL* (1877), 7 P. L. 260.—*CAN.*

e. — *In equity.*—In equity cases, comrs. cannot go to examine witnesses *de bene esse*, who are about to go abroad, though it might be proper

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sailed in fact, & no opportunity was given to cross-examine:—*Held*: B.'s allegation in reply to such libel could be brought in & witnesses could be examined & cross-examined thereon but the cause could not be heard till A. should have submitted the witnesses on his libel for cross-examination.—*THE CHANCE* (1857), Sw. 204; 30 L. T. O. S. 219; 6 W. R. 221; 166 E. R. 1115.

6335. ———.]—*WARNEK v. MOSSES*, No. 6251, *ante*.

6336. ———.]—*ELIN v. WILSON*, No. 6233, *ante*.

H. Old Age or Infirmary of Witnesses.

6337. General rule.—*WARNEK v. MOSSES*, No. 6254, *ante*.

6338. Witness in ill-health—& unable to be present.—*WADE v. GWYE* (1559), Cary, 40; 21 E. R. 22.

6339. ———.]—The ct. permitted the examination of a witness before the prothonotary under Evidence on Commission Act, 1831 (c. 22), on payment of costs, upon the affidavit of his medical attendant, who swore that he was in a precarious state & could not attend at the trial without great danger.—*POND v. DIMES* (1833), 2 Dowl. 730; 3 Moo. & S. 161.

6340. ———.] In an information by the A.-G. for penalties the ct. made absolute a rule that the A.-G. should be at liberty to examine a material witness for the Crown, who was too ill to attend the trial, on interrogatories before the Queen's Remembrancer, but would not make it part of the rule that his examination should be received as evidence on the trial.—*A.-G. v. REILLY* (1815), 13 M. & W. 676; 2 Dowl. & L. 690; 14 L. J. Ex. 150; 4 L. T. O. S. 358; 153 E. R. 283.

Annotations:—*Exp'd.* *A.-G. v. Boyet* (1846), 3 Dowl. & L. 492; *R. v. Upton St. Leonard's* (1847), 10 Q. B. 827.

6341. ———.]—*BANFIELD v. PICKARD*, No. 6210, *ante*.

Bankruptcy proceedings.—*See* *BANKRUPTCY*, Vol. V., p. 618, No. 5551.

6342. ———.]—*BAGNOLD v. GREEN* (1560), Cary, 48; 1 Dick. 2; 21 E. R. 26.

6343. ———.]—*HILLSBOROUGH (LORD) v. JEFFERIES* (1731), Barnes, 438; 91 E. R. 992.

6344. ———.]—*EXTON v. TURNER* (1681), 2 Cas. in Ch. 80; 22 E. R. 856.

6345. ———.] The examiner of the ct., or a special examiner, will be appointed to take the examination of a sick witness as occasion may require.—*PILLAN v. THOMPSON* (1853), 10 Har. App. 11, lxxvi; 22 L. J. Ch. 1006; 17 Jur. 781; 68 E. R. 1160.

6346. ———.]—*TREASURY SOLICITOR v. WHITE*, No. 6237, *ante*.

at law.—*SUTOR v. MITCHELL* (1787), Vern. & Ser. 395.—*IR.*

I. Consent to commission refused.—Examination by court.—*A de bene esse* examination of a witness about to leave the jurisdiction of the ct. must be taken by the ct., unless the parties consent to the evidence being taken under a commission.—*EDWARDS v. MULLER* (1870), 5 B. L. R. 252.—*IND.*

PART VIII. SECT. 1, SUB-SECT. 5.—*H.*

6337 1. General rule.—The serious illness of a necessary witness is ground for granting an order for his examination *de bene esse*.—*BANK OF MONTREAL v. HORNE* (1897), 6 B. C. R. 68.—*CAN.*

6338 1. Witness in ill-health—& unable to be present.—*Mt.* applied for a commission to issue for the

examination of a female witness at her residence. The ground upon which he based his application was that she was fifty-eight years of age & sickly & physically unable to attend the ct. —*Held*: the circumstances alleged were not such as to justify the issue of a commission.—*RUSTOMJI FRAMJI v. BANCONAI* (1890), 1 L. R. 14 Bom. 581.—*IND.*

6338 2. ———.]—An affidavit to ground an order for a commission to examine a witness resident out of the jurisdiction, for the reason that the party whose evidence is required is unable to attend in consequence of ill-health, must be positive; & one on information & belief is insufficient.—*BOYCE v. KOSHOBOGLOU* (1857), 7 L. C. L. R. 17.—*IR.*

6347. ———.]—In an action for replacement of railway stock alleged to have been transferred from the name of plff. by means of a forged transfer, an attesting witness of the execution of the transfer was dangerously ill. On motion for leave to examine the witness *de bene esse*, & for the appointment of a special examiner:—*Held*: (1) it was a proper case to make the order; (2) at the trial of the action, before leave to use the evidence was given, it would be necessary to prove that the witness was not capable of being examined.

The ct. refused to appoint a special examiner, holding that the matter must go to the examiner in rotation.—*BARTON v. NORTH STAFFORDSHIRE RY. CO.*, *BARTON v. NORTH-EASTERN RY. CO.* (1887), 56 L. T. 601.

6348. Pregnancy of witness.—*Qu.*: whether pregnancy & imminent delivery be a cause for the examination of a witness by the prothonotary, under Evidence on Commission Act, 1830 (c. 22). If so, it must be shown by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause.—*ABRAHAM v. NEWTON (OR NORTON)* (1832), 8 Bing. 274; 1 Dowl. 266; 1 Moo. & S. 381; 1 L. J. C. P. 91; 131 E. R. 407.

6349. ———.]—*Qu.*: whether the examination of a witness taken under an order of the ct. can be read in evidence at the trial, if the witness is prevented from attending it by pregnancy only.—*HAVILAND v. HAVILAND* (1863), 32 L. J. P. M. & A. 114.

6350. Old age of witness—Witness of seventy or over.—Rule relaxed if witnesses abroad.—Rule for examination of witnesses *de bene esse*, dispensed with, on account of parties living in Virginia.

The rule is that the witness must be seventy years old, but the parties living in Virginia is a favourable circumstance (LORD HARDWICKE, C.).—*FITZTHUM v. LEE* (1746), Amb. 65; 27 E. R. 38, L. C.

6351. ———.]—**Witness not stated to be ill.**—An application to examine witnesses *de bene esse*, rejected.—*HUGEN v. CALEMBERG* (1751), 1 Lee, 558; 161 E. R. 206.

Annotation: **Mentd.** *Dabbs v. Chisham, Jennens v. Beauchamp* (1810), 1 Phillim. 155.

6352. ———.]—*SHELLEY v. —*, No. 6242, *ante*.

6353. ———.]—*PRICHARD v. GEE*, No. 6213, *ante*.

6354. ———.]—*TOMKINS v. HARRISON*, No. 6270, *ante*.

6355. ———.]—**Witness in seventieth year.**—*McKENNA v. EVERITT*, No. 6328, *ante*.

6356. ———.]—*FORBES v. FORBES*, No. 6246, *ante*.

6357. ———.]—(1) The ct. has jurisdiction on a proper occasion, when it is "necessary for the

6338 3. ———.]—*GRAY v. GRAY*, [1923] O. P. D. 111.—*S. AF.*

g. —Er parte application.—An application for an order to examine a witness *de bene esse* on account of ill-health may be made *ex p.*—*OLIVER v. DICKEY* (1863), 2 Ch. Ch. 87.—*CAN.*

h. ——An order to examine a witness *de bene esse* on the ground of illness, will not be granted *ex p.*, unless the illness is dangerous: if there is no immediate danger the notice should be served.—*ANDERSON v. ANDERSON* (circa 1863), 1 Ch. Ch. 291.—*CAN.*

k. ——An application for an order to examine a witness *de bene esse* on account of ill-health may be made *ex p.*—*CHIPPEN v.*

purpose of justice," to make an order for an examination *de bene esse* of witnesses upon an *ex parte* application, the order being taken by *appet.* at his peril, & subject to the risk of being discharged on sufficient grounds.

(2) Although the fact that a witness is seventy years old is generally a good *prima facie* ground for an order for his examination *de bene esse*, such a practice will not necessarily be applied to an extraordinary case, *e.g.*, where an order has been made to examine thirty witnesses. The *ct.* declined to allow the examination *de bene esse* of ten of the proposed witnesses who were between seventy & seventy-five years old, without prejudice to a subsequent application for leave to examine them on grounds other than age, but allowed the other twenty witnesses above seventy-five to be examined *de bene esse* upon the undertaking of *plffs.* counsel to produce at the trial, if so requested by *deft.*, any of such witnesses who might be then alive.—*BIDDER v. BRIDGES* (1881), 26 Ch. D. 1; 53 L. J. Ch. 479; 50 L. T. 287; 32 W. R. 445, C. A.

Annotations:—As to (1) *Refd. Re Wagstaff, Wagstaff v. Julland* (1907), 96 L. T. 605. As to (2) *Consd. Crammond v. Thompson* (1895), 11 T. L. R. 572. *Generally, Mentd. Bonnard v. Perryman*, [1891] 2 Ch. 269.

6358. — — — *Witness of sixty-six—& frequently in ill-health.*—The *ct.* directed a commission to issue for the examination of the surviving attesting witness to a will, which was in litigation before it, although the affidavit filed to support the application merely stated that the witness was upwards of sixty-six years of age, & frequently suffered from ill-health.—*BROWN v. BROWN* (1869), 1 L. R. 1 P. & D. 720; 38 L. J. P. & M. 78; 21 L. T. 339; 33 J. P. 744; 17 W. R. 1110.

Annotation:—*Consd. Andrew v. Brooke* (1874), L. R. 3 P. & D. 181.

6359. — — — *Application was made to examine on commission one of the attesting witnesses to a will on an affidavit that he was an "elderly person," & that the other attesting witness was a foreigner resident abroad, & in ill health: Held:*

Ogden (circa 1870), 2 Ch. Ch. 301.—**CAN.**

1. — — — *—*—A local judge may make an *ex p.* order for the examination of a witness *de bene esse*, on the ground that he is dangerously ill, & not likely to recover.—*BAKER v. THOMPSON* (1885), 10 D. L. 294.—**CAN.**

Witness.—An order *de bene esse* to examine a witness *de bene esse* will be made without notice, where the witness is of advanced age.—*SCOTT v. SCOTT* (1846), 9 L. Eq. R. 451.—**IR.**

Those must be a

witness who is deaf.—*HUSSEY v. BODKIN* (1830), 2 Hog. 211.—**IR.**

PART VIII. SECT. 1, SUB-SECT. 5.—I.

6361 i. *Whether commission ordered.*—*JUDKINS v. PARKER* (1827), 1 N. B. R. (Chp.) 151.—**CAN.**

6361 ii. — — — *—*—Where *deft.*, appealing from a judge's order at chambers discharging an order *nisi* to change the venue from H. to B., alleged that he required five witnesses residing at B., & that it would cost him \$120 more to try the cause in H. than it would in B.; & *plff.* alleged that the attorneys & counsel on both sides resided in H., that he had two witnesses who could more easily be taken to H. than to B., & that it would cost him \$78 more to try the cause in B. than in H. The *ct.* dismissed the appeal without costs directing that the testimony of *deft.*'s witnesses be taken *de bene esse* & received in evidence at the trial in H.—*KING v. BADDECK SCHOOL SECTION TRUSTEES* (1877), 2 R. & C. 315.—**CAN.**

the commission could issue, but at the trial the evidence must not be read except on strict proof that it was impossible for the witness to attend.—*M'PHERSON & FRANZMAN v. PARNELL* (1871), 40 L. J. P. & M. 30; 24 L. T. 742; 19 W. R. 784.

6360. — — — *—*—*Crammond v. Thompson* (1895), 11 T. L. R. 572.

I. Saving of Expense.

6361. Whether commission ordered.—The affidavit in support of a motion for a commission to examine witnesses at Paris & Boulogne for *deft.* co. stated that certain Frenchmen residing in Paris, named, & others residing in Paris & Boulogne, unnamed, were necessary witnesses. *Deft.* co. was registered in England. Their business was in Paris. The *ct.* ordered the commission to issue, on *defts.*, if *plff.* pressed it, adding to their affidavit a statement that great inconvenience & expense would otherwise be occasioned. The costs of the commission were reserved, no security was required, & it was referred to chambers to settle the form in which the commission should issue.—*SPILLER v. PARIS SKATING RINK CO., LTD.* (No. 2) (1878), 27 W. R. 225.

6362. — — — *Presence in court not essential.*—A party is not entitled to a commission *ex debito justitiae* upon showing that a material witness is resident out of the jurisdiction. The granting of the commission is a matter of judicial discretion, to be exercised according to the particular circumstances of each case.

In a case where it was shown that witnesses were out of the jurisdiction & their examination on commission abroad would be much less expensive than bringing them to the trial in England, & there was nothing to show that their presence in *ct.* was essential, the *Cl.* of Appeal affirmed the order of the Q. B. Div. that the commission should issue.—*COCH v. ALLCOCK* (1888), 21 Q. B. D. 178; 57 L. J. Q. B. 489; 36 W. R. 747; 4 T. L. R. 630, C. A.

6361 iii. — — — *—*—In an action on a promissory note *deft.* pleaded that the note was obtained from him under duress, & *plffs.*, who lived in Ontario, applied for a commission to take their evidence there.—*Held:* as the probable expenses of the commission would not exceed a quarter of the expenses

wherein the defence of fraud was raised, on the application of the *deft.*—*Held:* a commission should be granted for the examination of a physician who had attended deceased, the expense of bringing the physician to the trial would have been, it was alleged, \$700; but the *ct.* imposed the

commission was made *bona fide*, it should be granted.—*THOMPSON v. HENDERSON* (1902), 9 B. C. R. 540.—**CAN.**

6361 iv. — — — *—*—Before an order for

must be shown that there are very strong reasons for the witnesses not coming before the *ct.* Mere saving of expense is not a ground for making the order.—*McGOWAN v. HUNTER* (1913), 23 W. L. R. 139; 3 W. W. R. 860; 9 D. L. R. 532.—**CAN.**

6361 v. — — — *—*—The saving of expense is insufficient ground for granting a commission to examine *plff.* abroad.—*ORMAN v. HOLLINS* (1913), 12 E. L. R. 520.—**CAN.**

6362 i. — — — *Presence in court not essential.*—Even where there is likely to be a conflict of evidence between a witness for *plff.* & an officer of the *deft.* co. whose evidence is sought to be taken on commission in U.S.A., the desirability of examining such witnesses before the *ct.* is not a sufficient reason to compel *defts.* to bring their witness, at great expense, to a forum not chosen by them & a commission should issue.—*WESTERN IRON CO. v. HEDDY CO.* (1916), 33 W. L. R. 915.—**CAN.**

6362 ii. — — — *—*—In an action on a life insurance policy for \$2,000,

discretion, on application by *plff.* before trial, to refuse to permit the depositions to be used.—*LAING v. NORTHERN LIFE ASSURANCE CO.* (1918), 14 Alta. L. R. 140.—**CAN.**

—An application by *plffs.*, an incorporated co., for a commission to take the evidence of their general manager at Toronto, where he resided, & *plffs.* works were situated, was refused, although it was sworn that the manager was a material witness on behalf of *plffs.* to prove the account sued on & to disprove the various defences, & that it would entail great loss & expense for him to attend a trial at Winnipeg, as his duties as manager required his continued presence in Toronto.—*Held:* *defts.* had the right to have this witness present at the trial, in order that the usual tests of demeanour & cross-examination in presence of the *ct.* might be applied. Even if interference with *plffs.*' business by the manager's absence would be a proper subject for consideration, a mere general statement, unsupported by any facts, that great loss & expense would ensue, was not convincing.—*TORONTO MANUFACTURING CO. v. IDEAL HOUSE FURNITURES* (1911), 17 W. L. R. 621.—**CAN.**

Sect. 1.—Examination of witnesses: Sub-sect. 6, A. & B. (a) & (b).]

SUB-SECT. 6.—PROOF OF GROUNDS FOR ORDER.

A. How Proved.

6363. By affidavit.—Of applicant.]—In an application for a commission to examine evidence to show that the legacies, given in two codicils, were both intended for the legatee, the legatee ought to swear she believes that to have been the intention.—*COOTE v. COOTE* (1785), 1 Bro. C. C. 448; 28 E. R. 1233, L. C.

*Annotation:—***Held.** *Mendizabal v. Machado* (1826), 4 L. J. O. S. Ch. 142.

6364. ———.]—The affidavit of an insurance broker, the agent of underwriters, sued on a policy, will not be received in support of an application for a commission to examine witnesses abroad. The party himself or his attorney should make the necessary affidavit in all such cases, & it should contain very satisfactory statements.—*BONHAM v. LEIGH* (1818), 5 Price, 444; 146 E. R. 659.

6365. ———.]—*FISCHER v. HAHN*, No. 6214, *ante*.

6366. ——— Of solicitor for applicant.]—Where a vessel has been seized by the officers of the customs, & on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the ct. will, on motion, a bill having been filed against the A.-G. for that purpose, grant deft. a commission to examine persons residing abroad, & make it part of the order, that their depositions shall be received in evidence on the trial. The affidavit of the solr. for deft. will be received in support of such a motion; & it will be sufficient if he swear, that he is informed of & believes the statements in the bill, if he also add, that his belief is founded on documents in his possession, & that, from the nature of the defence involving the question of what country the ship belongs to, he considers the commission necessary.—*LARAGOTTY v. A.-G.* (1810), 2 Price, 172; 146 E. R. 58; *subsequent proceedings, sub nom. A.-G. v. LARAGOTTY*, 3 Price, 221. *Annotations:—***Consd.** *A.-G. v. Boyet* (1840), 3 Dow. & L. 492. **Mentd.** *Dyson v. A.-G.*, [1911] 1 K. B. 410.

6367. ———.]—*BONHAM v. LEIGH*, No. 6364, *ante*.

6368. ———.] On a bill by underwriters

PART VIII. SECT. 1, SUB-SECT. 6.—A.

a. By affidavit.]—The motion for a commission to examine witnesses must be supported by affidavit.—*McNAIR v. SHELTON* (1827), Tay. 451.—**CAN.**

6363 i. ——— Of applicant.]—A party desiring a commission for his own examination outside the jurisdiction should himself make an affidavit of the facts relied on.—*COLLESMACHE v. HOBSON* (1897), 5 B. C. R. 216.—**CAN.**

6363 ii. ———.]—The affidavit in support of the motion by plff. for an order for the examination abroad of himself & several other witnesses was objectionable in that it was not made by plff. herself & was based almost entirely on information & belief.—*McGOWAN v. HUNTER* (1913), 23 W. L. R. 139; 3 W. W. R. 800; 9 D. L. R. 532.—**CAN.**

— Of law student.—In office of claimant's solicitor.]—Upon an ardn. before a district ct. Judge upon a claim for compensation by the father of a workman who was killed in an accident while in the co.'s service, claimant asked for a commission to take his evidence & that of other persons in Italy. The affidavit in support of the motion was made by a law student in the office of claimant's solr.:—**Held:** the affidavit was a sufficient

for a commission to examine witnesses abroad, to prove the circumstances under which a ship had been condemned & sold as not worth repair:—**Held:** an affidavit of plff.'s solr., stating his information & belief that there were several witnesses abroad whose testimony was necessary for plffs., was sufficient, though it did not state any grounds for his belief.—*ROBINSON v. SOMES* (1827), 1 Y. & J. 578; 148 E. R. 802.

6369. ———.]—*HEALY v. YOUNG*, No. 6263, *ante*.

6370. ———.]—*JAWSON v. VACUUM BRAKE Co.*, No. 6255, *ante*.

6371. ——— Of solicitor's clerk.]—*M'HAIRY v. HITCHCOCK*, No. 6286, *ante*.

6372. When affidavit dispensed with.—If sufficient evidence already in master's office.]—Where persons, not parties to the cause, claiming an interest in the subject-matter of a suit, obtained the master's certificate to examine witnesses abroad, in support of their claim, without producing an affidavit, there being other affidavits in the master's office sufficient to satisfy him of the propriety of granting the certificate:—**Held:** the certificate was regular.

On an application for a commission to examine witnesses abroad, it is generally necessary to state the places where it is proposed to execute the commission.—*BAUER v. MAULE* (1845), 2 Holt, Eq. 235; 5 L. T. O. S. 343; 9 Jur. 860; 71 E. R. 860.

B. What must be Proved.

(a) In General.

6373. Where witness to be examined abroad.—That cause of action arose abroad.]—*AKERS v. CHANCEY* (1787), 2 Bro. C. C. 273; 29 E. R. 150.

6374. Attempt to secure attendance of witness.]—*NORTON v. MELBOURNE* (LORD), No. 6261, *ante*.

6375. Special circumstances must be shown.]—The ct. refused to order a commission to issue for the examination of a witness in a testamentary suit pending before it, the witness not being old or infirm, & there being no circumstance beyond the allegation that the evidence was material, calling for her examination out of the ordinary course.—*ANDREW v. BROOKE* (1871), L. R. 3 P. & D. 181; 43 L. J. P. & M. 39; 31 L. T. 102; 38 J. P. 825; 22 W. R. 712.

6376. Examination on ground of ill-health—

6374 i. Attempt to secure attendance of witness.]—Where plff. seeks to have a material witness examined abroad & the nature of the case is such that it is important that he should be examined here, the party asking must show that he cannot bring him to this province to be examined on the trial.—*STEWART IRON WORKS Co. v. BRITISH COLUMBIA IRON, WIRE & FENCE Co.* (1914), 20 B. C. R. 515.—**CAN.**

6374 ii. ———.]—A pursuer having called his mother as defender to a cause, the ct. refused to allow her to be examined on commission, it not being alleged that she was unable to attend the trial.—*Macdonald v. Macdonald* (1859), 21 Dunl. (Ct. of Sess.) 783; 31 Sc. Jur. 421.—**SCOT.**

b. That person to be examined is sole witness as to particular fact.]—On applying for an order it should be clearly shown that the witness is the only witness as to the fact sought to be proved by him.—*J.* (1870), 3 Ch. Ch. 98.—**C.**

c. ——— Evidence not obtainable before witness left.]—Application was made for a commission to examine a witness resident in U.S.A. There was nothing to show that the evidence of the witness could not have been obtained before he left the jurisdiction,

foundation for an order to take the evidence in Italy.—*Re TRIPODI & West CANADIAN COLLIERIES, LTD.* (1914), 27 W. L. R. 766; 7 Alta. L. R. 167.—**CAN.**

q. Whether by affidavit of solicitor's partner.—On information from defendant's agent.]—Application was made for commission to examine a witness resident in the U.S., the application being based on an affidavit of the partner of deft.'s solr., on information obtained by him from M., deft.'s agent. There was no affidavit from M., personally:—**Held:** the application was properly dismissed.—*McPHERSON v. RITER-CONLEY MANUFACTURING Co.* (1909), 25 N. S. S. 429.—**CAN.**

PART VIII. SECT. 1, SUB-SECT. 6.—B. (a).

r. General rule.]—There is no doubt as to the *prima facie* right of a party to have the witnesses who are to give evidence against him present in ct.; the burden lies upon the party asking any indulgence in the way of commission & for special terms to suit the case, to justify the ct. in departing from the usual rule that the witnesses should attend in person.—*STEARNS v. KIMMELL* (1905), 1 W. L. R. 390.—**CAN.**

That state of witness dangerous.]—Motion to examine witnesses *de bene esse*, except in certain cases, as upon the ground of age, requires notice. The affidavit must be either, that the witness is of the age of seventy, or the only witness to the particular fact; or, if upon the ground of health, in a dangerous state.—*BELLAMY v. JONES* (1802), 8 Ves. 31; 32 E. R. 261, L. C.

Annotation:—*Reid. Bidder v. Bridges* (1884), 26 Ch. D. 1.

6377. ———.]—A witness will not be allowed to be examined *de bene esse*, on an affidavit that she labours under a cancer, but not stating that she is in immediate danger.—*ANON.* (1823), 1 L. J. O. S. Ch. 76.

6378. ———.]—*McKENNA v. EVERITT*, No. 6328, *ante*.

(b) *Nature of Evidence to be given.*

6379. Whether facts to be proved need be stated.]

—To obtain a commission to examine witnesses abroad, it is not necessary to state the points, to which it is intended to examine, or the names of the witnesses.—*ROUGEMONT v. ROYAL EXCHANGE ASSURANCE CO.* (1802), 7 Ves. 304; 32 E. R. 124.

Annotation:—*Consd. Mendizabal v. Machado* (1826), 4 L. J. O. S. Ch. 142.

6380. ———.]—*MENDIZABAL v. MACHADO*, No. 6228, *ante*.

6381. ———.]—It is not necessary that the affidavit in support of a motion for a commission to examine witnesses abroad should state either the names of the witnesses, or the matters to which they are to be examined, in a case where it is evident that such examination is necessary.—*CARBONELL v. BESSELL* (1833), 5 Sim. 636; 2 L. J. Ch. 73; 58 E. R. 478.

6382. ———.]—*HOPE v. HOPE*, No. 6277, *ante*.

6383. ———.]—In an action against an exor., upon a contract entered into by his testator, at B., founded upon an alleged custom there, the ct., on the application of deft., & upon payment of the sum demanded into ct., made absolute a rule for a commission to examine witnesses at B., though the affidavits did not disclose the names of any of the witnesses, nor the material facts which could be proved by them.—*Cow v. KINERSLEY* (1844), 6 Man. & G. 981; 1 Dow. & L. 906; 7 Scott, N. R. 892; 13 L. J. C. P. 114; 131 E. R. 1189; *sub nom. COWL v. KINERSLEY*, 8 Jur. 364.

Annotation:—*Distd. Dye v. Bennett* (1850), 9 C. B. 281.

Refd. Greville v. Stulz (1847), 12 Jur. 49.

6384. ———.]—It is not necessary, in an affidavit in support of an application for a commission to examine witnesses in India, under Evidence on Commission Act, 1831 (c. 22), s. 4, to state the nature of the evidence the witness is expected to give.—*STRACHAN v. GREEN* (1845), 9 Jur. 554.

6385. ———.]—Where it appeared upon affidavit that a material witness was going abroad, an order was made upon motion that deft. should be at liberty to examine him *de bene esse*.—*Held: it*

was not necessary that the affidavits should disclose the points to which it was proposed to examine the witness, or that he was the only witness who could give evidence on the points.—*GROVE v. YOUNG* (1840), 3 De G. & Sm. 397; 13 L. T. O. S. 88; 13 Jur. 847; 64 E. R. 532.

6386. ———.]—Pltf. must give to deft. a statement of the points as to which he proposed to examine the witnesses, & the names of all the witnesses whom he then knew & intended to examine (*per Cur.*).—*MEYER v. THORNTON* (1852), 19 L. T. O. S. 89, 122.

6387. ———.]—*LAING v. BRADSHAW* (1855), 25 L. T. O. S. 182.

6388. That evidence will support a defence.]—In the affidavit used in applying for commission to examine witnesses abroad, it is not necessary to state that apper. would have a good defence if he could procure the evidence of the witnesses proposed to be examined, or to show that there are necessary facts within their knowledge required by pltf. to be proved on his defence.—*WOODHEAD v. BOYD* (1818), 6 Price, 101; 146 E. R. 751.

6389. ———.]—*AMESON v. LIDYATT* (1855), 3 C. L. R. 926, n.

6390. That evidence admissible.]—When a witness resides abroad at such a great distance that a commission sent out to examine him would necessarily occasion great delay, it is not a matter of course to grant such a commission on the application of deft., but it must be made out to the satisfaction of the ct. that the evidence of the witness would be admissible, & of service to deft. when obtained; therefore, where in an action on a bill by the indorsee against the acceptor, deft. applied for a commission to examine the drawer in Canada, to show that there was nothing due from deft. to him, & it was sworn that it was believed that pltf. had not given value, but upon a former hearing before a judge in chambers it appeared to him that the pltf. had given value, the ct. refused to interfere.—*LLOYD v. KEY* (1831), 3 Dowl. 253.

Annotation:—*Refd. Dye v. Bennett* (1850), 1 L. M. & P. 92.

6391. ———.]—Where an affidavit in support of an application for a commission to examine witnesses abroad stated that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, & that their evidence was material & necessary: *Held: sufficient; & the affidavit need not state that the evidence was admissible, or that the application was bonâ fide & not for delay, & also that no affidavit of merits was necessary.* The ct. in granting such an application, will not impose terms upon the party applying.—*BADDELEY v. GILMORE* (1836), 1 M. & W. 55; 1 Gale, 410; Tyr. & Gr. 369; 5 L. J. Ex. 115; 150 E. R. 313.

6392. Legal necessity for examination.]—*BOODE v. BOODE* (1847), 5 Notes of Cases, 385.

or that the facts said to be in the knowledge of the witness could not be supplied by other persons:—*Held: the application was properly dismissed.*—*McHERSON v. UTTER-CUNLEY MANUFACTURING CO.* (1902), 35 N. S. R. 429.—*CAN.*

u. Where witness travelling.—*That he will be at place fixed.—When examination held.*—On an application for a foreign commission to examine a witness who is travelling, it should be shown that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution.—*SINGERR. WILLIAMS (C.W.) MANUFACTURING CO.* (1881), 8 P. R. 483.—*CAN.*

a. That specific issue must be tried.]—Upon an application for a foreign commission it is not necessary to show that the action is technically at issue; it is sufficient that it be shown that some issue is raised on the pleadings which must be tried in the action.—*SMITH v. GREY* (1885), 11 P. R. 38.—*CAN.*

b. Position of officer of company.—*Whether responsible.*—The master in chambers refused to order the examination of one H., alleged to be the manager for Canada of deft. co., an English corp., on the ground that it must be clearly shown that a responsible officer is sought to be examined.—*GROVECK v. EDGAR ALLEN*

Co. (1913), 23 O. W. R. 788; 4 O. W. N. 660; 10 D. L. R. 391.—*CAN.*

PART VIII. SECT. 1, SUB-SECT. 6. — B. (b).

6379 i. Whether facts to be proved need be stated.]—It is not always necessary upon an application for a commission to show the nature of the evidence proposed to be given.—*ONTARIO BANK v. SMITH* (1890), 6 Man. L. R. 600.—*CAN.*

6379 ii. ———.]—Where an order for a commission is sought, the affidavit must particularise the nature of the evidence which it is desired to obtain.—*HARRETT v. CANADIAN PACIFIC RAILWAY CO.* (1907), 6 W. L. R. 714.—*CAN.*

Sect. 1.—Examination of witnesses: Sub-sect. 6, B. (c) & C.; sub-sect. 7.]

(c) Names of Witnesses.

6393. Whether names of witnesses must be stated.—*ROYAL EXCHANGE INSURANCE CO. v. — (1742), 2 Russ. 553, n.; 38 E. R. 445.*

6394. —.—*OLDHAM v. CARLETON, No. 6258, ante.*

6395. —.—*ROUEMONT v. ROYAL EXCHANGE ASSURANCE CO., No. 6379, ante.*

6396. —.—*MENDIZABAL v. MACHADO, No. 6228, ante.*

6397. —.—*CARBONELL v. BESSELL, No. 6381, ante.*

6398. —.—*NORTON v. MELBOURNE (LORD), No. 6261, ante.*

6399. —.—*Or otherwise identified.*—The affidavit on which to ground a motion for a commission to examine witnesses abroad, must either specify the names of the witnesses proposed to be examined, or in some other way describe them.—*GUNTER v. McTEAR (1836), 1 M. & W. 201; 4 Dowl. 722; 1 Gale, 440; Tyr. & Gr. 215; 5 L. J. Ex. 115; 150 E. R. 106.*

Annotations:—Refd. Richards v. East India Co. (1839), 3 Jur. 822; Cowl v. Kinnersley (1844), 8 Jur. 364.

6400. —.—*It is not essential that the names should be given in the affidavit to ground a motion for the examination of witnesses abroad, under East India Company Act, 1772 (c. 63); a certain description or designation is sufficient.*—*RICKARDS v. EAST INDIA CO. (1839), 3 Jur. 822.*

6401. —.—*Some names given.*—In an application to examine witnesses abroad by a commission, the ct. will allow the commission to go for the examination of witnesses not named in the rule, if the names of certain witnesses are given.—*DIMOND v. VALLANCE (1839), 7 Dowl. 590; 2 Will. Woll. & H. 67.*

Annotation:—Folld. Beresford v. Easthope (1840), 8 Dowl. 294.

6402. —.—*A rule to examine witnesses abroad, under Evidence on Commission Act, 1831 (c. 22), s. 4, granted if the names of some of the witnesses proposed to be examined are mentioned in the affidavits, although the names of others are not.*—*BERESFORD v. EASTHOPE (1840), 8 Dowl. 294; 4 Jur. 101.*

6403. —.—*COW v. KINNERSLEY, No. 6383, ante.*

6404. —.—*M'HARDY v. HITCHCOCK, No. 6266, ante.*

6405. —.—*MEYER v. THORNTON, No. 6386, ante.*

6406. —.—*NADIN v. BASSETT, No. 6290, ante.*

6407. —.—*One witness should be named.*—It was the recognised, though not an absolutely rigid practice to give in the affidavit filed in support of the application for a commission the name of at least one witness whom it was desired to examine (*LORD ESHER, M.R.*).—*HOWARD v. DULAU & CO. (1895), 11 T. L. R. 451, C. A.*

C. Sufficiency of Proof.

6408. Of necessity of examination—Belief of deponent.—*SHEDDEN v. BARING (1797), 3 Aust. 880; 145 E. R. 1069.*

6409. —.—*LARAGOITY v. A.-G., No. 6306, ante.*

6410. Of ill-health of witness—Whether affidavit of medical man necessary.—The ct. will not grant a rule to examine a witness on interrogatories, on the ground of infirmity, of age, or illness, unless the affidavit of a surgeon is produced, stating the nature of the complaint, & alleging his belief that the witness will not be able to attend the trial of the cause.—*DAVIES v. LOWNDES (1838), 7 Dowl. 101; 6 Scott. 738; 2 Jur. 945.*

6411. That witness sole witness to fact—Belief of deponent.—*HOPE v. HOPE, No. 6277, ante.*

6412. Of inability to attend trial.—*LAWSON v. VACUUM BRAKE CO., No. 6255, ante.*

SUB-SECT. 7.—ORDER SUBJECT TO TERMS.

6413. Applicant admitting some indebtedness—Payment into court or security.—*FODERINGTON v. WILSON (1812), 19 Ves. 373, n.; 34 E. R. 557, L. C.*

Annotations:—Refd. Noble v. Garland (1815), Coop. G. 222; Cheminant v. De La Cour (1816), 1 Madd. 208; Bowden v. Hodge (1818), 2 Swan. 258.

6414. —.—*INGRAM v. BIGH (1838), 2 Jur. 1044.*

Annotation:—Refd. Birnie v. Janson (1842), 2 Gal. & Dav. 630.

6415. —.—*LEWIS v. KINGSBURY (1888), 1 T. L. R. 639, C. A.*

6416. —.—*Payment of costs in former suit.*—The ct. will not stay the issuing of a commission to examine witnesses abroad on the ground of plff. being indebted to deft. for certain costs in equity.—*OUGHAN v. PARISH (1835), 4 Dowl. 29.*

6417. Delay in application—Payment into court of part of claim.—Plff. in a bill for discovery, in aid of a defence to an action against him at law, may have, on motion at the sittings after term, a commission to examine his witnesses abroad, where the cause in the ct. of law is at issue, & was entered for trial the term before the term immediately preceding the sittings, where a case of defence has been stated by the bill, although the affidavit on which it is moved is in the common form, & the delay in staying of the trial is not a sufficient ground of opposition to such an application. But the ct. in granting it will order it only on the terms that appet. pay into ct. a very considerable part at least of the demand of plff. at law, to abide the event.—*EBDEN v. PRINCE (1820), 8 Price, 290; 116 E. R. 1207.*

6418. —.—*Payment into court of whole claim.*—If it appear to the ct. that a *mandamus* or commission to examine witnesses abroad is moved for to delay plff., the ct. will grant the writ only on bringing the money into ct.—*DALTON v. LLOYD (1835), 1 Gale, 102.*

6419. —.—*To induce the ct. to refuse to allow a commission to issue for the examination of deft.'s witnesses abroad, a very strong case of misconduct on the part of deft. must be made out. But, where there is reason to suspect deft.'s object to be to delay plff., they will order him to bring*

PART VIII. SECT. 1, SUB-SECT. 6.—B. (c).

6393 i. Whether names of witnesses must be stated.—An application was made by defts. for the issue of a commission to cities in U.S.A. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at

the trial:—*Held:* the order for the commission must be refused.—*A.-G. v. GOODERHAM (1884), 10 P. R. 259.—CAN.*

6393 ii. —.—An affidavit for an order for a comr. to examine witnesses abroad must state the names of the witnesses proposed to be examined.—*HERMANN v. LAWSON (1895), 3 B. C. R. 353.—CAN.*

c. — "Other persons"—Whether principal officer of plaintiff company included.—The principal officer of plff. co., who is a material witness, cannot be examined on plff.'s behalf under cover of a general leave given by an order for a commission to examine "other persons."—*STEWART IRON WORKS CO. v. BRITISH COLUMBIA IRON, WIRE & FENCE CO. (1914), 20 B. C. R. 515.—CAN.*

o. Commission involving great expense.]-Whether security for costs ordered.—*Def't.*, in an affidavit filed in opposition to the application for a commission stated, that if it issued it would occasion him great expense, which he believed would be wholly disposable of recovery:—*Held:* not to be sufficient to entitle the *et.* to require security from *plff.*—*JONES*

SECT. 1.—Examination of witnesses: Sub-sects. 7, 8 & 9.]

deft. having obtained an order for the examination of two witnesses, whose names were given, in Australia, the ct., upon a motion to rescind the order, imposed as a term that deft. should state what it was that he expected the witnesses to prove.—*BAIRY v. BARCLAY* (1864), 15 C. B. N. S. 849; 143 E. R. 1019.

6431. Applicant leaving jurisdiction—Security for costs.]—*FISCHER v. HAHN*, No. 6214, *ante*.

SUB-SECT. 8. — WHO MAY BE APPOINTED EXAMINER.

6432. Solicitor—Of party.]—*FORTEGUE & COAKE'S CASE* (1612), Godb. 193; 78 E. R. 117.

6433. — — —.]—Depositions suppressed because a comr. is solr. for plff.—*FRICKER v. MOORE* (1730), Bunb. 289; 145 E. R. 677.

6434. — — —.]—Depositions suppressed, because plff.'s solr. was one of the comrs.—*SELWYN'S CASE* (1779), 2 Dick. 563; 21 E. R. 111; C.

6435. — — —.]—A new commission was to examine witnesses, in consequence of the misconduct of the comr. named by the party applying for a new commission.

One of the comrs. nominated by deft. was A., a solr. After being appointed a comr., A. was totally unjustified in acting as solr. for a party who had to examine witnesses under the commission (*LORD LANGDALE, M.R.*).—*SAYER v. WAGSTAFF* (1812), 5 Beav. 402; 12 L. J. Ch. 35; 40 E. R. 657.

6436. Assisting solicitor of party.]—Where a solr. has been engaged in assisting the solr. of one of the parties in the cause to make preliminary examinations of witnesses, & to select witnesses to be called by that party such a solr. is an improper person to be a comr. for examining witnesses in the cause; & had he taken the examinations the depositions would have been suppressed.—*MACDONALD (LORD) v. MAJORIBANKS* (1815), 6 L. T. O. S. 81, L. C.

6437. Not engaged in cause.]—*EVANS v. BATH* (1853), 20 L. T. O. S. 189.

6438. To take acknowledgment of married woman abroad.]—19 & 20 Vict. c. 120, in requiring the appointment of a solr. to examine a married woman abroad, means a solr. of the Ct. of Ch. in England, & therefore the ct. refused to direct a commission to a barrister & solr. of a ct. in Canada for that purpose.—*TURNER v. TURNER* (1858), 2 De G. & J. 531; 27 L. J. Ch. 272; 31 L. T. O. S. 64; 4 Jur. N. S. 127; 6 W. R. 355; 41 E. R. 1096, L. C. & L. J.J.

6439. Resident abroad British consul not

available.]—Where a party to a suit, who wished to put in accounts, resided at Lyons, & the nearest British consulate was 100 miles distant, the ct. appointed a solr. resident at Lyons to be special examiner to take the evidence, on the ground that the consul, before whom an affidavit might be sworn, resided at too great a distance for that purpose.—*DREVON v. DREVON* (1863), 9 L. T. 406; 12 W. R. 66.

6440. Clerk to solicitor of party.]—Under a commission issued to examine witnesses abroad, it is no objection that a clerk to plff.'s attorney is appointed one of the comrs., & settles the draft of the depositions of one of plff.'s witnesses.—*LOPES v. DE TASTET* (1820), 4 Moore, C. P. 424.

6441. Barrister—Witnesses resident more than twenty miles from London.]—Plff. moved that a solr. might be appointed to examine witnesses residing more than twenty miles from London;—*Held*: the application might be made by motion in ct. instead of at chambers; & that, in case of witnesses residing so far from London, the old practice was unchanged; but the evidence in this case being special, a barrister to be chosen by both parties must be the examiner.—*REED v. PRIEST* (1853), Kay, App. XIV.; 69 E. R. 318; *sub nom.* *READ v. PRIEST*, 22 L. T. O. S. 197; 2 W. R. 86.

*Annotation:—**REID*, *Brocas v. Lloyd* (1856), 26 L. T. O. S. 230.

6442. — — —.]—It is not imperative that comrs. appointed by the ct. to examine witnesses in a suit should be barrister-at-law.—*HENDERSON v. PHILLIPSON* (1853), 22 L. J. Ch. 1037; 17 Jur. 615.

6443. — — — Complicated questions involved.]—On the taxation of costs in an action on a policy of insurance where the questions involved were of an extremely complicated & important character, the master having duly considered all the circumstances, allowed the expenses of sending a barrister as comr. to examine witnesses in the Canaries. The ct. refused to interfere with his discretion.—*YGLESIAS v. ROYAL EXCHANGE, ETC. CORPN.* (1870), L. R. 5 C. P. 141; 39 L. J. C. P. 173; 22 L. T. 269; 18 W. R. 381.

6444. When special examiner appointed To avoid delay.]—Examiner specially appointed for the examination of witnesses in London, on an application of defts., who were restrained by an interlocutory injunction, in a case in which plff. had undertaken to submit to any order which the ct. might make for the early hearing of the cause, & no appointment could be obtained for examination before the examiner for upwards of a month from the time of making the application.—*BRENNAN v. PRESTON* (1853), 10 Hare, App. I. xvii; 1 Eq. Rep. 51; 22 L. J. Ch. 1040; 17 Jur. 824; 1 W. R. 322; 68 E. R. 1123.

6445. — — — To examine witness abroad—Orally or on Interrogatories.]—Where an application was

made before "the registrar of this ct." The registrar not being able to take the examination, the witness was examined before the deputy registrar of the ct. — *Held*: the nomination of the registrar by the order to take the examination, was not as "*persona designata*" but as registrar, & the deputy registrar was competent to act for him thereon.—*RICHARDS v. ANCIENT ORDER OF FORESTERS* (1896), 5 B. C. R. 59.—**CAN.**

a. Commissioner appointed by judge — Under Judicature Act.]—Judicature Act which empowers a judge to appoint a commissioner & to name that commissioner gives him power to appoint any one who is qualified to take evidence, & that person need not be such an one as would, without such a commission, be the only proper person

v. HUTCHINSON (1899), 18 N. Z. L. R. 807.—**N.Z.**

p. Action to recall probate.]—An action to recall the probate of a will granted twelve years previously, on the ground of mental incapacity of testator & to obtain probate of a prior will which was alleged by those claiming under the subsequent will to be a forgery, a commission to take the evidence of the attesting witnesses to the prior will in Australia was refused as to one of them & granted as to the other, who was sworn to be too ill to attend, subject to a condition that his evidence taken under the commission should be received only if it should be proved to the satisfaction of the judge at the trial that he was still too ill to attend.—*BOGSON v.*

CHICKEN (1903), 23 N. Z. L. R. 795.—**N.Z.**

PART VIII. SECT. 1, SUB-SECT. 8.

q. Associate of judge making order — Foreign Tribunals Evidence Act, 1856.]—When an examination of witnesses on commission, issued out of a foreign tribunal, is ordered under Foreign Tribunals Evidence Act, 1856, & R. S. Ct. Ord. 37, r. 54, the prothonotary will not be appointed examiner, but the examination will be ordered to be held before the associate of the judge who makes the order.—*AKT. STORM & BULL, LTD. v. KNORRINGS TRAVARUKETBOLOG*, [1922] V. L. R. 432.—**AUS.**

r. Deputy registrar — Order directed to registrar.]—An order directed the examination of a witness *de bene*

made to the ct., under 15 & 16 Vict. c. 80, ss. 28, 30, 31 & 32, for a commission to examine witnesses in America, & for leave to the comrs. to take the evidence either orally or upon interrogatories:—*Held*: as the writ of commission proceeds on the assumption that witnesses are to be examined by interrogatories, the proper course in such a case is to appoint a special examiner, & not to direct a commission to be issued.—*LAWRENCE v. MAULE* (1855), 25 L. T. O. S. 193; 3 W. R. 534.

6446. ———.]—A witness who has made an affidavit may be cross-examined either before one of the examiners of the ct. or a special examiner, & in the case of a witness abroad the proper course is to apply for a special examiner.—*EDWARDS v. SRAIGHT* (1862), 2 John. & H. 617; 70 E. R. 1205.

6447. ———.]—**Witnesses more than twenty miles from London.**—A special examiner will not be appointed for the examination of witnesses in the country, merely on the ground that they reside in a neighbourhood distant more than twenty miles from London.—*ALTREE v. SHERWIN* (1858), 2 De G. & J. 92; 27 L. J. Ch. 725; 44 E. R. 922, L. J. J.

6448. Examiner of court.—*PYE v. PYE*, [1855] W. N. 174.

6449. ———.]—(1) In an action to perpetuate testimony, the time for delivery of defence having expired, & deft. not having applied for an extension of time, plff. obtained, on motion, an order that the action might proceed notwithstanding deft.'s default, & that he might be at liberty to examine the witnesses, one of whom was of advanced age & in failing health, as if the pleadings were closed.

(2) It is not now the practice of the ct. to appoint a special examiner to take a country examination, even, for instance, in a Welsh case where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language. In such a case the examination will be referred in the usual way to one of the examiners of the ct., who is entitled, if necessary, to the assistance of an interpreter.—*BUTE (MARQUESS) v. JAMES* (1886), 33 Ch. D. 157; 55 L. J. Ch. 658; 55 L. T. 133; 34 W. R. 751.

6450. ———.]—*BARTON v. NORTH STAFFORDSHIRE RY. CO.,* *BARTON v. NORTH-EASTERN RY. CO.*, No. 6347, *ante*.

6451. ———.]—*BADDELEY v. BAILEY*, [1893] W. N. 56.

6452. Foreign court or judge.—*LUMLEY v. GYE*, No. 6630, *post*.

6453. ———.]—*TIMES LIFE ASSURANCE CO. v. NATIONAL ALLIANCE CO.* (1858), cited in E. B. & E. p. 322; 27 L. J. Q. B. 239; 31 L. T. O. S. 130; 4 Jur. N. S. 632; 120 E. R. 528.

Annotation:—*Reid. Fischer v. Izataray* (1858), E. B. & E. 321.

6454. ———.]—A commission, having been issued in this cause, addressed to individual comrs. to examine witnesses at Pesth, was sent back, unexecuted, through the Austrian Embassy, on the ground that the Austrian Govt. did not permit any but the tribunals of the country to examine witnesses in Hungary. The ct. made absolute a rule

directing a commission to issue directed to the Imperial Royal Provincial Ct. at Pesth, to examine the witnesses.—*FISCHER v. IZATARAY* (1858), E. B. & E. 321; 27 L. J. Q. B. 239; 31 L. T. O. S. 130; 4 Jur. N. S. 632; 6 W. R. 549; 120 E. R. 528.

6455. ———.]—Upon application for a commission to issue directed to the judges of a foreign ct., to examine witnesses on the part of deft., it appeared that the action was brought, in *forma pauperis*, to recover the value of certain shares & coupons, & it was objected by plff.'s attorney that she had already been interrogated by one of the judges, whose name appeared in the commission, in the course of proceedings taken against her abroad, respecting the same shares & coupons; & it was stated that this judge had put questions to her suggesting that she had been guilty of fraud; that he had threatened her with imprisonment, & refused to hear evidence on her behalf; & it was requested that, even if the commission were allowed, she might be at liberty to exhibit cross-interrogatories to the witnesses for the defence:—*Held*: the commission might issue, the name of the judge complained of to be omitted from it, & the foreign ct. to be requested not to allow him to take part in the examination.—*VALENTIN v. HALL* (1866), 35 L. J. Q. B. 121; 14 W. R. 606.

6456. British minister abroad—Though witnesses attached to embassy.—Plff. was desirous of cross-examining some of deft.'s witnesses who were attached to the British Embassy at Teheran, in Persia, one of them being the Minister's personal attendant:—*Held*: notwithstanding the intimate relations between him & the witnesses, the Minister should be appointed special examiner.—*ONCLEY v. HILL* (1871), 22 W. R. 817.

6457. "Judges of Supreme Court of Bengal" — Powers transferred to "High Court of Justice."—In a divorce suit a commission to examine witnesses in India was issued addressed to "The Judges of the Supreme Ct. at Calcutta, or such person or persons as they or one of them may depute." The Supreme Ct. at Calcutta had been abolished in 1861, & all its powers transferred to a new ct. called "The High Ct. of Judicature at Fort William in Bengal." The witnesses were examined by a person deputed by a judge of the High Ct. at Fort William: *Held*: the evidence was receivable, for that the commission must be taken to be addressed to the judges of the highest ct. for the time being at Calcutta.—*WILSON v. WILSON* (1883), 9 P. D. 8; 49 L. T. 430; 32 W. R. 282, C. A.

SUB-SECT. 9.—CONDUCT OF EXAMINATION.

See, note, R. S. G., Ord. 37, rr. 10–23.

6458. Taking down evidence—Whether whole examination taken down.—Where a person is examined at a private examination before comrs. of bkpts., & that examination is taken down, it is

to receive & take evidence for use in the ct.—*MILLER v. WILLIAMS* (1906), 3 W. L. R. 264.—*CAN.*

1. Master—Preliminary examination in taking accounts.—The discretion vested in the master by Con. Rules 668 & 669 as to preliminary examinations in taking accounts is very wide, & where in the proper exercise of his discretion an examination of a party is directed, it will not be interfered with; but he has no power to require the attendance within the jurisdiction of deft. residing thereout,

or to issue a commission naming himself as comr. As it appeared in this case, that it would be in the interests of justice that the examination should be held before the master personally, the ct. directed a commission to issue for such examination, naming him as the comr.—*CONNOLLY v. CONNOLLY* (1906), 12 O. L. R. 364; 8 O. W. R. 74.—*CAN.*

PART VIII. SECT. 1, SUB-SECT. 9.

a. By whom questions put—Whether attorney.—The examination of wit-

nesses under a commission is of the same nature as an examination in open ct., & there is no reason why attorneys should be allowed to examine in the one case more than the other.—*FRANKISHINA CHANDRA v. BISWANATH CHANDRA* (1872), 8 B. L. R. App. 101.—*IND.*

b. Authority of examiner—To appoint stenographer.—A special examiner or officer of the ct., taking an examination in a cause or proceeding pending in ct., has no power to authorise any other person to take

Sect. 1.—Examination of witnesses: Sub-sects. & 10.]

if so much only is taken down as is conceived to be necessary to be used in evidence, provided such part has been read over to him, & he has signed it. The whole of his examination need not be taken down, to make that evidence which applies to the matter in dispute.—*MILWARD v. (1802)*, 4 Esp. 172, N. P.

Mentd. *Lord v. Green* (1846), 15 M. & W. 216.

6459. ———. ———. ———. The examiner is justified in taking down answers which are not immediately within the scope of the interrogatory, it being better that the ct. should subsequently expunge it than be altogether ignorant of it. —*THE JOHANNA EMILIE* (1851), Spinks, 12; 1 Ecc. & Ad. 317; 2 Eng. Pr. Cas. 252; 23 L. T. O. S. 322; 18 Jur. 703; 164 E. R. 183.

Annotations:— **Mentd.** *The Aldworth* (Part Cargo Ex) (1914), 31 L. L. R. 36; *The Miramichi* (Cargo Ex) (1914), 31 L. L. R. 72; *The Ophelia*, [1915] P. 129; *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

6460. ———. ———. ———. **Whether taken down in own handwriting.]** 15 & 16 Vict. c. 86, s. 32, makes it compulsory on the examiner to take down the evidence of the witness with his own hand. It is not enough that such evidence be taken down in the presence of the examiner, & the depositions signed as directed, & authenticated by him, according to s. 34. —*STOBART v. TODD* (1851), 2 Eq. Rep. 114; 23 L. J. Ch. 956; 23 L. T. O. S. 225; 18 Jur. 618; 2 W. R. 617.

6461. ———. ———. ———. **Depositions taken in the colonies, signed by, but not in the handwriting of, the examiner, were received in evidence.** —*COOPER v. MACDONALD* (1867), 36 L. J. Ch. 301.

6462. ———. ———. ———. **A witness's depositions, de bene esse, not taken down by the examiner, specially appointed, in his own handwriting, as directed by 15 & 16 Vict. c. 86, s. 32, but taken down in the presence of the other parties & certified by the examiner to have been read over to the witness, & signed by her in his presence, were, under R. S. C., 1875, Ord. 37, r. 4, ordered to be filed.** —*BOLTON v. BOLTON* (1876), 2 Ch. D. 217; 34 L. T. 123; 24 W. R. 426; 3 Char. Pr. Cas. 114.

6463. Who may be examined—Commissioner—Refusing to act.] *ANON.* (1622), Win. 4; 121 E. R. 4.

6464. ———. ———. ———. **Under special circumstances, the ct. will permit a comr. to be examined, even after the commission has been opened, the examination of witnesses proceeded with.**

down the depositions in shorthand; & a person cannot be compelled, in the face of his objection, to submit himself for examination where the examiner proposes to have the depositions so taken. —*BRADT v. BRADT* (1889), 13 P. R. 271.—**CAN.**

c. ———. To permit cross-examination—After copies of depositions given out.]—After the close of the examination of witnesses by commission under a decree to account, & after a return of the depositions, & copies of them being given out by the master, plff. permitted to cross-examine deff.'s witnesses, upon an affidavit of his agent denying that he knew the contents of the depositions, & asserting that deff. had examined his witnesses without giving any notice of their names or their places of abode. —*TYNNE v. TROCHE* (1769), Wallis by Lyne, 36.—

d. ———. To amend pleadings.]—A judge sitting as comr. de bene esse has no power to allow amendment of pleadings. —*ROBINSON v. BENSON &*

SIMPSON, [1918] W. L. D. 1. —**S. AF.**

e. ———. To require pursuer to take oath in spite of ill-health.]—The ct. refused to instruct a comr. to abstain from taking the oath of a pursuer, if she was in such a state of health as to make it inexpedient, on the ground that such an exercise of discretion was part of the ordinary duty of his office. —*KIRKPATRICK v. BELL* (1864), 2 Macph. (Ct. of Sess.) 1396; 36 Sc. Jur. 706.—**SCOT.**

f. Who may attend—Examination of defendant—Co-defendant present on behalf of plaintiff.]—Upon the examination of two deffs. before a master, he, at the request of their solrs., directed two other deffs. present on behalf of plff., who was too ill to attend, to withdraw, but they refused. The master thereupon declined to proceed with the examination:—**Held:** the

deffs. were not bound to be present on behalf of plff., if he was satisfied that this was required for the proper representation of plff.'s interest he might require such deff. to be

(GRUBB (1826), 1 Y. & J. 36; 148 E. R.

576.

6455. ———. Witness—Refusing to make affidavit.]—*Re SPRINGALL & GOLDSACK'S CONTRACT*, [1875] W. N. 225.

6466. By whom questions put—By agent of party.]—An order for a joint commission to examine witnesses in Ireland, besides the usual provision for the delivery of interrogatories cross-interrogatories by each party to the other, empowered the comrs. to put, or cause to be put, additional questions when it should appear to them to be necessary & proper, such questions to be put down in writing & returned with the answers, together with the interrogatories & answers under the commission:—**Held:** this power was not well exercised by the comrs. allowing the agent for one of the parties to put additional questions, subject to the objection raised by the other party. —*WILLIAMSON v. PAGE* (1845), 1 C. B. 464; 3 Dow. & L. 14; 14 L. J. C. P. 172; 5 L. T. O. S. 55; 135 E. R. 621.

Annotation:— **Mentd.** *Frost v. Oliver* (1853), 2 E. & B. 301.

6467. ———. Solicitor's managing clerk.]—*VIMBOS, LTD. v. MEADOWCROFT* (1901), 46 Sol. Jo. 2.

6468. Authority of examiner—To adjourn de die in diem.] By the old practice, the comr. was limited to the examination of the witnesses on the interrogatories "now," that is, at the time of taking the oath produced & left with him. He could not, therefore, examine on new interrogatories exhibited during the execution of the commission without a new commission or special order of the ct. According to the new practice, the word "now" is omitted in the comr.'s oath, & accordingly it has been held that new interrogatories may be exhibited & examined on by the comr. without any special application to the ct. There is no such thing now as joining in a commission issued, it being for the benefit of all parties, & the execution of it being continued *de die in diem* till every party has exhausted his interrogatories. —*LANCASHIRE v. LANCASHIRE* (1816), 10 Beav. 26; 16 L. J. Ch. 48; 8 L. T. O. S. 153; 10 Jur. 938; 50 E. R. 491.

6469. ———. To determine relevancy of question.]—(1) Common Law Procedure Act, 1851 (c. 125), authorising a party to a suit to discredit his own adverse witness, applies to the Cts. of Ch., & to an examination not in ct., but before an examiner, but the leave to produce counter evidence must be given, not by the examiner, but by the judge upon a special motion.

examined first, if he was to be called as a witness. —*SIVEWRIGHT v. SIVEWRIGHT* (1879), 8 P. R. 81.—**CAN.**

g. ———. Defendant—During examination of co-defendant.]—A special examiner has authority to exclude one deff. from his office during the examination of co-deff., at the request of plff. —*CULVERWELL v. BIRNEY* (1885), 10 P. R. 575.—**CAN.**

h. ———. Counsel's clerk—Witness's solicitor.]—Upon an examination before a special examiner at his chambers, the examining counsel has no right to have a clerk present to assist him, if the opposite party objects. It is within the discretion of the examiner to exclude from his chambers even the solr. for the examinat. if his presence interferes, in the examiner's opinion, with the due execution of his duty as

FC CAN.

k. ———. Counsel of party affected.]—In an action against the maker &

(2) An examiner in Chancery has no authority to determine whether questions as to the relevancy or adverse nature of the evidence of a witness, but when the question as to his being adverse is likely to be raised the examiner should take down the questions as well as the answers upon which counter evidence may be required. At the hearing this leave cannot be given, because no new witness can then be called.—*BUCKLEY v. COOKE* (1854), 1 K. & J. 29; 3 Eq. Rep. 138; 24 L. J. Ch. 24; 24 L. T. O. S. 70; 3 W. R. 33; 69 E. R. 356.

Annotations:—Generally, Mentd. Re Cutlin (1854), 18 Beav. 508; *Farmer v. Smith* (1859), 23 J. P. 230.

6470. ——— *To determine admissibility of question.*—In an examination taken *ex parte*, the examiner ought not to refuse to allow questions to be put, unless upon matters which would clearly & palpably not be evidence.—*SURR v. WALMSLEY* (1866), 1 L. R. 2 Eq. 439; 14 L. T. 621; 14 W. R. 888.

6471. ——— *By Foreign Tribunals* Evidence Act, 1856 (c. 113), an examination upon oath of a witness in a foreign action may be ordered, & a judge may give all such directions as to matters connected therewith as may appear reasonable, & just, & the order may be enforced in like manner as an order of the same kind in an English action:—*Held*: the person directed to take such examination ought not to limit the questions by the rules as to admissibility of evidence in this country, but he may exercise his discretion in allowing cross-examination of friendly witnesses, or questions which are totally irrelevant or useful only for illegitimate purposes.—*DESILLA v. FELS & Co.* (1879), 40 L. T. 423, D. C.

Annotation:—Expld. Eccles v. Louisville & Nashville Railroad, [1912] 1 K. B. 135.

6472. ——— *To allow witness to be treated as* ——— *COOKE*, No. 6169, *ante*.

6473. ——— *(1) Where a witness under examination before a special examiner has a document exhibited to him by the solicitor in the cause, even although that is the document touching which the examination is taking place, such act, although a highly improper one, is not a contempt of ct.*

(2) Under 15 & 16 Vict. c. 86, s. 31, the ct. has no power to delegate to an examiner, whether general or special, the discretion to treat witnesses on examination in chief as adverse, & subject them to cross-examination. A special examiner has full power to regulate the examination in regard to allowing a shorthand writer to be present, or in admitting the public, as he pleases. *WRIGHT v. WILKIN* (1858), 4 Jur. N. S. 804; 6 W. R. 613.

Annotation:—As to (2) Refd. Ohlsen v. Terrero (1874), 10 Ch. App. 127.

6474. ——— *There is no rule that a witness on his examination in chief before the*

examiner may not be treated as a hostile witness.—*OHLSSEN v. TERRERO* (1874), 10 Ch. App. 127; 44 L. J. Ch. 155; 31 L. T. 811; 23 W. R. 195, L. C. & L. J.J.

Annotation:—Refd. Ex p. Bottomley, (1909) 2 K. B. 14.

6475. ——— *—*—*—*—*DESILLA v. FELS & Co.*, No. 6471, *ante*.

6476. ——— *To determine order of witnesses.*—*STUART v. BALKIS CO.*, No. 6502, *post*.

6477. Whether proceedings private.—*HERBERT (LADY) v. HERBERT (LORD)* (1819), 2 Hag. Con. 263; 3 Phillim. 34, 58; 161 E. R. 737, 1250, 1257.

Annotations:—Mentd. Harrison v. Sparrow (1842), 3 Curt. 1; *R. v. Millis* (1844), 10 Cl. & Fin. 534; *Fenton v. Livingstone*, *Livingstone v. Livingstone* (1859), 5 Jur. N. S. 1183; *Beamish v. Beamish* (1861), 9 H. L. Cas. 274; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Ogden v. Ogden*, [1908] P. 46.

6478. ——— *—*—*—*—*WRIGHT v. WILKIN*, No. 6473, *ante*.

6479. Whether written statement admitted.—On a commission to examine witnesses, a witness, after giving oral evidence, put in a document which he called a "legalised copy" of a deposition which he stated himself to have made eighteen months earlier before the British consul at the foreign port near which the loss occurred, & which document purported to contain evidence of his opinion as to the circumstances of the vessel at the time of the loss, & the witness stated that he now confirmed such deposition & that any discrepancy between the said & his present testimony must be attributed to the lapse of time:—*Held*: the document was not admissible in evidence.—*ALCOCK v. ROYAL EXCHANGE ASSURANCE CORPN.* (1849), 13 Q. B. 202; 18 L. J. Q. B. 121; 12 L. T. O. S. 473; 13 Jur. 415; 116 E. R. 1275.

6480. Who may attend Shorthand writer.—*WRIGHT v. WILKIN*, No. 6173, *ante*.

In private examination in bankruptcy.—*See BANKRUPTCY*, Vol. V., pp. 618-621, Nos. 5552-5591.

In examinations under Companies Acts.—*See COMPANIES*, Vol. X., pp. 897, 898, Nos. 6116-6131.

SUB-SECT. 10. PRODUCTION OF DOCUMENTS OR SUBJECT-MATTER OF ACTION AT EXAMINATION.

See, ante, R. S. C., Ord. 37, r. 5, Ord. 50, r. 3.

6481. Documents referred to by witness—Become part of depositions.—If a witness examined upon interrogatories refers to a writing itself not evidence, as containing a statement of the facts to which he is interrogated, this writing may be read as part of his deposition.—*FALCONER v. HANSON* (1808), 1 Camp. 171, N. P.

6482. Production to witness Documents in hands of other party.—On an application by deft.

(1880), 8 P. R. 351. **CAN.**

o. Examination on affidavit confined to matters alleged therein.—A party or witness who has made an affidavit in a cause is only liable to be examined before a special examiner as to the matters therein alleged, when a motion on which it may be used is pending.—*CLINTON v. VARGO* (1876), 7 P. R. 61. **CAN.**

PART VIII. SECT. 1, SUB-SECT. 10.

p. Production to witness—Books & documents produced in action.—Books & documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission. But documents produced in another action, which is *sub judice*, will not be taken from the office for

indorser of a promissory note judgment went by default against the indorser, but the maker appeared & upon the consent of pliffs. obtained an order for the examination before a special examiner of the indorser & his book-keeper before the delivery of defence:—*Held*: the interests of the indorser as a party might be affected by the examination, & he was entitled to have counsel present upon the examination to protect his interests.—*DOMINION BANK v. BELL* (1890), 13 P. R. 471. **CAN.**

1. — Discretion of examiner.—A special examiner has a discretion to admit or exclude from his chambers persons who desire to be present upon an examination; & where deft. attended for examination as a judgment debtor, but refused to answer questions unless a former partner of his, who was present

to instruct counsel for the judgment creditors, was excluded:—*Held*: the examiner rightly exercised his discretion in refusing to exclude & deft. was ordered to attend again at his own expense. *MEMPHIS BANK v. CANADA v. KETTER* (1895), 16 P. R. 366. **CAN.**

m. Mode of examination Interrogatories.—All examinations under foreign commission must be by interrogatories, unless otherwise arranged by consent.—*GORDON v. ELLIOT* (1869), 2 Ch. Ch. 471. **CAN.**

n. — By viva voce examination—Intricate questions of fact.—Where a commission was issued to England to take evidence in a case involving many intricate questions of fact, the evidence was ordered to be taken in *viva voce* questions, instead of upon interrogatories.—*WATSON v. McDONALD*

answers returned to the Ct. of K. B. must be in English.—*CLAY v. STEPHENSON* (1837), 7 Ad. & El. 185; 2 Nev. & P. K. B. 189; Will. Woll. & Dav. 537; 6 L. J. K. B. 211; 1 Jur. 448; 112 E. R. 441. *Annotation*.—*Reid. Lumley v. Gye* (1854), 3 E. & B. 114.

6492. Interpretation—At what stage done.]—Under a commission for the examination of French witnesses who could not speak English, the depositions are not to be taken in French, but must be turned by the interpreter into English, & be so taken down & returned.—*BELMORE (LORD) v. ANDERSON* (1792), 4 Bro. C. C. 90; 2 Cox, Eq. Cas. 288; 29 E. R. 793.

6493. ———.]—A commission for the examination of witnesses in a foreign country, directed the comrs. to examine the witnesses on interrogatories, & to reduce the examinations into writing in the English language, & send the same to England, & to swear an interpreter to interpret the depositions of such witnesses as did not understand the English language. It appeared by the return that the depositions, in the first instance, were reduced into writing in the foreign language, & translated by the interpreter into the English language within an interval of six weeks:—*Held*: the commission was well executed by the comrs. returning the depositions so translated into the English language.—*ATKINS v. PALMER* (1821), 4 B. & Ald. 377; 106 E. R. 975.

6494. — What is sufficient verification.]—When a commission issues to take the answer of a foreigner a power to take it through an interpreter when necessary is virtually implied. If the comrs. certify that deft. was duly sworn to such answers in presence of the comrs., & it appears by the affidavit of a comr. that the interpreter was duly sworn, & that he believes deft. understood the contents of the answer, it is sufficiently verified.—*LOUGHMAN v. NOVAES* (1818), 6 Price, 108; 146 E. R. 756.

6495. ———.]—(1) Where a commission to examine witnesses abroad issues under Evidence on Commission Act, 1831 (c. 22), s. 4, the names of the comrs. & the place at which it is to be executed must be specified in the order authorising the commission, or in some subsequent order.

(2) A commission authorised the swearing of an interpreter on the examination of French witnesses. The return showed that the interpreter had been sworn, but did not state that he interpreted the evidence of any of the witnesses:—*Held*: unnecessary.

(3) The commission directed the witnesses to be examined apart:—*Qu.*: whether the return must expressly state they were so examined.—*GREVILLE v. STULZ* (1847), 11 Q. B. 997; 2 New Pract. Cas. 399; 17 L. J. Q. B. 14; 10 L. T. O. S. 204; 12 Jur. 49; 116 E. R. 745.

Annotations.—*As to* (1) *Reid. Howkins v. Baldwin* (1851), 16 Q. B. 375; *Bulham v. Mears* (1858), 6 W. R. 597; *Hodges v. Cobb* (1867), 36 L. J. Q. B. 265.

6496. — In examination by examiners of court.]—*BUTE (MARQUESS) v. JAMES*, No. 6149, *ante*.

SUB-SECT. 12.—POSITION OF WITNESSES.

6497. May be examined subsequently *vivâ voce*.]—It is not an objection to a witness tendered in proof of an exhibit *vivâ voce*, that he has been previously examined as a witness under a commission.—*NEEP v. ABBOT* (1838), Coop. Pr. Cas. 191; 2 Jur. 870; 47 E. R. 460.

6498. ———.]—A reference was made to the master to ascertain certain facts. Under this reference a witness was examined upon written

interrogatories, & his depositions were published. The witness was afterwards examined *vivâ voce*. The evidence of the witness given *vivâ voce* was objected to before the master, but not on the ground of his having been examined before on interrogatories. The master received the evidence. Exceptions were taken to the report on this ground. On the hearing of the exceptions:—*Held*: the objection to the *vivâ voce* evidence on the ground of the witness having been examined before could not be raised.—*ANDREW v. ANDREW* (1819), 18 L. J. Ch. 222; 13 L. T. O. S. 6; 13 Jur. 400.

6499. Refusal to sign deposition.]—Where a witness refuses to sign his depositions before a commission, & absconds, & violently refuses to complete his examination, he will be ordered to attend before the examiner at his own expense, & put in his examination.—*TOPHAM v. BUXTON* (1816), 6 L. T. O. S. 479.

6500. Refusal to answer.]—*CUTLER v. WRIGHT*, [1890] W. N. 28.

— *In examinations under Companies Acts.*—*See COMPANIES*, Vol. X., pp. 895, 896, Nos. 6102–6111.

6501. Refusal to be sworn—Without subpoena.]—Deft. was summoned to chambers for cross-examination after a decree in the suit. She was not cross-examined in chambers, but was served with notice to attend before the examiner, to be cross-examined by him. When before the examiner, she refused to be sworn, on the ground that she was entitled to a *subpoena ad testificandum*, & that no special direction had been given by the judge for her examination:—*Held*: she was entitled to a subpoena, but no special order of the ct. was necessary to transfer her examination from chambers to the examiner.—*STEBBING v. ATLEE* (1856), 26 L. J. Ch. 265; 28 L. T. O. S. 172; 2 Jur. N. S. 1161; 5 W. R. 100.

— *In examination under Companies Acts.*—*See COMPANIES*, Vol. X., p. 895, No. 6101.

6502. Refusal to attend—Without subpoena.]—(1) A witness required to attend before an examiner under R. S. C., Ord. 37, r. 20, is not bound to attend unless served with a subpoena.

(2) There is no general rule as to the order of priority in which witnesses are to be examined before an examiner; but the examiner may exercise his discretion as to the most convenient order in which the examination of the witnesses may be taken.

Where an examiner's certificate has not been taken up, its effect will not be allowed to be stated in ct.—*STUART v. BALKIS CO.* (1881), 53 L. J. Ch. 791; 50 L. T. 479; 32 W. R. 676.

Annotations.—*As to* (1) *Reid. Re Baker, Connell v. Baker* (1885), 54 L. J. Ch. 844, n.; *Townend v. Townend* (1905), 93 L. T. 680.

6503. ——— Officer of court.]—*Re GENERAL FINANCIAL BANK*, [1888] W. N. 47.

— *In examinations under Companies Acts.*—*See COMPANIES*, Vol. X., p. 895, Nos. 6091–6100.

Attendance of witnesses on subpoena generally.]—*See Part V., Sect. 3, ante*.

Examination of witnesses under Companies Acts generally.]—*See COMPANIES*, Vol. X., pp. 891–900, Nos. 6066–6149.

SUB-SECT. 13.—CORRECTION OF EVIDENCE.

6504. Mistake of witness—Whether further examination allowed.]—*RANDALL v. RICHARDS* (1663), Nels. 92; 1 Cas. in Ch. 25; Freem. Ch. 178; 1 Eq. Cas. Abr. 102; 21 E. R. 798; *sub nom. ANON.*, 2 Eq. Cas. Abr. 417.

Sect. 1.—Examination of witnesses: Sub-sect. 13.

Sect. 2: Sub-sect. 1, A., B., C. & D.]

6505. ————.]—Liberty was given, after publication had passed, to re-examine a witness to correct a mistake in his depositions as to the numbers of certain bank notes.—*ANON.* (1836), 5 L. J. Ch. 299.

6506. ————.]—Upon a motion by plff. to suppress a deposition, on the ground of a mistake of the witness in making it:—*Held*: plff. would be given leave, without prejudice to the deposition, to examine the witness again upon the same interrogatory, deft. having liberty to cross-examine the witness at large.—*EDWARDS v. BROWN* (1815), 5 L. T. O. S. 70; 9 Jur. 421.

6507. Witness admitting perjury—Affidavit by witness as to perjury admitted.]—*THE CENTURION* (1823), 1 Hag. Adm. 162, n.; 166 E. R. 58.

6508. Omission by examiner—Leave to re-examine as to part omitted.]—Liberty was given to plff. to re-examine one of his witnesses to part of an interrogatory as to which the examiner had omitted to take down the deposition.—*BRIDGE v. BRIDGE* (1833), 6 Sim. 352; 58 E. R. 626.

6509. Omission by witness—Leave to re-examine refused.]—It is in the discretion of the ct. to re-open a commission, so as to enable a witness, who has been already examined, to be examined again; but it is a discretion to be sparingly exercised.

Where a witness had been examined, re-examined, & cross-examined before a comr., the ct. refused to re-open the commission to enable him to supply important facts omitted in his evidence, although he deposed that it was in consequence of resp.'s personal observations & interruptions during the examination that he forgot to mention them at that time.

If the comr. had reported that resp. had so conducted himself during the examination as to disturb the mind of the witness, the ct. would have acceded to the application. —*BEVAN v. McMAHON & BEVAN* (1859), 2 Sw. & Tr. 55; 28 L. J. P. & M. 40; 161 E. R. 912.

6510. Mistake in transcript of shorthand note Returned to examiner for amendment.] If after filing in the Admty. Registry the transcript of the shorthand notes of the evidence of a witness taken before an examiner of the ct. a mistake is discovered to have been made by the shorthand writer in transcribing his notes, application should be made by the party aggrieved to the ct. for an order directing that the transcript be taken off the file & returned to the examiner for amendment, & the costs thereby incurred will be costs in the cause.—*THE KNUTSFORD*, [1891] P. 219; 61 L. T. 352; 39 W. R. 559; 7 Asp. M. L. C. 33.

SECT. 2. HOW EVIDENCE OBTAINED.

SUB-SECT. 1. — COMMISSION.

A. The Application.

Whether allowed in criminal cases.]—*See CRIMINAL LAW*, Vol. XIV., p. 440, Nos. 4661-4668.

6511. What must be shown Names of

PART VIII. SECT. 2, SUB-SECT. 1.—A.

a. By motion on master's certificate—Not on affidavit.]—A commission to examine a witness abroad to use his evidence in a pending reference to a master, should be moved for on the master's certificate, & not on an affidavit as to the facts.—*STREPHENS v. MEANS* (circa 1863), 1 Ch. Ch. 200.—**CAN.**

d. By married woman—Necessity

for next friend—Husband co-defendant.]

—A married woman deft. applied for a commission. Her husband, who was also a deft., appeared & supported the motion:—*Held*: a next friend was necessary for the purposes of the application, but the order was made as upon the application of both husband & wife.—*ONTARIO BANK v. SMITH* (1890), 6 Man. L. R. 600.—**CAN.**

e. Necessity for consent—Action

by Crown.]—It is not necessary, on applying for a commission to examine witnesses out of the jurisdiction, to state the names of the examiners.—*FEARON v. WHITE* (1837), 5 Dowl. 713; Will. Woll. & Dav. 379.

6512. ———— Points of examination.]—*Qu.*: whether, upon an application to the master for his certificate of the necessity of a commission to examine witnesses, it is necessary to produce before him the interrogatories upon which it is intended to examine the witnesses. The practice in the masters' offices in this respect differs.

Plffs. & defts. applied to the master for a certificate for a commission to examine witnesses abroad, & they produced to him the proposed interrogatories. He certified, in both cases, that a commission was necessary to examine witnesses under the said interrogatories, & orders were made accordingly. The parties afterwards, by consent, obtained an order for a single commission, directed to a sole comr. Plffs. examined on fresh interrogatories:—*Held*: (1) under the first orders the proceeding of plffs. was irregular; (2) it was equally so under the consent order; (3) the ct., however, refused to suppress the depositions, but made plffs. pay the costs of the application, & gave leave to defts. to apply to be put on a footing of equality with plffs.—*NEILON (EARL) v. BRIDPORT (LORD)* (1813), 7 Beav. 195; 49 E. R. 1039.

6513. ———— Place where commission to be executed.]—*BAUER v. MAULE*, No. 6372, *ante*.

What must be proved.]—*See Sect. 1, sub-sect. 6, B., ante.*

B. Notice of Commission.

6514. Notice of execution of commission—To whom given—In interpleader.]—Notice of the execution of a commission to examine witnesses, was given to plff., in an interpleading bill, & not to deft.:—*Held*: this was good.—*DUNCANNON v. CAMPBELL* (1785), 2 Dick. 618; 21 E. R. 123, L. C.

6515. ————.]—In the course of the proceedings on a bill of interpleader a commission issued on the part of one deft. for the examination of witnesses of which notice was given to plff. but not to the other deft.:—*Held*: this practice, though it might be inconvenient, was not irregular. —*BRYMER v. BUCHANAN* (1788), 1 Cox, Eq. Cas. 425; 29 E. R. 1232, L. C.

6516. ———— To opposite party.]—General Ord., Feb. 5, 1861, r. 22, does not require forty-eight hours' notice of intention to examine to be given to the witness, but to the "opposite party" in the cause or matter. The witness is entitled to reasonable notice, having regard to the circumstances of the case.—*Re NORTH WHEAT EXMOUTH MINING CO.* (1862), 31 Beav. 628; 1 New Rep. 42; 7 L. T. 306; 8 Jur. N. S. 1168; 11 W. R. 58; 51 E. R. 1283.

6517. ———— Execution abroad.]—Ord., Feb. 5, 1861, r. 22, requiring a party summoning a witness to give to the opposite party "forty-eight hours' notice at least of his intention to examine or cross-examine such witness," will not be applied strictly in the case of an examina-

by Crown.]—On an application by deft. in a case wherein the Crown was plff. for the issue of a commission to examine material witnesses whose evidence could not otherwise, without considerable difficulties, be procured:—*Held*: the Crown had of right a discretion in the matter, & without the consent of the Crown, the ct. could not exercise its jurisdiction.—*A-G. v. COOKE* (1856), 9 Ir. Jur. 51.—**IR.**

tion taken abroad before examiners specially appointed.

Semble: an objection to a deposition on the ground of irregularity should be taken at the hearing when the deposition is tendered in evidence, & not by motion to take it off the file.—*DE BRITO v. HILLEL* (1873), L. R. 15 Eq. 213; 42 L. J. Ch. 307; 28 L. T. 59; 21 W. R. 379.

6518. ——— *To witness.*—*Re NORTH WHEAL EXMOUTH MINING CO.*, No. 6516, *ante*.

6519. ——— *Length of notice.*—Where an answer is to be taken by commission in which *pltf.* joins *pltf.* is entitled to six days' notice of the time & place of taking the answer to be given to the commission named by him & such notice should be a six days' notice & signed by two of the other commissioners.—*POUND v. WILDGOOSE* (1820), 8 Price, 102; 146 E. R. 1144.

Annotation:—*Distd. Hall v. Connell* (1839), 3 Y. & C. Ex. 528.

6520. ——— *When not misleading.*—Commission to take the answer of two defts., provided notice of the execution of the commission be given to J., who was *pltf.*'s attorney. The comrs. gave notice to J. of their intention to execute a commission to examine witnesses, & thereupon executed the commission as to one deft.:—*Held*: the execution was good, inasmuch as J. could not be deceived by the notice.

Under a commission to take the answer of two defts., the comrs. may take the answer of one deft. only.—*HALL v. CONNELL* (1839), 3 Y. & C. Ex. 528; 160 E. R. 811.

6521. ——— *Where no stipulation as to notice.*—On May 12, 1858, a commission issued, on *pltf.*'s application, to take evidence at New York. On May 28 *pltf.*'s attorney wrote to deft.'s attorney to inform him that he had sent out the commission. In reply, deft.'s attorney complained he had not had time to instruct his agent at New York. On June 28 the commission was returned. On the trial, at the sittings after Hilary Term, 1859, deft. objected to the reception of the evidence taken under the commission, on the ground that he had received no notice of the time of taking the evidence at New York:—*Held*: the evidence was properly received, & unless the commission contained a special stipulation as to notice, none was required.—*WHITE v. HALLET* (1859), 33 L. T. O. S. 94; 7 W. R. 408.

C. Form of Order.

See, now, R. S. C., Ord. 37, r. 6, Appendix K., Forms 36, 37.

6522. General rule—Order moulded to suit circumstances of case.—Upon an application for a commission to examine witnesses abroad, the *ct.* will so mould the rule as to meet the peculiar circumstances of the case.—*MILLS v. WELLBANK* (1841), 3 Scott, N. R. 177.

6523. What must be included—Names of witnesses.—*REYNARD v. COPE* (1831), 1 Tyr. 505, n.; 9 L. J. O. S. K. B. 326.

6524. ——— *Or means of identification.*—*Re LABAN* (1854), 24 L. T. O. S. 110.

6525. ——— *Place of examination.*—*REYNARD v. COPE* (1831), 1 Tyr. 505, n.; 9 L. J. O. S. K. B. 326.

6528. ——— ————*GREVILLE v. STULZ*, No. 6495, *ante*.

6527. ——— ————*HOWKINS v. BALDWIN*, No. 6741, *post*.

6528. ——— ————*An order for a commission to examine witnesses upon interrogatories in the United States of America directed that the interrogatories should be exhibited to the witnesses in the city of S. in the state of N.Y. & ordered that the commission should be returned in England on or before Mar. 1, 1848:—Held*: the order was sufficiently specific as to the place where & the time when the commission was to be executed.—*BULHAM v. MEARS* (1858), 31 L. T. O. S. 186; 6 W. R. 597.

6529. ——— *Time & manner of examination.*—*REYNARD v. COPE* (1831), 1 Tyr. 505, n.; 9 L. J. O. S. K. B. 326.

6530. ——— ————*BULHAM v. MEARS*, No. 6528, *ante*.

6531. ——— *Names of commissioners.*—(1) Under Evidence on Commission Act, 1831 (c. 22), s. 4, the order of a judge for issuing a commission to examine witnesses in places out of the jurisdiction of the *ct.* need not contain the names of the comrs.

(2) The names of such comrs. as the parties agree upon may be inserted in the commission.

(3) The commission need not be tested in term.—*NICOL v. ALISON* (1848), 11 Q. B. 1006; 3 New Pract. Cas. 14; 10 L. T. O. S. 481; 116 E. R. 749; *sub nom. NICOL v. ALISON*, 17 L. J. Q. B. 355; 12 Jur. 598.

6532. Variance between order & commission—Clause in order directory.—A judge's order, under Evidence on Commission Act, 1831 (c. 22), s. 4, ordering a commission to issue for the examination of witnesses abroad, contained a clause that "the depositions of every witness be signed by him & the *comr.*" The writ of commission contained no such clause. The commission was duly executed, & the depositions returned without the signature of the witnesses:—*Held*: the clause in the order was merely directory, & a non-compliance with it did not render the depositions inadmissible in evidence under sect. 10 against deft., who had refused to join in the commission. *HODGES v. COBB* (1867), L. R. 2 Q. B. 652; 8 B. & S. 583; 39 L. J. Q. B. 265; 16 L. T. 702; 15 W. R. 1038.

D. Form of Commission.

See, now, R. S. C., Ord. 37, r. 6, Appendix J., Form 13.

6533. Ordinary form followed—Except in special circumstances.—The *ct.* will not, without special grounds, depart from the ordinary form of a commission for the examination of witnesses under Evidence on Commission Act, 1831 (c. 22).—

PART VIII. SECT. 2, SUB-SECT. 1.—B.

6518 i. Notice of execution of commission—To whom given—To witness—Defendant.—An appointment was made *ex p.* by the master at O., for the examination of deft. at his office in O. A copy of the appointment & of a subpoena was served on deft. who resided in H., Que., & a copy of the appointment was served on deft.'s solicitor.—*Held*: the proceedings were regular.—*BANK OF BRITISH NORTH AMERICA v. EDDY* (1882), 9 P. R. 396.—CAN.

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1. ——— *Sufficiency.*—Service on deft.'s attorney at his home at 9.30 p.m. on Saturday of an order & appointment to examine deft. at 2 p.m. on the following Tuesday, is irregular, the notice not being sufficient.—*SENN v. HEWITT* (1879), 8 P. R. 70.—CAN.

g. ——— ————*It is desirable that the opposite party should have reasonable notice of an application for an order to examine witnesses in Ireland, under a commission issued by the judge ordinary of the Ct. of Divorce & Matrimonial Causes in England, &*

also be informed of the time & place fixed for the holding of such examinations, & of the names of the witnesses to be examined.—*PLACK v. PLACK* (1860), 12 Ir. Jur. 104.—IR.

PART VIII. SECT. 2, SUB-SECT. 1.—C.
h. Settled by judge—Appeal.—*GRAHAM v. BIGGLOW* (1911), 9 E. L. R. 285.—CAN.

PART VIII. SECT. 2, SUB-SECT. 1.—D.
k. Variance between order & commission.—Where an order was made

Q Q

Sect. 2.—How evidence obtained: Sub-sect. 1, D., E., F., G. & H.]

FOLLETT v. DELANY (1840), 7 C. B. 775; 137 E. R. 307.

6534. Form in cross-suits.]—Where the same issues are raised in cross-suits, made necessary by the imperfect powers granted by the Legislature to the ct., the ct. will, as a general rule, stay one, & that without reference to their relative positions in the cause list. In such a case, if a commission to examine witnesses is granted, it will be drawn in such a form as that the evidence shall be available in the stayed suit, should that come to a hearing. —OSBORNE v. OSBORNE, OSBORNE v. OSBORNE & MARTELL (1863), 3 Sw. & Tr. 327; 33 L. J. P. M. & A. 38; 9 L. T. 156; 10 Jur. N. S. 80.

6535. What must be inserted — Commission to judge of Indian Supreme Court—Pleadings at length.] A commission to examine witnesses, awarded to the judges of one of the Supreme Cts. in India, under 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length. —MURRAY v. LAW-FORD (1831), 7 Sim. 139; 58 E. R. 780.

6536. — Direction that commissioners be sworn — Omitted when directed to foreign judge.] — The ct. will grant a commission to examine witnesses, without the clause requiring the comrs. to take an oath, if, from the circumstances, it appears that the commission cannot be made available unless that clause be omitted. Thus, where a commission to examine witnesses had issued, directed to certain individuals at Hamburg, who were unable to enforce the attendance of some material witnesses; & it was stated, on affidavit, that if a commission was directed to the judges of the Ct. of Commerce there, without such a clause, they, in all probability, would act, & would exercise their power to compel the witnesses to attend & give evidence upon oath: — *Held*: the commission would be granted without the clause requiring the comrs. to be sworn. —CLAY v. STEPHENSON (1835), 3 Ad. & El. 807; 1 Har. & W. 409; 5 Nev. & M. K. B. 318; 4 L. J. K. B. 212; 111 E. R. 620.

Annotations:—Expld. R. v. Douglas (1846), 13 Q. B. 42. *Reid*, Fischer v. Szatary (1858), 31 L. T. O. S. 130.

6537. —] — A commission to examine witnesses, directed to the judges of a foreign ct., may be issued without the usual clause requiring the comrs. to be sworn. —PONS-FORD v. O'CONNOR (1830), 5 M. & W. 673; 7 Dowl. 866; 9 L. J. Ex. 90; 151 E. R. 286.

6538. —] — Where a commission had issued to a foreign country, requiring the comrs. to be sworn & to administer an oath to the witnesses, & depositions had been taken by the comrs. & returned, but no oath had been taken by the foreign country that burgomasters alone should administer oaths, & that no voluntary oaths should be taken: — *Held*: a new commission must issue to burgomasters to examine the witnesses, without requiring the burgomasters to be sworn. —BOELEN v. MELLADEW (1851), 10 C. B. 808; 20 L. J. C. P. 172; 138 E. R. 355.

Annotation:—Mentd. Lunley v. Gye (1854), 3 E. & B. 114.

6539. — Single commissioner—Power to self-administer oath.]—When a single comr. is

for a commission to examine M. *and* other witnesses on interrogatories: — *Held*: the commission could not issue to examine M. only, without amending the order. —SMITH v. BAR-COCK (1881), 9 P. R. 175. —CAN.

1. Amendment of—Additional witnesses.]—Rule for commission amended by adding permission to examine, in

addition to the witness specified in original rule, any others. —SALTER v. RUGHER (1854), James, 218. —CAN.

m. Mistake in title of cause—Effect of.]—A mistake in the titling of the cause in the commission, deft. having been styled William instead of Samuel, is fatal to it, & the taking of the evidence under it is a void pro-

appointed to take evidence abroad, the commission should authorise him to administer the oath to himself. —WILSON v. DE COULON (1883), 22 Ch. D. 841; 53 L. J. Ch. 248; 48 L. T. 514; 31 W. R. 839.

6540. — Names of witnesses—All names need not be inserted.]—A commission to examine witnesses may be issued to examine other persons who may be found, as well as those who are named in moving for the commission. — *v.* — (1839), 3 Jur. 385.

6541. — Names of commissioners.]—NICOL v. ALISON, No. 6531, *ante*.

6542. —]—A commission for the examination of witnesses abroad under Evidence on Commission Act, 1831 (c. 22), s. 4, issued under a judge's order neither named the comrs. nor the time, place, or manner of examination: — *Held*: a verdict would be set aside, which had been influenced by the evidence so obtained.

Qu.: whether a party who does not join in the commission, is entitled to notice of the several proceedings under it or to cross-examine the witness. —STEINKELLER v. NEWTON (1840), 6 Man. & G. 30, n.; 8 Dowl. 579; 1 Scott, N. R. 148; 9 L. J. C. P. 262; 131 E. R. 796; *previous proceedings* (1838), 9 C. & P. 313, N. P.

Annotations:—Mentd. McCombie v. Anton (1843), 6 Man. & G. 27; Robinson v. Davies (1879), 28 W. R. 255.

6543. — Place of examination.]—STEINKELLER v. NEWTON No. 6542, *ante*.

6544. —] — Where a commission issued to examine witnesses residing at Macao, & elsewhere, in China, on interrogatories, the comrs. were required to summon the witnesses before them at Macao, & then & there to examine them: — *Held*: interrogatories taken at Canton were not admissible. —ENTWISTLE v. DENT (1847), 8 L. T. O. S. 495.

Annotation:—Reid. Greville v. Stulz (1847), 12 Jur. 49.

Variance between order & commission.]—See No. 6532, *ante*.

B. To What Places issued.

See, now, R. S. C., Ord. 37, r. 5.

6545. Ireland.]—An attachment being taken out against deft. in Ireland, since he could not be examined in person to the contempt, a commission was granted into Ireland to examine him. —ANON. (1729), Mos. 85; 25 E. R. 286, L. C.

6546. India—East India Company Act, 1773 (c. 63).]—Commission for examination of witnesses was directed to B. in India, notwithstanding above Act, sect. 44. —BASKETT v. TOOSEY (1822), 6 Madd. 261; 56 E. R. 1090.

6547. Evidence on Commission Act, 1831 (c. 22) — Places outside the dominions.]—Under above Act, sect. 4, the power of the cts. at Westminster to issue commissions for the examination of witnesses abroad, is not confined to cases where the witnesses reside within the King's dominions. —

DUCKETT v. WILLIAMS (1831), 1 Cr. & J. 510; 1 Tyr. 502; 9 L. J. O. S. Ex. 177; 148 E. R. 1525. *Annotation:—Reid.* Castelli v. Groom (1852), 18 Q. B. 490.

6548. —] — A commission to examine a witness on interrogatories under above Act, sect. 1, may issue to a place not within the

ceeding. —GRAHAM v. STEWART (1865), 15 C. P. 169. —CAN.

PART VIII. SECT. 2, SUB-SECT. 1.—E. n. Party out of jurisdiction—Most convenient place within jurisdiction.]—A party out of the jurisdiction will be ordered to be examined at that place within the jurisdiction where, in

dominions of Her Majesty.—**KENDALL v. UNITT** (1839), 3 Jur. 652.

6549. —[—]—The ct. has power under above Act, sect. 1, to issue a commission to examine witnesses in China, & a *mandamus* for that purpose is unnecessary.—**ANON.** (1840), 4 Jur. 609.

6550. —**British Colony.**—[—]—Under above Act the ct. or a judge has power to issue a commission to a British colony for the examination of witnesses on interrogatories.—**SOLAMAN v. COHEN** (1851), 15 Jur. 302.

6551. Hostile country.—[—]—A commission to take an answer of a person resident in a foreign country at war with us, must be executed in that very country; a commission to examine witnesses at the nearest neutral port.—**v. ROMNEY** (1746), Amb. 62; 27 E. R. 35.

6552. —[—]—Commission was issued to examine witnesses in an enemy's country.—**CAHILL v. SHEPHERD** (1806), 12 Ves. 335; 33 E. R. 127, L. C.

6553. —[—]—A commission will not be granted for the examination of witnesses in a hostile country.—**BARRICK v. BUBA** (1855), 16 C. B. 492; 3 C. L. R. 921; 25 L. T. O. S. 104; 1 Jur. N. S. 1020; 139 E. R. 851; *sub nom.* **BARWICK v. BUBER**, 19 J. P. 391; 3 W. R. 524; *subsequent proceedings, sub nom.* **BARRICK v. BUBA** (1857), 2 C. B. N. S. 563.

6554. —[—]—**OPPENHEIMER v. ROBINSON SOUTH AFRICAN BANKING CO., LTD.** (1900), *Times*, Jan. 31, May, 31.

F. Time allowed for Commission.

6555. Commission executed on day returnable.—[—]—Commission was executed after four in the afternoon of the day on which it was returnable:—*Held*: it was regular.—**MORETON v. MORETON** (1710), Dick. 21; 21 E. R. 174, L. C.

6556. Time not limited by order.—[—]—Upon a motion for a commission to take deft.'s examination the time is left to the master & not limited by the order.—**HAIRBY v. EMMET** (1800), 5 Ves. 683; 31 E. R. 803, L. C.

6557. Reasonable time allowed.—[—]—The ct. will not postpone the trial of an information on the application of deft., on the ground of his commission to examine witnesses abroad not having been returned, if they think that there have been sufficient time for its return.

It should be stated in the affidavit, in support of such an application, that the return is expected, & when.—**A.-G. v. LARAGOITY** (1816), 3 Price, 221; 146 E. R. 242; *previous proceedings, sub nom.* **LARAGOITY v. A.-G.**, 2 Price, 172.

6558. —[—]—Commissions for the examination of witnesses abroad, returnable without delay, need not be returned within the same period as home commissions, viz. before the end of the term next after they are issued; but a reasonable time is allowed according to circumstances.—**WAKE v. FRANKLIN** (1822), 1 Sim. & St. 95; 57 E. R. 38.

6559. —[—]—**REYNARD v. COPE** (1831), 1 Tyr. 505, n.; 9 L. J. O. S. K. B. 326.

6560. Whether time extended.—[—]—The ct. cannot extend the time mentioned in a commission for

the examination of witnesses.—**HALL v. DE TASTET** (1822), 6 Madd. 269; 56 E. R. 1093.

6561. —[—]—Issue being joined in a cause in Apr. 1843, a commission to take evidence was not sued out by defts. till 1845, in the month of Oct. of which year publication was enlarged to Hilary Term then next, then to Mar., then to the beginning of this present Trinity Term, & it was now sought to enlarge it to the end of the term. The evidence was being taken in Mexico by the agents of deft., & it was stated on affidavit to be difficult to obtain it, as well from the nature of the evidence itself as the course of proceeding usual in Mexico; & on the oath of defts. that there "was a reasonably near prospect" of the commission being returned by the end of the Term:—*Held*: the motion would be granted.—**KINDER v. ASHBURTON (LORD)** (1816), 7 L. T. O. S. 222.

6562. —[—]—The ct. will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad, under Fines & Recoveries Act, 1833 (c. 74), where, by reason of the remoteness of the residences of the parties, the time allowed has proved too short.—**Re BOOTH** (1858), 5 C. B. N. S. 510; 28 L. J. O. P. 138; 32 L. T. O. S. 107; 4 Jur. N. S. 1301; 141 E. R. 218.

Annotation:—**Expld.** **Re Carter** (1861), 9 C. B. N. S. 791.

6563. —[—]—**PROCTER v. TYLER** (1887), 3 T. L. R. 282, D. C.

G. Effect of Order.

6564. How far stay of proceedings.—[—]—A rule of ct. for the examination of witnesses on interrogatories in a foreign country, is not an absolute stay of proceedings but only a limited one.—**FORBES v. WELLS** (1835), 3 Dowl. 318.

6565. Revocation of notice of trial given by applicant.—[—]—An order of a judge directing that a commission issue for the examination of witnesses abroad on behalf of pltf., if served on deft.'s attorney, is a revocation of a notice of trial which pltf.'s attorney may have given, & if pltf. choose not to avail himself of the order, he cannot proceed to trial without giving fresh notice in the regular way.—**DUFFIELD v. MORRETT** (1810), 7 L. T. O. S. 28.

H. Remuneration of Commissioner.

6566. How recoverable—By action.—[—]—An *assumpsit* lies on a promise to pay in consideration of pltf.'s having served as a comr. at request of deft. on a commission out of the exchequer in a cause depending before the barons.

This action [by a comr. for his labour] well lies upon this matter; for though a comr. is an officer of the ct., yet they cannot compel him to attend against his will, & therefore the parties are to take care to name such persons who will serve therein; & it is reasonable that it should be at the charge of him for whom he officiates (*per Cur.*)—**STOKELD v. COLLINGSOON** (1691), Carth. 208; 90 E. R. 724; *sub nom.* **STOCKTON v. COLLISON**, Comb. 186; Ho't. K. B. 7; 12 Mod. Rep. 9; 1 Salk. 330; 1 Show. 342.

CANADA CO. (1869), 2 Ch. Ch. 461.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 1.—H.

6566. 1. How recoverable—By action.—[—]—A comr. for taking evidence in a contested election might maintain an action for his fees, & was not restricted to the remedy given under the recognition.—**BURRITT v. HAMILTON** (1860), 18 U. C. R. 461.—**CAN.**

the opinion of the ct., it is most expedient that the examination should be held, & not necessarily that nearest to his place of abode.—**SMITH v. BABCOCK** (1881), 9 P. R. 97.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 1.—F.

o. General rule.—[—]—An order for a commission to examine witnesses should state the time within which it is to be executed. When no time is

specified, the proper application is, that pltf. do proceed within a given time, or pay deft. his costs.—**PARR v. HOWLIN** (1837), Sau. & Sc. 124.—**IR.**

p. Whether time extended—Illness of commissioner.—[—]—Where a commission to take evidence abroad could not be executed in time by reason of the illness of the commissioner, pltf. was allowed further time to set the cause down for examination & hearing.—**MCISTYRE v.**

Sect. 2.—How evidence obtained: Sub-sect. 1, H., I. & J.]

6567. ——— *Reference to master.*—The ct. will restrain comrs. for examining witnesses from bringing an action for their fees against a solr. in the cause, & will refer it to the master to ascertain what is due to them.—*BLUNDELL v. GLADSTONE* (1830), 9 Sim. 455; 8 L. J. Ch. 109; 3 Jur. 431; 59 E. R. 434.

Annotation:—Distd. Parsons v. Benn (1850), 19 L. J. Ch. 264.

6568. ——— *Comrs. for the examination of witnesses restrained from prosecuting an action at law for the recovery of their fees, & a reference made to the master to ascertain what was due to them.*—*AMBROSE v. DUNMOW UNION* (1844), 8 Beav. 43; 3 L. T. O. S. 330; 50 E. R. 17.

6569. ——— *By lien on depositions.*—Comrs. for the examination of witnesses have a lien on the depositions for their fees, & will not be compelled to return them, until they have received payment.—*PETERS v. BEER* (1851), 14 Beav. 101; 20 L. J. Ch. 424; 18 L. T. O. S. 23; 15 Jur. 1024; 51 E. R. 224.

6570. ——— *A barrister has a lien for fees on a commission.*—*SMITH v. HALEN* (1861), 2 F. & F. 678, N. P.

6571. *How calculated.*—Comrs. in the country cannot, on any account, take more than 20s. for their attendance, & charges beyond that sum must be struck out of the bill (*LORD THURLOW, C.*)—*Ex p. PAGET* (1786), 2 Bro. C. C. 50; 29 E. R. 27, L. C.

6572. ——— *By day.*—Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit.—*SMALL v. ATTWOOD* (1834), 1 Y. & C. Ex. 37; 4 L. J. Ex. Eq. 1; 100 E. R. 16.

Annotation:—Mentd. Doyle v. Muntz (1846), 5 Hare, 509.

6573. ——— *Special examiner.*—Special examiners are entitled to a fee of 5 guineas a day only.

Seem: their clerks are entitled to 5s. per diem.

No extra fee is payable for an extended sitting during a day, nor for the preliminary labour of reading the papers.—*PAYNE v. LITTLE* (1855), 21 Beav. 65; 52 E. R. 783.

6574. ——— *The sum of £2 2s. a day, which a special examiner is entitled to receive for*

his expenses under the regulations subjoined to the Consolidated Orders, is a fixed sum payable in every case, without reference to the amount of expenses actually incurred by the special examiner, & does not include the expense of hiring a room for the purpose of the examination.—*WRIGHT v. LARMUTH* (1870), L. R. 10 Eq. 139; 22 L. T. 903; 18 W. R. 1103.

6575. ——— *Fee for reading pleadings.*—*HOWELL v. TYLER*, No. 6747, post.

6576. *By whom payable.*—On a petition by the comr. appointed to examine witnesses in the cause, the solr. for defts. was ordered to pay the comr.'s expenses in attending the commission, & the costs of this petition, although he had given no personal guarantee for the payment of such expenses.—*PARSONS v. BENN* (1850), 19 L. J. Ch. 264.

I. Misconduct of Commissioner.

6577. *How rectified.*—*ANON.* (1803), Cary, 30; 21 E. R. 16.

6578. ——— *MORGAN v. BOWDLER* (1634), Toth. 40; 21 E. R. 117.

6579. *Ground for suppressing depositions.*—*DEDORE v. DAY* (1702), 2 Fowler's Exchequer Practice, 134.

6580. ——— *Evidence taken by clerk & communicated to other side.*—Depositions taken by commission, were suppressed, it appearing that the evidence had been taken by the clerk to the comrs., & that the effect of some of the depositions had been communicated to the agent on the other side.—*LENNOX v. MUNNINGS* (1828), 2 Y. & J. 483; 148 E. R. 1009.

6581. ——— *Depositions taken irregularly.*—Depositions were suppressed for irregularity in the order under which they had been taken. The examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, & inquired whether they were correct; & on being answered in the affirmative, he caused them to be signed by the witnesses:—*Held:* the depositions must be suppressed as having been irregularly taken.—*A.-G. v. NETHERCOTE* (1839), 10 Sim. 311; 9 L. J. Ch. 17; 59 E. R. 634.

Suppressing depositions generally.—See Sub-sect. 1, J., post.

6582. *Ground for issuing new commission.*—

before a deputy clerk of the Crown, though not designated in the order as acting in his official capacity, the fees for such examination are payable in stamps & not in money.—*DENMARK v. MCCONAGHY* (1879), 8 P. R. 136.—*CAN.*

c. On what scale payable.—The ct., in appointing a comr. to take evidence in England, expects that the fees of such comr. will not exceed those which the Supreme Ct. in England would allow to a special examiner or comr. acting in England under its orders. If the parties desire that higher fees should be allowed to the comr. whom they name, they should obtain an order from the judge appointing the comr.—*GOCULDAS BULABARAS MANUFACTURING CO., LTD. v. SCOTT* (1890), 1 L. R. 15 Bom. 209.—*IND.*

PART VIII. SECT. 2, SUB-SECT. 1.—1.

6581 i. *Ground for suppressing depositions—Depositions taken irregularly.*—A foreign commission directed the comr. to reduce the questions & answers to writing. He took down the evidence of some of the witnesses in narrative form:—*Held:* a fatal objection.—*GENDRON v. MANITOBA MILLING CO.* (1891), 7 Man. L. R. 484.—*CAN.*

6569 i. ——— *By lien on depositions.*—The ct. will compel a comr. examiner to deliver, for the purposes of the suit, the documents lodged with him for the examination of witnesses, though he has not been paid his fees or expenses, the solr. undertaking to return them to the examiner after the termination of the suit.—*LECAN (LOHN) v. O'MALLEY* (1845), 8 L. Eq. 11, 386.—*IR.*

6576 i. *By whom payable.*—All who take an active part in the case before a comr. for taking evidence therein are liable for his fees & not the person only on whose written request the evidence was taken.—*HURRITT v. HAMILTON* (1860), 18 L. C. R. 461.—*CAN.*

q. Commissioner appointed by parties jointly.—By consent of plt. & defts., a commission was issued to M. to examine witnesses, & under it plt. examined on the direct, & defts. merely cross-examined. On a motion by M. against defts., for one-half of his fees & expenses as comr.:—*Held:* he was to be considered as having undertaken & been appointed to the office, on the joint retainer of the parties, & his motion was granted with costs.—*MILLNER v. JOSEPH* (1840), 5 L. Eq. 11, 214.—*IR.*

r. ———.—*Deft. assented to the appointment of the person nominated comr. examiner by plt. He cross-examined one of plt.'s witnesses, but did not examine any witness on the direct:—Held:* he was bound to pay the costs & expenses incurred by reason of his cross-examination, viz. for the attendance of the comr. during the time occupied by the cross-examination, & for ingrossing the depositions to cross interrogatories; but, not to contribute to the comr.'s travelling expenses.—*ROGERS v. AYLMER* (1843), 5 L. Eq. R. 586.—*IR.*

s. Commissioner in contested election for Legislative Council—Whether entitled.—*HURRITT v. JONES* (1860), 19 U. C. R. 194.—*CAN.*

t. Discretion of taxing master.—The costs of executing a commission are entirely in the discretion of the master.—*FOX v. TORONTO & NIAGARA RY. CO.* (1877), 7 P. R. 167.—*CAN.*

u. ———.—*Re GHASSEFAM* (1873), 12 B. L. R. App. 4.—*IND.*

b. How payable—Examination before deputy clerk of Crown—Not acting in official capacity.—Where an examination of parties pursuant to R. S. O., 1877, c. 50, s. 161, takes place

DEDORE v. DAY (1702), 2 Fowler's Exchequer Practice 134.

6583. — Non-attendance of commissioners.]—Where comrs. on one side do not attend, in order to have a new commission the affidavit must state that the party or his agents have not seen, heard, or been informed of the depositions on the other side.—**GEAST v. BARBER** (1785), 2 Bro. C. C. 1; 20 E. R. 1, L. C.

6584. — Refusal to proceed.]—Commission for examination of witnesses runs jointly & severally. A second commission granted on a suggestion that one comr. being absent, the other had not thought himself at liberty to proceed alone.—**THE CERES** (1800), 3 Ch. Rob. 129; 165 E. R. 410.

6585. —.]—**SAYER v. WAGSTAFF**, No. 6435, *ante*.

Issue of new commission generally.]—*See* Subsect. 1, K., *post*.

J. Suppression of Depositions.

6586. Grounds for suppression—Commission issued irregularly.]—**RANDALL v. RICHARDS** (1663), Nels. 92; 1 Cas. in Ch. 25; 1 Eq. Cas. Abr. 102; Freem. Ch. 178; 21 E. R. 798; *sub nom.* ANON., 2 Eq. Cas. Abr. 417.

6587. — Clerk to solicitor of party acting as clerk of commission.]—Depositions suppressed, because the clerk of pltf.'s solr. sat as clerk to the comrs.—**NEWTON v. FOOT** (1686), 2 Dick. 793; 2 Rep. Ch. 393; 21 E. R. 479.

*Annotation:—***Refd.** **Shaw v. Lindsey** (1808), 15 Ves. 380.

6588. —.]—Depositions were suppressed, the comrs. having employed the clerk of one of the parties as their clerk.—**SHAW v. LINDSEY** (1808), 15 Ves. 380; 33 E. R. 798, L. C.

*Annotations:—***Refd.** **Hood v. Pimm** (1831), 4 Sim. 101; **A. G. v. Nethercoat** (1839), 9 L. J. Ch. 17.

— Solicitor of party acting as commissioner.]—*See* Nos. 6433, 6434, 6436, *ante*.

6589. — Expiry of time.]—**HAMOND v. —** (1727), 1 Dick. 50; 21 E. R. 186.

6590. — Depositions taken after abatement.]Depositions were allowed to be read, though taken during an abatement.—**THOMPSON v. TOOK** (1733), 1 Dick. 115; 21 E. R. 212; *sub nom.* **THOMPSON'S CASE**, 3 P. Wms. 95, L. C.

6591. — Misconduct of witness—Refreshing memory.]—Deposition suppressed [by reason of an error of comrs.] & a re-examination directed; the deposition being taken from the witness, using during the examination full minutes in writing,

which she stated to have been originally her own, put into method by the attorney & so copied with some corrections by herself.—**FERRY v. FISHER** (1753), cited in 15 Ves. 382; 33 E. R. 799; *sub nom.* ANON., Amb. 252; 3 Keny. 27; cited in 3 Term Rep. 752, L. C.

*Annotations:—***Consd.** **Shaw v. Lindsey** (1808), 15 Ves. 380. **Refd.** **Doe d. Church & Phillips v. Perkins** (1790), 3 Term Rep. 749; **Hood v. Pimm** (1831), 4 Sim. 101.

6592. — Refusal to be cross-examined.]—**FLOWERDAY v. COLLET** (1750), 1 Dick. 288; 21 E. R. 279.

6593. —.]—The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must at the time enforce such right of cross-examination as he has.—**COURTENAY v. HOSKINS** (1820), 2 Russ. 253; 38 E. R. 331.

*Annotation:—***Mentd.** **Whitaker v. Wright** (1844), 3 Haro. 412.

— Misconduct of commissioner.]—*See* Subsect. 1, L., *ante*.

6594. — Conversation between party & adverse witness.]—A motion to suppress the depositions of witnesses examined on behalf of deft., after a conversation by him with one of pltf.'s witnesses on the subject of his testimony, was refused, the conversation not having been communicated to his solr. before deft.'s interrogatories were prepared, but without costs, communications between witnesses & parties being disapproved.—**BOUGHTON v. PIERREPOINT** (1819), 3 Swan. 550; 30 E. R. 971, L. C.

*Annotation:—***Refd.** **Mostyn v. Spencer** (1844), 4 L. T. O. S. 129A.

6595. — Examination on fresh interrogatories.]—**NELSON (EARL) v. BRIDPORT (LORD)**, No. 6512, *ante*.

6596. Effect of mistakes, omissions, etc.—Omission of date of taking depositions.]—**DIXIE v. DIXIE** (1702), 12 Sim. 316; 11 L. J. Ch. 13, n.; 50 E. R. 1164.

*Annotation:—***Refd.** **Brydges v. Brannfl** (1841), 11 L. J. Ch. 12.

6597. — Omission of description of witness.]—**CHAPMAN v. CHAPMAN** (1712), 12 Sim. 317; 11 L. J. Ch. 13, n.; 50 E. R. 1165.

*Annotation:—***Refd.** **Brydges v. Brannfl** (1841), 11 L. J. Ch. 12.

6598. — Omission to endorse adjournment.]—**WEST v. YERRURY** (1713), 12 Sim. 318; 11 L. J. Ch. 14, n.; 50 E. R. 1165.

*Annotation:—***Refd.** **Brydges v. Brannfl** (1841), 11 L. J. Ch. 12.

6599. — Alteration by officer of court.]—The ct. refused to suppress depositions, where, after publication had passed, the officer of the ct. had,

been complied with. Pltf., having given notice, applied, at the opening of the trial, to suppress the depositions. As in the opinion of the Court, the objections were based only on "irregularities," & not on "matters of substance," & it did not appear that any harm had been or might be done by the non-compliance with the directions of the commission, & the delay in moving to suppress was unreasonable, it was held, that the depositions were admissible.—**DECEAN v. VAN ANSEY** (1913), 25 W. L. R. 27; 6 Alta. L. R. 384; 12 D. L. R. 412.—**CAN.**

h. — One of four commissioners not acting—Waiver.]—Where a commission for the examination of witnesses abroad was issued directing the depositions to be taken before four comrs., one of whom, though notified, did not attend, & the commission was executed by the other three, in the absence of any protest at the time, or suggestion that deft. had been injured by its execution by three only, & where he had an opportunity of applying at term to suppress the depositions;

PART VIII, SECT. 2, SUB-SECT. 1.—J.

6586i. Grounds for suppression—Commission issued irregularly.]—Under an order to take evidence on commission the evidence can only be taken on interrogatories unless otherwise ordered. Under such order a commission was issued to take the evidence *ex pte.* **Held:** the commission was irregular & the depositions were suppressed.—**WATTS v. ANDERSON** (1888), 5 Man. L. R. 291.—**CAN.**

d. — Misconduct of witness—Communicating with party contrary to order of judge.]—Where a witness under examination *de bene esse* before a judge had held communication relative to the suit with one of the parties during an adjournment of the examination, notwithstanding a caution to the contrary given him by the judge: **Held:** not a sufficient ground for suppressing the examination.—**DOE d. BEATRY v. KEILLOR** (1845), 2 Kerr. 643.—**CAN.**

e. — Non-compliance with directions—Whether fatal.]—**COWAN v. DRUMMOND**, 14 C. L. T. Occ. N. 24.—**CAN.**

1. —.]—A commission was issued out of the Supreme Ct. of N.B. directed to two comrs., one named by each of the parties to the suit, to take evidence at St. T., N. B., with liberty to pltf.'s comr. to proceed *ex pte.* if the other neglected or refused to attend. Both comrs. attended the examination, & deft.'s nominee cross-examined the witness which was sent back to the ct. signed by one comr. only. Some of the interrogatories & cross-interrogatories were put to the witnesses by the comrs.: **Held:** the failure to administer the interrogatories according to the terms of the commission was a substantial objection, & rendered the evidence incapable of being received.—**MILLVILLE MUTUAL MARINE & FIRE INSURANCE Co. v. DRISCOLL** (1884), 11 S. C. R. 183.—**CAN.**

f. —.]—The return to a commission issued for the taking of depositions in a foreign country did not show, in a number of respects, that the directions of the commission had

Sect. 2.—How evidence obtained: Sub-sect. 1, J. & K. (a) & (b).]

without the sanction of the ct., made an alteration in the depositions, by erasing the name, subscribed thereto.—*NASH v. COCHRANE* (1837), 1 Jur. 70.

6600. — Variance in titles of commission & depositions.—An order for commission to examine witnesses was made, on the application of plffs., in a cause in which B. & another were plffs., & C. & others were defts., by original & amended bill, & in which B. & another were plffs., & Lady B. & others were defts., by bill of revivor & supplement. The commission was made out in a cause in which B. & another were plffs., & C. & others were defts., by original bill & bill of revivor & supplement. In the title to depositions taken under that commission, both the original & amended bill & the bill of revivor & supplement were mentioned, & the names of the parties to each bill were set forth at length. A motion by defts. to suppress the depositions, grounded on the variance between the title of the commission & the title of the depositions, was refused.

Although it is usual to express in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting comrs.) & others directed," yet, if the names of all the comrs. are inserted, the depositions will not be suppressed because they are not signed by all the comrs. provided they are signed by those who acted.—*BRYDOES v. BRANFILL* (1841), 12 Sim. 331; 11 L. J. Ch. 12; 59 E. R. 1160.

6601. ——Depositions were taken on the part of pltf. in a cause, in which it was alleged that K. was pltf., as next friend to other plffs. who were infants, whereas the fact was, that K. was then dead. Defts. joined in the commission for the examination of witnesses, but made no objection to the alleged irregularity till after publication had passed. On application by defts. to suppress the depositions taken on the part of plffs., the ct. refused the motion.—*LINCOLN v. WRIGHT* (1841), 4 Beav. 166; 10 L. J. Ch. 331; 49 E. R. 302.

6602. ——In the title of a commission to examine witnesses, the names of all the persons who had been made parties to the cause, whether by original bill or bill of revivor, were inserted. In the title of the interrogatories the names of those persons only who were then parties to the cause were inserted. A motion to suppress the depositions for irregularity, on the ground of variance between the title of the commission & the title of the interrogatories, was refused with costs.—*JONES v. SMITH* (1843), 12 L. J. Ch. 432; 7 Jur. 500, L. C.

6603. — Omission to copy signatures.]—

—*Held:* the objection was waived, & it was too late to object to their reception in evidence at the trial.—*GILBERT v. CAMPBELL* (1869), 1 Han. 471.—**CAN.**

k. — Deposition dealing with matters not raised.]—On a commission to examine witnesses, if the answer to an interrogatory extends to matters not inquired of & which the opposite party could not have anticipated, & therefore, did not file a cross interrogatory, the answer will be suppressed.—*BARNHUR v. ROBERTS* (1884), 24 N. B. R. 211.—**CAN.**

l. ——Where a witness deposed to facts to which he could not have been examined the ct. upon motion suppressed the depositions.—*SMITH v. HARDING* (1841), 3 L. Eq. R. 336.—**IR.**

6604 l. Effect of mistakes, omissions, etc.—Evidence taken vivâ voce & not on written interrogatories.]—*Prima facie* the examination upon a commission is

Where the comr. for the examination of witnesses omitted to copy on the engrossment of the depositions the signatures which the witnesses had affixed to the drafts, a motion to suppress the depositions on this ground was refused, & the clerk of records & writs was directed to supply the omission.—*LEE v. EGREMONT* (1848), 2 De G. & Sm. 363; 17 L. J. Ch. 437; 12 Jur. 860; 64 E. R. 163.

6604. — Evidence taken vivâ voce & not on written interrogatories.]—It is no objection to the admissibility of depositions taken under a commission, that the comr. did not put any of the written interrogatories or cross-interrogatories which were sent out with the commission, but took the evidence of the witnesses under a *vivâ voce* examination.—*GRILL v. GENERAL IRON SCREW COLLIER CO.* (1866), L. R. 1 C. P. 600; Har. & Ruth, 654; 35 L. J. C. P. 321; 14 L. T. 711; 12 Jur. N. S. 727; 14 W. R. 893; 2 Mar. L. C. 362; *affd.* on other grounds (1868), L. R. 3 C. P. 476, Ex. Ch.

*Annotations:—***Mentd.** *Leuw v. Dudgeon* (1867), 17 L. T. 145; *Giblin v. McMullen* (1868), L. R. 2 P. C. 317; *Oppenheim v. White Lion Hotel Co.* (1871), L. R. 6 C. P. 515; *Notara v. Henderson* (1872), L. R. 7 Q. B. 225; *The Chasca* (1875), L. R. 4 A. & E. 446; *Scaramanga v. Stamp* (1879), 4 C. P. D. 316; *Chartered Mercantile Bank of India v. Netherlands Steam Navigation Co.* (1883), 10 Q. B. D. 521; *Wilson v. The Xantho* (Owners of the Cargo) (1887), 12 App. Cas. 503; *Steinman v. Angier Line*, [1891] 1 Q. B. 619; *The Glendarroch*, [1894] P. 226; *Trinder, Anderson v. Thames & Mersey Marine Insee.*, *Trinder, Anderson v. North Queensland Insee.*, *Trinder, Anderson v. Weston, Crocker*, [1898] 2 Q. B. 114; *Fenton v. Thorley*, [1903] A. C. 443; *Price v. Union Lighterage Co.*, [1904] 1 K. B. 412; *Re Etherington & Lancashire & Yorkshire Accident Insee.*, [1909] 1 K. B. 691; *Newman v. Bourne & Hollingsworth* (1915), 31 T. L. R. 209; *Leyland Shipping Co. v. Norwich Union Fire Insee. Soc.*, [1917] 1 K. B. 873; *Becker Gray v. London Assee. Corp.*, [1918] A. C. 101.

See, also, Sub-sect. 1, K., post.

K. Where New Commission issued.

(a) In General.

See, also, Sub-sect. 1, J., ante.

6605. Application for—Must be on notice.]—Deft. who has joined in commission cannot obtain a new commission except upon a special application & with notice.—*BOND v. BOND* (1831), 4 Sim. 518; 58 E. R. 194.

6606. Contents of affidavit in support—Names of witnesses—& nature of evidence.]—General affidavit of having a material witness is not sufficient for a new commission, but the witness must be named in the affidavit, as also the point to which he is to be examined.—*ANON.* (1685), 1 Vern. 334; 23 E. R. 503, L. C.

*Annotation:—***Refd.** *Mendizabal v. Machada* (1826), 4 L. J. O. S. Ch. 142.

to be upon interrogatories. Where an order for a commission made no provision for the mode of examination, depositions which had been taken *ried* *roce* were quashed.—*MULLIGAN v. WHITE* (1887), 5 Man. L. R. 40.—**CAN.**

m. — Commissioner wrongly named.]—A commission was addressed to S. B. Henry, & G., of Philadelphia, jointly & severally. G. took no part in executing it, but all was done by one S. B. Huey, & an affidavit of pltf.'s counsel at Philadelphia, taken before G. explained that Huey was the name forwarded by him to pltf.'s attorney here, but through some clerical error it was directed to Huey; & he knew no such person as S. B. Henry in Philadelphia, but that the Huey before whom the depositions were taken, was the person intended. This objection was not taken to the commission at the trial, though others were, & the evidence of witnesses on both sides

taken under it was read:—*Held:* nevertheless the objection was fatal.—*LODGE v. THOMPSON* (1867), 26 U. C. R. 588.—**CAN.**

n. Motion for—Time for making.]—Where publication passed on May 8, a notice of motion to suppress the interrogatory for being leading, given on May 28, was held not to be too late.—*BALL v. PHILIPS* (1838), 6 Ir. L. Rec. N. S. 385.—**IR.**

o. ——[The proper time to move to suppress depositions for irregularity is after publication has passed.—*DOBBS v. IR.* *ADAMS* (1846), 9 L. Eq. R. 275.—**IR.**

PART VIII. SECT. 2, SUB-SECT. 1.—K. (a).

p. Application for—Must be on notice—Proof of special circumstances.]—An ex p. order will not be granted for the re-examination of a party under Administration of Justice Act, 1873,

6607. — Ignorance of adverse evidence.]—GEAST v. BARBER, No. 6583, *ante*.

6608. — Evidence material & application bonâ fide.]—Pltf. had taken out a commission to examine a witness in a country out of the of the jurisdiction, & applied for a new commission to examine other witnesses in other countries out of the jurisdiction:—*Held*: the motion would be on condition that the solr. of pltf. would produce an affidavit that the commission was not asked for the purpose of delay, & that the evidence to be obtained was material.—REID v. O'BRIEN (1846), 8 L. T. O. S. 182.

6609. — Grounds of application.]—CROWTHER v. NELSON (1891), 7 T. L. R. 653, D. C.

6610. Form of interrogatories.—Where former depositions suppressed.]—Where depositions are suppressed for irregularity, the interrogatories to be exhibited under a new commission must be in the same form.—CHAMEAU v. RILEY (1843), as reported in 7 Jur. 711.

(b) *Grounds for Granting or Refusing New Commission.*

6611. Non-attendance of witnesses.]—SHEPARD v. SHEPARD (1879), Cary, 111; 21 E. R. 59.

6612. —.]—FISH v. MOUNTFORD (1879), Cary, 81; 21 E. R. 43.

6613. Witness examined before person not commissioner.]—HAREFORTH v. GATES (1880), Cary, 91; 21 E. R. 49.

6614. Inability to examine witnesses.]—MINEVE v. ROW (1702), 1 Dick. 18; 21 E. R. 173.

6615. —.]—Commission to examine witnesses abroad was granted to a deft., who had cross-examined, but not examined in chief under a commission sued out by pltf.—SHEWARD v. SHEWARD (1813), 2 Ves. & B. 116; 35 E. R. 263, L. C.

6616. Failure to examine witnesses.—Through mistake of law.]—Under an impression that the Tithe Comrs. had power to determine the matters in issue, defts. had neglected to examine witnesses under a commission from this ct.; on the motion of defts., supported by an affidavit of facts:—*Held*: a new commission would be granted on payment of the costs of suing out thereof.—WETHERELL v. BELLWOOD (1838), 3 Y. & C. Ex. 319; 8 L. J. Ex. Eq. 65; 160 E. R. 724.

6617. Inability to cross-examine witnesses.]—Commission to examine witnesses abroad was executed & returned; deft., who had not interrogatories prepared, had not the opportunity of cross-examining:—*Held*: a new commission would be granted for that purpose, deft. to state whom he wished & undertook to cross-examine, but pltf.'s depositions would not be suppressed.—CAMPBELL v. SCOUZAL (1816), 10 Ves. 552; 34 E. R. 621, L. C.

*Annotations:—***Apld.** Hanover (King) v. Wheatley (1841), 4 Beav. 78. **Eld.** Forsyth v. Ellice (1852), 21 L. J. Ch. 590. **Mentd.** Anon. (1827), 6 L. J. O. S. Ch. 21; Carter v. Draper (1827), 2 Sim. 52.

6618. —.]—The ct. directed a commission to

issue for the examination of witnesses upon the certificate of the master, & that commission having miscarried, by reason of deft. being deprived of an opportunity of cross-examining pltf.'s witnesses:—*Held*: a new commission must issue without any further certificate of the master.—FORSYTH v. ELLICE (1852), 21 L. J. Ch. 590.

6619. Error of commissioners.]—FERRY v. FISHER, No. 6591, *ante*.

Misconduct of commissioners.]—See Sub-sect. 1., I., *ante*.

6620. Premature publication.]—TURBOT v. — (1803), 8 Ves. 315; 32 E. R. 375, L. C.

6621. Oath not administered in prescribed form.]—JONES v. JONES (1814), 2 Phillim. 241; 161 E. R. 1132.

6622. Oath of commissioner omitted.]—BORLEN v. MELLADEW, No. 6538, *ante*.

6623. Some witnesses not examined.]—Where pltf. by his conduct renders it impossible to examine all the witnesses under the first commission, & afterwards applies for a second commission, the ct. will order him to pay the extra costs occasioned by the second commission, as well as deft.'s costs of the motion, & will likewise put him under terms with respect to the time & mode of executing the second commission.—MORRIS v. DAVIES (1823), 1 L. J. O. S. Ch. 220.

6624. —.]—Under a commission for the examination of witnesses abroad, the comrs. examined the witnesses for pltf.; & under an impression that deft. had no witnesses to examine, whether he had or had not given notice of his intention to examine witnesses was disputed, they closed the commission, & returned it to England. After the commission had been sent off, deft. examined his witness before some of the comrs.; & the depositions of those witnesses, & the interrogatories upon which they were taken, were sealed up & forwarded to England. On motion to annex the last-mentioned depositions & interrogatories to the commission & the depositions on the part of pltf., the ct. expressed an inclination to grant deft. a new commission, unless pltf. would consent to the motion: & upon such consent being given:—*Held*: the order would be made.

When a commission to examine witnesses is returned it is opened by the junior sworn clerk, for the purpose of entering the names of the acting comrs. in the commission-book & the commission is then kept under lock & key until the publication is passed.—IRVING v. VIANA (1827), 1 Y. & J. 416; 148 E. R. 733.

6625. Amendment of bill Old commission resealed.]—A commission to examine witnesses was issued by deft.; pltf. joined in the commission & named comrs. Pltf., afterwards, with leave of the ct., withdrew his replication, & amended the bill, to which an answer was put in, & a replication filed thereto, & then the commission was resealed:—*Held*: it was not necessary to issue a new commission, & if the comrs. named by pltf., on the

s. 24, special circumstances must be shown.—LAIRD v. STANLEY (1876), 6 P. R. 322.—CAN.

a. Costs of.]—A second commission to New York granted to deft. to examine a witness, he having already obtained a commission to the same place, but he was ordered to pay the costs of executing it in any event of the action.—GILL v. ELLIS (1890), 5 B. C. R. 137.—CAN.

PART VIII. SECT. 2, SUB-SECT. 1.—K. (b).

r. Failure to examine witnesses.—Through oversight.]—On an application for a second commission on the ground

of oversight:—*Held*: though it was unusual to grant a second commission, as deft. had not appeared at the trial & the cost of bringing the witness to ct. would be very heavy, the commission would be granted, as it was in the interests of all parties, on pltf. paying costs.—CANADIAN BANK OF COMMERCE v. MATHEWSON (1908), 8 W. L. R. 972.—CAN.

s. First commission unable to be executed by law of foreign country.—New commission granted on terms.]—A commission to examine witnesses in H., in which pltf. & deft. joined, lapsed by reason of the law there not permitting oaths to be administered

except by the ct. An injunction had been granted against deft. until the hearing or further order. The primary judge in chambers, refused an application by pltf. for a new commission, except upon the terms of dissolving the injunction. Upon appeal the order for a new commission was made, upon the terms of pltf. paying the costs of the abortive commission, & giving an undertaking to answer damages to deft. if the injunction were dissolved at the hearing.—WOLFE v. HART (1879), 5 V. L. R. 52.—AUS.

t. Witness not fully examined.]—Where a commission to examine a witness abroad has been executed &

mission Act, 1831 (c. 22), s. 4, to have a witness within the jurisdiction of the ct., examined on interrogatories, the name of the person before whom the examination is to take place must be mentioned, before the rule nisi will be granted.—*DOE d. THORN v. PHILLIPS* (1831), 1 Dowl. 56.

C. Form of Order.

See, now, R. S. C., Ord. 37, rr. 5, 39, Appendix K., Form 37, C.

6635. "Saving just exceptions."—In an order directing an issue, with liberty for the parties to read at the trial evidence taken *vivâ voce* before the master, it is proper to insert "saving all just exceptions."—*TURNER v. MAULE* (1848), 2 De G. & Sm. 209; 11 L. T. O. S. 372; 12 Jur. 860; 61 E. R. 93.

Annotation:—*Mentd. Edgar v. Reynolds* (1858), 27 L. J. Ch. 562.

6636. Witness residing abroad — Alternative names of examiners.—Where a deft., whose evidence it was desired to take, was resident in Australia, & it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first-named examiner being capable; & liberty was, in the same order, reserved to the principal deft. in the cause to appoint some person in the colony to attend the taking of the examination on his behalf.—*CROFTS v. MIDDLETON* (1853), 9 Hare, App. 11, lxxv.; 17 Jur. 112; 1 W. R. 103; 68 E. R. 809.

6637. ———.]—*LONDON BANK OF MEXICO & SOUTH AMERICA v. HART* (1868), L. R. 6 Eq. 467; 18 L. T. 553.

6638. Order expressed generally Where all witnesses & parties resident in country.—Where a special examiner is appointed in the country, & the examiner, solr., & parties there, the ct. will order the examination & cross-examination of witnesses generally there, on the assumption that it shall apply to witnesses on both sides.—*Re FORSTER'S TRUSTS* (1851), 2 W. R. 679.

6639. Should not state liberty to give depositions in evidence.—An order to take the examination of a witness *de bene esse* ought not to state that the party is to be at liberty to give such depositions in evidence at the trial, as it may be that the witness will then be capable of being examined, & his incapacity will have to be shown before leave will be given at the trial to use the evidence.

The examination would be taken not by a special examiner, but before the examiner in rotation.—*BURTON v. NORTH STAFFORDSHIRE RY. CO.* (1887), 35 W. R. 536.

6640. Order imposing time limit to complete examination.—*GEDYE v. PELLING*, [1892] W. N. 44.

D. Duties of Examiner.

6641. To attend witness—Upon affidavit of incapacity.—*ANON.* (1819), 4 Madd. 463; 56 E. R. 776.

6642. Omission to sign deposition—Whether receivable.—The omission by an examiner to sign his name to the depositions of a witness, taken by him & returned to the Record & Writ Clerk's Office, is not such an irregularity as to prevent the ct. from directing them to be filed, on terms; but where, in a suit at issue before the new practice came into operation, a special examiner had been appointed by order of the ct., but no commission had been issued according to the old practice, & witnesses were examined upon interrogatories & not orally, & there had been great delay, the ct.

refused to order the depositions to be filed.—*STEPHENS v. WANKLIN, STEPHENS v. SALWAY* (1854), 19 Beav. 585; 52 E. R. 478.

6643. ——— **Death of examiner.**—Depositions taken before an examiner who had died before affixing his signature to them, were allowed to be received in evidence as if they had received such signature.—*BRYSON v. WARWICK & BIRMINGHAM CANAL CO.* (1853), 20 L. T. O. S. 205; 1 W. R. 124.

6644. ——— ———.]—The examiner to the ct., before whom a witness had been examined, died without having signed the deposition:—*Held*: the deposition was ordered to be filed without any signature.—*FELTHOUSE v. BAILEY* (1866), 11 W. R. 827.

E. Remuneration of Examiner.

6645. By whom payable — Party obtaining order.—

The party who obtains an order for the examination of witnesses before an examiner, which gives liberty to the other parties to examine witnesses, may properly be ordered under R. S. C., Ord. 37, r. 50, to pay to the examiner all his fees & expenses of the examination including those on account of the examination of witnesses on behalf of the other party.—*LINLEY v. HOULDER* (1903), 88 L. T. 829, C. A.

SUB-SECT. 3. — MANDAMUS.

A. In General.

Mandamus generally, see CROWN PRACTICE, Vol. XVI., pp. 276-352, Nos. 880-1822.

See East India Company Act, 1772 (c. 63), ss. 40, 41; Evidence on Commission Act, 1831 (c. 22), s. 1.

6646. Not granted if commission equally suitable.—*ANON.* (1840), No. 6549, *ante*.

6647. ———.]—The ct. will not grant a *mandamus* to examine witnesses abroad, unless it be perfectly clear that the same object cannot be obtained by issuing a commission.—*FARNWORTH v. HYDE* (1863), 14 C. B. N. S. 719; 2 New Rep. 279; 11 W. R. 783; 113 E. R. 627.

6648. Not refused on ground of expense.—Distance & the smallness of the amount of pltf.'s claim form no ground for refusing a writ in the nature of a *mandamus* for the examination of witnesses abroad on behalf of deft. under Evidence on Commission Act, 1831 (c. 22).—*DYE v. BENNETT* (1850), 9 C. R. 281; 1 L. M. & P. 92; 137 E. R. 901.

6649. Rule nisi in first instance.—A rule for a *mandamus* to examine witnesses in India under East India Company Act, 1772 (c. 63), s. 45, is *nisi* in the first instance.—*DOE d. GRIMES v. PATTISON* (1831), 3 Dowl. 35.

6650. When application may be made—While issues in law pending for argument.—It is no answer to a rule for a *mandamus* to examine witnesses, that it is moved whilst issues in law are pending for argument.—*KELSALL v. MARSHALL* (1856), as reported in 1 C. B. N. S. 241; 28 L. T. O. S. 66; 140 E. R. 100.

6651. Copies of depositions—Whether opposite party entitled to.—Where deft. at his own expense obtained a writ of *mandamus* under East India Company Act, 1772 (c. 63), s. 44, for examining witnesses in India:—*Held*: pltf. was entitled to copies of the depositions returned on paying the expense of making such copies, although he refused to pay any part of the expenses attending the writ.—*DAVIDSON v. NICOL* (1831), 1 Dowl. 220; 5 Moo. & P. 185.

Sect. 2.—How evidence obtained: Sub-sect. 3, B., C. & D.; sub-sect. 4, A. & B. Sect. 3: Sub-sect. 1.]

B. In What Proceedings Granted.

See, generally, Sect. 1, sub-sect. 3, ante.

6652. In civil actions—East India Company Act, 1772 (c. 63), ss. 40, 44.—Under above Act, the ct. will grant a *mandamus* to the ct. in India to examine witnesses on behalf of deft. in a civil action.—(HILLARD v. HOGUE (1820), 1 Brod. & Bing. 519; 4 Moore, C. P. 313; 129 E. R. 828.

Annotation:—Refd. Davidson v. Nicol (1831), 5 Moo. & P. 185.

6653. —.—[—BRUNTON v. HARDY, No. 6659, *post*.

In criminal proceedings.]—*See CRIMINAL LAW, Vol. XIV., pp. 128, 441, Nos. 997, 4669, 4670.*

C. To What Countries issued.

6654. India—If cause of action arising there—East India Company Act, 1772 (c. 63), s. 44.—A., captain of an India country trader, contracted in India with B. for a crew according to the custom of the country; A. arrived in England with the crew, & then made a voyage with them to the West Indies & back again. An action was brought by part of the crew for wages due on the West India voyage. On motion for a *mandamus* to examine witnesses in India:—*Held*: the cause of action did not arise in India within sect. 44 of above Act.—FRANCISCO v. GILMORE (1797), 1 Bos. & P. 177; 126 E. R. 845.

6655. —.—Wherever cause of action arising—*Evidence on Commission Act, 1831 (c. 22), s. 1.*—By above Act the ct. has power to issue a *mandamus* to examine a witness in India, wheresoever the cause of action may have arisen.—BAIN v. DE VETRY (1835), 1 Gale, 52.

6656. —.—[—The Ct. of Exch. have power under East India Company Act, 1772 (c. 63), s. 44, to award a writ of *mandamus* for the examination of witnesses in India.—SAVAGE v. BINNY (1834), 3 L. J. Ex. 219.

6657. —.—[—FORBES v. MARSHALL (1853), 22 L. T. O. S. 70.

6658. Scotland.—A *mandamus* to examine witnesses cannot be issued to Scotland.—WAINWRIGHT v. BLAND (1835), 1 Gale, 103.

D. Costs.

See, generally, Sect. 5, post.

6659. General rule—Costs costs in cause.—(1) A *mandamus* was granted to examine deft. in India, on his own behalf, he being an officer who had left England after action brought to rejoin his regiment.

(2) The costs in such cases will be costs in the cause, except under special circumstances.—BRUNTON v. HARDY (1862), 10 W. R. 562.

6660. Discretion of judge trying cause.—Upon application for a *mandamus* to examine witnesses in India, with a view to prove, on behalf of pltf., who moved for the commission, a retainer as his attorney by deft., the ct. left the question of costs to the discretion of the judge at *nisi prius*.—WRIGHT v. CAPE (1843), 7 Jur. 374.

6661. Failure to prove facts required.—ANDERSON v. HEYWOOD (1852), 10 L. T. O. S. 204.

SUB-SECT. 4.—LETTERS OF REQUEST.

A. In General.

See, now, R. S. C., Ord. 37, r. 6A, B, c, Appendix K, Forms 37A., 37B., 37CCC.

6662. May be issued—In addition to order for examination abroad before special examiner.—An examination of witnesses abroad before a special examiner, ordered under R. S. C., Ord. 37, r. 5, is not an ordinary commission so as to prevent the issuing of letters of request in addition thereto under r. 6 A of the same order.—MASON & BARRY, LTD. v. COMPTON D'ESCOMPTE (1890), 38 W. R. 685, D. C.

6663. Purpose of issue—Examination of witnesses—Not production of documents alone.—An order for letters of request to issue to a foreign ct., under R. S. C., Ord. 37, r. 6 A, can only be made where it is sought to examine witnesses under the order, & the ct. has no jurisdiction to make such an order where production of documents alone is asked for.—CAPE COPPER CO. v. COMPTON D'ESCOMPTE DE PARIS (1890), 38 W. R. 763; 6 T. L. R. 405, C. A.

B. To What Countries issued.

6664. To British colony.—Where witnesses are resident in a colony, & it is desired that they should be examined, the order for their examination may take the form of a request to the judge of the colony to examine them.—FRASER v. NEVINS, WELSH & CO. (1888), 4 T. L. R. 448, C. A.

6665. —.—South Africa.]—A co., who were manufacturers of lime juice, commenced an action against another co. for infringement of pltf.'s trade marks & for passing off their lime juice as pltf.'s lime juice. Pltfs. alleged that they owned certain trade marks & that they sold their lime juice in bottles which were moulded with representations of their trade marks, & they alleged that the moulding on deft.'s bottles was calculated to deceive. Both pltfs. & defts. put labels on their bottles, but pltfs. alleged that such labels frequently got rubbed off. Both firms exported their lime juice to other countries, including South Africa. Pltfs. made an application for a commission to take evidence in South Africa or alternatively for letters of request to issue. They stated that they wished to obtain evidence as to the circumstances & conditions of the trade in South Africa. The application came before ASTBURY, J., in chambers, to whom certain proofs of the proposed witnesses were submitted by pltfs., & an order was made for letters of request to issue. Leave was given to defts. to appeal, & they appealed:—*Held*: the order made was right, & the appeal would be dismissed with costs.—ROSE (L.) & CO., LTD. v. RIDDLE (ALEXANDER) & CO., LTD. (1913), 31 R. P. C. 48.

6666. To country not allowing evidence to be taken on commission—Switzerland.—*Re CORNWALLS-WEST, Ex p. TRUSTEE*, [1918-19] B. & C. R. 126.

SECT. 3.—RETURN AND USE OF EVIDENCE.

SUB-SECT. 1.—THE RETURN.

6667. Return may be ordered de die in diem.—The ct. will, upon an interlocutory application,

PART VIII. SECT. 2, SUB-SECT. 4.—A.

a. Issue.—Letters rogatory, such as are provided for by an act of Congress of U.S.A. as issuable from any foreign ct., will be issued by the ct. here, although in the present state

of our law no reciprocal accommodation can be afforded here to suitors in the U.S.A. In letters rogatory so issued here, the usual offer to render similar service when required was necessarily omitted. Such letters need not necessarily be in the name of the sovereign

but may be issued as from the judges of the Ct. of Ch.—UNITED STATES v. DENISON (circa 1867), 2 Ch. Ch. 176.—CAN.

d. Necessity for letter of request.—*Re KING (L.) & Co.* (1911), 1 L. R. 38 Calc. 542.—IND.

direct the depositions of witnesses, who are ordered to be cross-examined before a special examiner, to be returned *de die in diem*, without waiting for the evidence to be closed.—*CLARK v. GILL* (1854), 1 K. & J. 19; 2 Eq. Rep. 1108; 23 L. J. Ch. 711; 2 W. R. 652; 69 E. R. 351.

Annotations.—*Mentd.* *Nokes v. Gibbon* (1857), 26 L. J. Ch. 208; *Re Working Men's Mutual Soc.* (1882), 21 Ch. D. 831.

6668. Verification of return—Return lost—Oath as to non-alteration by finder.—*SMALES v. CHAYTER* (1745), 1 Dick. 99; 21 E. R. 205.

Annotation.—*Fold.* *Hind v. Selby* (1853), 20 L. T. O. S. 256.

6669. — By solicitor to whom transmitted.—*BOURDILLON v. ALLEYNE* (1792), 4 Bro. C. C. 100; 29 E. R. 799.

6670. — — — — ——*HIND v. SELBY* (1853), 20 L. T. O. S. 256.

6671. — What amounts to.—(1) A judge's order directed a commission to issue to four comrs. at Newfoundland. The commission directed the comrs. to summon the witnesses, at a certain day & place, to be appointed by them for that purpose, in Newfoundland, & then & there examine them apart, & *visd voce*. The commission also directed the commission & depositions to be returned, sealed up. At the trial it was proved that a packet of papers had been brought to the master's office, sealed up, by some person unknown, containing a commission, which was identified as that issued under the order, & also returns, proved to be in the handwriting of the persons named in the commission. It was also proved that the persons so named lived in Newfoundland:—*Held*: the return of the commission was sufficiently proved.

(2) The examinations did not purport to be taken apart:—*Held*: it must be presumed they were duly taken.—*SIMMS v. HENDERSON*, *HENDERSON v. HENDERSON* (1848), 11 Q. B. 1015; 3 New Pract. Cas. 1349B; 17 L. J. Q. B. 209; 11 L. T. O. S. 513; 12 Jur. 773; 116 E. R. 752.

Annotations.—*Generally*, *Reid*, *Bulham v. Mears* (1858), 6 W. R. 597. *Mentd.* *Vanquelin v. Bouard* (1863), 15 C. B. N. S. 341.

PART VIII. SECT. 3, SUB-SECT. 1.

6679. 1. Presumption that directions complied with—That oath taken by commissioners.—Depositions taken abroad under a commission & returned with the commission, are admissible in evidence without proof that the comrs. had taken the oath prescribed by the commission, or return by them to that effect. Such oath is required to be taken, but the ct. will presume that this has been done, nothing appearing to the contrary.—*WILMOT v. HAWES* (1841), 1 Kerr. 351.—*CAN.*

a. — As to sealing.—Where depositions taken under a commission are returned to the ct. enclosed in an envelope, addressed as directed by the statute & sealed up, it will be presumed that the seal is that of the comr. who took the deposition.—*DORR v. HEATHCOTE v. HUGHES* (1878), 2 P. & B. 296.—*CAN.*

f. Return not under seal.—Where the execution of a commission to examine witnesses in U.S.A. was proved by the affidavit of the comr. named therein, & the return thereof made under his hand, without his seal:—*Held*: under the Provincial statute 2 Geo. IV. c. 1, the execution was sufficiently authenticated.—*BEACH v. ODELL* (1834), 4 O. S. 8.—*CAN.*

g. Affidavit of execution.—Certificate signed by a comr., certifying that the sheets of paper annexed were furnished to him by the stenographer as containing a transcript of his notes of evidence, followed by the type-written evidence, is a sufficient com-

pliance with Ord. 37, r. 16, requiring the deposition to be authenticated by the signature of the comr. & with the commission requiring the deposition to be signed by the comr.—*SIMPSON v. MALCOLM* (1914), 43 N. B. R. 79.—*CAN.*

h. — Absence of.—Where a commission to a foreign country has been executed & returned, & remains unopened, & it is supposed that there is no proper affidavit of the execution attached, the ct. will order it to be returned to the comrs.—*DORR v. HAY v. HUNT* (1851), 1 P. R. 44.—*CAN.*

k. — — — — ——At the commencement of the trial, the counsel for deft. not being present, the counsel for plff. opened his case, & while he was reading evidence taken under a commission at Montreal, the counsel for deft. appeared & objected to the commission, as the envelope enclosing it was not under the hand & seal of the comr., & there was no affidavit of the due taking:—*Held*: the objection was fatal, & taken in time.—*KEFORM v. McDONALD* (1864), 14 C. P. 150.—*CAN.*

l. — Signature of deponent.—The affidavit of the due taking of the commission need not be signed by deponent.—*WILMOT v. WADSWORTH* (1853), 10 U. C. R. 594.—*CAN.*

m. — Form of.—It is no objection to an affidavit of execution of a commission to take evidence abroad, that the contractions "plff." & "deft." were used in the intituling of it,—

6672. Loss of return—Draft filed.—*JONES v. DONITHORNE* (1702), 1 Dick. 352; 21 E. R. 305. *See, also*, No. 6668, *ante*.

6673. Directions for return must be complied with—Copy examinations sent instead of original.—*CLAY v. STEPHENSON*, No. 6491, *ante*.

6674. — What amounts to sealing.—A return of the examination of a witness with the signature of the comr. appended thereto in a sealed envelope, is a good compliance with the judge's order, which requires the examination to be returned under the hand & seal of the comr., although the seal on the envelope is the only one connected with the return.—*DOE d. BAKER v. WINCHESTER* (1850), 15 L. T. O. S. 68.

Annotations.—*Mentd.* *Baker v. White* (1875), L. R. 20 Eq. 166; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213.

6675. — Mode of examination.—A requisition with interrogatories & cross-interrogatories annexed to it, issued to a French ct. to examine a witness resident in France. The judge of the French ct. having the interrogatories & cross-interrogatories before him, examined the witness by putting to him such questions as he deemed convenient, & no questions were put or suggested by the counsel & agent of the parties who were present at the examination. The ct. doubted whether the depositions so taken & returned under the requisition by the French ct. was admissible in evidence, but declined to reject it.—*HITCHINS v. HITCHINS* (1866), L. R. 1 P. & D. 153; 35 L. J. P. & M. 62; 14 L. T. 258.

6676. Presumption that directions complied with—Examinations taken separately.—*GREVILLE v. STULZ*, No. 6495, *ante*.

6677. — — — — ——*SIMMS v. HENDERSON*, *HENDERSON v. HENDERSON*, No. 6071, *ante*.

6678. — That interpreter so acted in examination.—*GREVILLE v. STULZ*, No. 6495, *ante*.

6679. — That oath taken by commissioners.—The return of a commission from Jamaica, which omitted to state that the comrs. & their clerks had taken the oaths, was ordered to be amended, & to

FRANK v. CARSON (1865), 15 C. P. 135.—*CAN.*

n. — — — — ——The affidavit stated that "the examination of B., the witness named in the commission, was taken before me & W. at, etc., according to the directions of the commission."—*Held*: the examination annexed to the commission was not proved, for the affidavit did not in any way identify it with that which it stated to have been duly taken.—*MILLIGAN v. GRAND TRUNK RY. CO.* (1865), 16 C. P. 191.—*CAN.*

o. — — — — ——The affidavit of the comr. stated that "the examination of M., the witness named in the commission, was duly taken before me at, etc., as above certified, under & according to the directions of the said commission." Preceding this affidavit was a certificate stating that "the foregoing are the depositions of M., in the annexed commission named, upon the interrogatories taken before me at, etc., under the commission hereto annexed; & I certify that the same were taken according to the directions in commission contained, & that annexed hereto & to commission are the said interrogatories & the documents therein respectively referred to." On the commission was indorsed the following return: "The return of the within written commission will appear by the depositions, affidavits, & papers thereunto annexed."—*Held*: the examination or depositions, which were in effect held to be synonymous terms, was, or were, fully identified as the

Sect. 3.—Return and use of evidence: Sub-sects. 1 & 2, A. & B. (a).]

be received in evidence, though, in addition, the signature of the comrs. had not been affixed to the interrogatories.—*DAVIS v. BARRETT* (1851), 14 Beav. 25; 18 L. T. O. S. 59; 51 E. R. 196.

6680. How return executed.—A return to a commission to take an answer abroad, must be executed on the back of the commission, & not on the envelope enclosing it.—*PHILIPS v. PHILIPS* (1840), 4 Jur. 599.

SUB-SECT. 2.—ADMISSIBILITY IN EVIDENCE.

A. In General.

6681. Objection must be taken at examination.—Under a commission to take evidence abroad in an

examination of the witness under & annexed to the commission.—*MUCKLE v. LUDLOW* (1866), 16 C. P. 420.—**CAN.**

p. Return to wrong office.—An objection taken at *Nisi Prius* to the admission of evidence taken under a commission, on the ground that the commission was not returned to the office of the Deputy Clerk of the Crown pursuant to the Judge's order:—*Held*: bad.—*STEVENSON v. RAE* (1853), 2 C. P. 406.—**CAN.**

q. Necessity for diligence to obtain return.—Postponement of trial.—Def't., in order to obtain a continuance on the ground of a commission not being returned, must show that he has used due diligence to obtain its return in time.—*LANDRY v. JONES* (1854), James, 311.—**CAN.**

r. ———.—*FERGUSON v. HYDE* (1851), James, 334.—**CAN.**

s. Annexing papers.—Papers enclosed & returned with a commission to examine witnesses, & referred to by the witnesses, need not be annexed to the depositions, if sufficiently identified. It will be presumed that a commission produced in ct. is in the same state as it came from the comrs., & that the exhibits enclosed are those referred to in the depositions.—*LAWTON v. TARBATT* (1858), 4 All. 1.—**CAN.**

t. Form of Witness's full name not given.—Upon a commission the name of one witness was stated to be William Lausling Flynn, & in the return of the comrs., they stated they had reduced to writing the answers of William L. Flynn:—*Held*: not to vitiate the commission.—*COMSTOCK v. TYRRELL* (1862), 12 C. P. 173.—**CAN.**

u. Opening.—Of return.—No order is necessary for leave to open a foreign commission duly returned. The proper practice is to open it without order, in the presence of all parties.—*CHALMERS v. PIGOTT* (*circa* 1863), 1 Ch. Ch. 282.—**CAN.**

v. ——— In envelope.—A commission enclosed in an envelope, which came to hand with an opening not large enough to allow of the escape of the papers contained therein is sufficiently close to render it admissible. Such commission need not be endorsed with the style of the cause in which it is issued.—*FRANK v. CARSON* (1865), 15 C. P. 135.—**CAN.**

w. ——— Time for.—A judge has no power, without consent of parties, to open the commission before the jury are sworn.—*BURPER v. CARVILL* (1875), 3 P.ug. 141.—**CAN.**

x. ——— Effect of.—Where a foreign commission had been opened before trial for the convenience of parties, it is too late at the trial to object to the mode of its execution.—*WALTON v. APOHIN* (1884), 5 O. R. 65.—**CAN.**

y. ——— Using evidence before trial.—The ct. in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would be acquired by the solrs. by such opening.—*SMITH v. GREKY* (1886), 11 P. R. 238.—**CAN.**

z. ———.—A commission produced at the trial in an envelope open at both ends, though otherwise well secured, & under the hand & seal of the comr., is properly admitted in evidence.—*GRAHAM v. STEWART* (1865), 15 C. P. 169.—**CAN.**

aa. Waiver of objections.—Formalities prescribed by statute.—A party who joins in acting under a commission, which contains specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted.—*FRANK v. CARSON* (1865), 15 C. P. 135.—**CAN.**

bb. Return by one of two commissioners.—Where a commission issues to two comrs. for the examination of witnesses & some evidence is properly taken before both, one comr. may return the commission & is not bound to wait an indefinite time to permit other witnesses to be examined.—*BURPER v. CARVILL* (1875), 3 P.ug. 141.—**CAN.**

cc. Endorsement on envelope enclosing.—*BANQUE VILLE MARIE v. LORDLY* (1881), 21 N. B. R. 273.—**CAN.**

dd. Refusal of one commissioner to sign.—The refusal of one of two comrs. to sign the return does not vitiate it.—*MILLVILLE MUTUAL MARINE & FIRE INSURANCE CO. v. DRISCOLL* (1884), 11 S. C. R. 183.—**CAN.**

ee. Whether return should show.—How commissioners were sworn.—A commission directed that before proceeding to examine witnesses the comrs. should take an oath in the form indorsed on the commission. The return stated that the comrs. were severally duly sworn, & that all things were had, done, taken, & performed by them as required by the commission:—*Held*: sufficient.—*HARBOUR v. ROBERTS* (1884), 24 N. B. R. 211.—**CAN.**

ff. Preventing return.—*HESSE v. ST. JOHN RY. CO.* (1899), 20 C. L. T. 113; 30 S. C. R. 218.—**CAN.**

gg. Return not under cover.—Examination sealed.—At the trial ptf.'s counsel tendered the depositions of witnesses taken under the order as evidence upon an issue joined between them & def't. as to the ownership of the subject-matter of the action, the depositions relating solely to that question & that def't.'s counsel objected to their admission since they had been found not under cover:—*Held*: as

action, copies of certain documents & answers of witnesses with regard to the contents of such documents were received by the comrs. in e on behalf of ptf., without objection on the part of def't., who joined in the commission. The copy documents were appended to the depositions & returned by the comrs.:—*Held*: the secondary evidence of the documents having been taken under the commission, without objection on the part of def't., was receivable before an arbitrator to whom the action was referred, & it was too late then to take objection on the ground that the original documents were not produced.—*ROBINSON v. DAVIES* (1879), 5 Q. B. D. 26; 49 L. J. Q. B. 218; 28 W. R. 255, D. C.

6682. ———.—A commission was issued abroad for the purpose of taking the evidence of a witness touching certain matters relating to an action brought by ptfs. against def't. The witness

they were under the examiner's seal they should be admitted.—*CRAMER v. BELL* (1907), 6 W. L. R. 382.—**CAN.**

aa. Irregularities in return.—Delay in moving to suppress.—The return to a commission issued for the taking of depositions in a foreign country did not show, in a number of respects, that the directions of the commission had been complied with. Ptff., having given notice, applied, at the opening of the trial, to suppress the depositions. As in the opinion of the ct., the objections were based only on "irregularities," & not on "matters of substance," & it did not appear that any harm had been or might be done by the non-compliance with the directions of the commission, & the delay in moving to suppress was unreasonable:—*Held*: the depositions were admissible.—*DECREAN v. VANCANNEY* (1913), 25 W. L. R. 27; 6 Alta. L. R. 384.—**CAN.**

PART VIII. SECT. 3, SUB-SECT. 2.—A.

6681 i. Objection must be taken at examination.—The proper time to strike inadmissible evidence out of a commission is at the hearing, & not in chambers before the hearing.—*BELL v. CLARKE* (1881), 10 V. L. R. 283.—**AUS.**

6681 ii. ———.—Def't. having made one objection to the evidence which was overruled, allowed it to be read, & commented upon it:—*Held*: he was precluded from taking any further exceptions.—*FARREL v. STEPHENS* (1859), 17 U. C. R. 250.—**CAN.**

6681 iii. ———.—A commission, in which def't. joined, was addressed to two comrs., with power to either of them to act. One comr. only, acted, & took the depositions of the witnesses produced by ptff., def't. not being present or represented by counsel. Some of the evidence given by ptff.'s witnesses was legally inadmissible, & when offered on the trial def't.'s counsel objected to its reception, but the presiding judge admitted it:—*Held*: the fact of the evidence not having been objected to on behalf of def't. at the time the witnesses were examined before the comrs. did not preclude def't. from objecting to it on the trial, & it should have been rejected.—*BOSTON BELTING CO. v. GABEL* (1880), 20 N. B. R. 347.—**CAN.**

6681 iv. ———.—Depositions of witnesses taken upon a foreign commission are admissible in evidence, notwithstanding that they are taken in short-hand, without authority therefor in the order, because objection was not taken at the time the witnesses were examined.—*MINOR GROCERY CO. v. DURICK* (1913), 23 W. L. R. 270; 3 W. W. R. 901; 10 D. L. R. 126; 6 Sask. L. R. 44.—**CAN.**

6681 v. ———.—Documents attached to the return of a commission & identified with the documents referred to in

objected to be sworn & was allowed by the comr. to affirm. His evidence was then taken. The deposition was regular upon the face of it, & was returned by the comr. in the following terms: "Affirmed before me, the witness objecting to an oath." Pltfs. were represented at the commission, but took no objection at the time to the evidence being given upon affirmation; subsequently, however, they applied at chambers to have the deposition taken off the file on affidavits showing that the witness was not a person who was entitled to affirm:—*Held*: the objection should have been taken at the time, & ought not now to be entertained, there being nothing on the face of the deposition itself to show that it was not properly taken.—*RICHARDS, TWEEDY & Co. v. HOUGH* (1882), 51 L. J. Q. B. 361; *sub nom. RICKARDS v. HOUGH*, 30 W. R. 676, D. C.

B. Grounds for Granting or Refusing Admission.
(a) *In General.*

6683. No notice given of execution of commission.]—*LOVEDEN v. MILFORD* (1794), 4 Bro. C. C. 540; 29 E. R. 1031, L. C.

6684. —.]—It is no objection at *nisi prius* to the reception of depositions taken on interrogatories, that there was an alleged breach of faith on the part of deft. in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as, for instance, if it were executed without any notice to pltf. to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, & the ct., if they have been received at *nisi prius*, will grant a new trial, & direct a fresh commission to be issued.

To enable a witness to use a paper written by himself for the purpose of refreshing his memory, it must be shown that the paper was written, contemporaneously with the transaction it refers to. A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers, the contents of a letter which was not produced. On the trial of the cause in England:—*Held*: so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility that there were no means, as the witness was out of the jurisdiction of the English Cts., of compelling the production of the letter.—*STEINKELLER v. NEWTON* (1838), 9 C. & P. 313,

the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the comr. Objections to the admissibility of such documents cannot be taken at the hearing of the suit.—*STRUTHERS v. WHEELER* (1880), 6 C. L. R. 109.—*IND.*

q. —.]—*Fresh objection at trial.*—If, when evidence is taken before comrs. a document is tendered & objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.—*RALLI v. GAU KIM SWEE* (1883), 1 L. R. 9 Calc. 939.—*IND.*

r. Addressed to court.—Sufficiency of.—The depositions of a witness taken *de bene esse* sealed up & indorsed "in the Supreme Ct." with the title of the cause, the dt. & the comr.'s name, are sufficiently addressed to the

N. P.; *subsequent proceedings* (1840), 1 Scott, N. R. 148; (1841), 2 Mood. & R. 372.

Annotation.—*Refd. M'Combie v. Anton* (1843), 6 Man. & G. 27.

6685. —.]—Pltf. obtained a judge's order for a commission to examine witnesses. The parties having agreed upon A. & B. as comrs., pltf. obtained another order to examine witnesses upon interrogatories before A. & B., without describing them as comrs., & without referring to any commission. Deft. afterwards withdrew the name of B., his comr., & declined to proceed with the examination, upon the ground that the second order was informal. Pltf. then obtained a further order to examine witnesses before A. on interrogatories, *ex p.*—*Held*: the examinations taken under the last order were admissible in evidence, although deft. had received no notice of the time & place of taking the examinations.—*M'COMBIE v. ANTON* (1843), 6 Man. & G. 27; 6 Scott, N. R. 923; 1 L. T. O. S. 230; 134 E. R. 795.

6686. —.]—By a judge's order of June 11, 1838, a commission issued to examine witnesses in Scotland, & one of the terms was, that pltf. should furnish deft. with the names of the witnesses ten days before the issuing of the commission. Upon an affidavit that S., one of the witnesses, was about to proceed to America, an order of June 19 authorised the issuing of the commission forthwith, & it was issued the next day. The second order provided, that, as to the witnesses other than S., deft. was to have a copy of the interrogatories & notice of their examination twenty days before the first appointment. No list of witnesses was delivered to deft., nor was the name of any witness communicated to him, except that of S.:—*Held*: this omission rendered their depositions inadmissible.

By the Order of June 19, a copy of the interrogatories on which S. was to be examined was to be delivered to deft. on that day, & he was to have six days' notice of his examination:—*Held*: a notice by the opposite party, not signed or directed by the comrs., was sufficient. *SCOTT v. VAN SANDAU* (1844), 6 Q. B. 237; 8 Jur. 1114; 115 E. R. 92.

Annotations.—*Refd. White v. Hallet* (1839), 33 L. T. O. S. 94. *Mentd. Hawley v. North Staffordshire Ry.* (1848), 11 L. T. O. S. 121.

6687. —.]—A commission having issued, to be examined at New York, returnable in a month, with leave to deft. to cross-examine, etc., there

ct. within the Act to be receivable in evidence.—*WATERHOUSE v. NEW BRUNSWICK MARINE ASSURANCE CO.* (1848), 3 Kerr, 639.—*CAN.*

s. —.]—A commission for the examination of witnesses in England was returned indorsed with the title of the ct. & cause signed by the comrs. & addressed to the clerk of the circuits of the county in which the venue was laid:—*Held*: sufficiently addressed to the ct.—*MORAN v. TAYLOR* (1884), 24 N. B. R. 39.—*CAN.*

t. Examination of aged or infirm person within jurisdiction.—*RYAN v. DEVEREUX* (1866), 26 U. C. R. 100.—*CAN.*

u. Order not providing for reading at trial.—Evidence taken abroad under an order may be read at the hearing although the order does not state that the evidence may be so read.—*GRISDALE v. CHUBBUCK* (1884), 1 Man. L. R. 202.—*CAN.*

v. Admitted by consent.—Where books are received on the taking of evidence under commission by the express consent of both parties, their

reception cannot afterwards be objected to on the general grounds that they are irrelevant & immaterial to the issue.

—*CAISTERS v. MUGGAN* (1905), 36 S. C. R. 612.—*CAN.*

w. Evidence read in counsel's opening.—Deft. examined a witness on commission. The commission was returned to the ct. Pltf. in opening his case claimed the right to refer to the evidence taken on commission as part of the record of the suit. Deft. objected, contending that, if pltf. read it, he must read it as his own evidence:—*Held*: pltf. was entitled to refer to the evidence as part of the record.—*NISTARINI DASSEE v. NUNDO LAL BOSE* (1899), 1 L. R. 26 Calc. 591.—*IND.*

PART VIII. SECT. 3, SUB-SECT. 2.—B. (a).

d. No cross-examination.—A material witness for pltf. stated during the assizes that he was obliged to go to the States on business; & a commission was granted & the witness examined. Deft.'s counsel objected to the issuing of the commission, & refused to cross-examine, as he could not consult his

c. *Order for examination made on insufficient grounds.*—On an application *ex p.* for leave to examine a witness about to leave the colony the ct. has power to make the order, the order being taken by appt. at his peril & subject to the risk of being discharged

proved to be correct evidence, although not signed.—**BODDENHAM v. LEWIS** (1812), Peake, Add. Cas. 245, N. P.

6694. Depositions not signed by commissioner.]

—**DAVIS v. BARRETT**, No. 6679, ante.

6695. Witness referring to documents.]—The depositions of a witness examined on interrogatories are admissible, though it appears that on his examination he referred to papers which he refused to allow the comrs. to see.—**STEINKELLER v. NEWTON** (1841), 2 Mood. & R. 372, N. P.; *previous proceedings* (1840), 6 Man. & G. 30, n.

(b) *Death of Witness.*

6696. Whether admissible.]—A common law ct. may grant a commission to take the testimony of aged witnesses on a question of title; but such testimony cannot be used till after the witnesses are dead.—**BEGUALL v. OWEN** (1828), Het. 29; 124 E. R. 317.

6697. — Examination before issue joined Opportunity to examine after issue joined.]—In an action of ejectment:—*Held*: if a witness had been examined for a *de bene esse* to preserve his testimony before issue joined upon an order of the ct. & the witness should have died after issue joined before being examined again, his examination could not be read in evidence because it had been taken before issue joined & there had been the opportunity to examine him after. — *v. BROWN* (1862), Har. 315; 145 E. R. 475.

6698. — — — — —.]—**WATT'S CASE** (1663), Har. 331; 145 E. R. 483.
Annotation:—*Mentd.* **Abrahams v. Bunn** (1768), 4 Burr. 2251.

6699. — — — — —.]—**SOUTHWELL v. LIMERICK** (LORD) (1725), 9 Mod. Rep. 133; 2 Eq. Cas. Abr. 418, pl. 7; 88 E. R. 360.

6700. — — Death before examination in chief.]

Depositions of a witness examined *de bene esse*, he dying before he was examined in chief, were ordered to be read at a trial at law.—**MARSDEN v. BOUND** (1685), 1 Vern. 331; 1 Eq. Cas. Abr. 234, pl. 2; 23 E. R. 502.

6701. — — — — —.]—Depositions taken *de bene esse* shall not be published without affidavit of the party's death, & that could not be examined in chief.—**COX v. GEORGE** (1725), Cas. temp. King, 11; 25 E. R. 194.

6702. — — — — —.]—(1) Depositions *de bene esse*, where witnesses are dead, & no opportunity to examine in chief, although after great length of time, were published, but without prejudice to exceptions at the hearing.

(2) Bill to perpetuate, if set down, dismissed, but the testimony not thereby prejudiced.
ANON. (1754), 2 Ves. Sen. 497; 28 E. R. 318, L. C.
Annotation:—*As to* (2) *Consd.* **Ellie v. Roupell** (No. 2) (1863), 32 Beav. 308.

6703. — — Death before signature of examination.]—Where a witness dies after examination,

but before such examination is signed by him, the depositions cannot be made use of. But yet where deff., after publication, examined a witness, & on the usual affidavit that deff., his clerk or solr., had not seen the depositions, got an order to re-examine this witness, but the witness died before a re-examination:—*Held*: leave would be given deff. to make use of the former depositions of the same witness.—**COPELAND v. STANTON** (1718), 1 P. Wms. 414; 2 Eq. Cas. Abr. 417, pl. 1; 24 E. R. 451, L. C.

Annotation:—**Folld. Hill v. Bulkeley** (1811), 1 Phillim. 280.

6704. — — — Death must be proved.]—An affidavit of the death or absence beyond sea of the witness is necessary before examinations *de bene esse* can be published.—**WARD v. SYKES** (1741), Ridg. temp. H. 193; 27 E. R. 801.

6705. — — —.]—Depositions of a witness examined *de bene esse*, who was dead, were published in order to be read at a trial at law.—**PRICE v. BRIDGMAN** (1750), 1 Dick. 144; 21 E. R. 223, L. C.

6706. — — —.]—*Held*: depositions should be read at the trial of an issue, if the witnesses should be then dead, or proved to be in such a state of health as not to be capable of attending, without such order, to make the depositions evidence at law, the whole record would have to be read. **PALMER v. AYLESBURY** (LORD) (1808), 15 Ves. 176; 33 E. R. 721, L. C.; *subsequent proceedings*, 15 Ves. 209, L. C.

Annotation:—*Refd.* **Corbett v. Corbett** (1813), 1 Ves. & B. 335.

6707. — — — Death before cross-examination.]—The deposition of a witness who died before he had been repeated & before he had been examined on the interrogatories of the adverse party admitted.—**HILL v. BULKELEY** (1811), 1 Phillim. 280; 161 E. R. 985.

6708. — — —.] The depositions of such of the witness in a cause, as had died, were ordered to be read at the trial of an issue in the cause. *Ptff.* afterwards died, having appointed A., one of his witnesses, his exor. A. revived the suit, & his name was substituted for *ptff.*'s in the issue: *Held*: A.'s depositions must be read at the trial.

ANDREWS v. BEAUCHAMP (LADY), **WALKER v. BEAUCHAMP** (LADY) (1831), 7 Sim. 65; 58 E. R. 761; *subsequent proceedings, sub nom.* **WALKER v. BEAUCHAMP** (COUNTESS), 6 C. & P. 552, N. P.
Annotations:—*Mentd.* **Slaney v. Wade** (1839), 7 Sim. 595; **Davies v. Lowndes** (1843), 6 Man. & G. 471; **Shedden v. A.-G.** (1860), 30 L. J. P. M. & A. 217.

(c) *Absence of Witness.*

In criminal proceedings.] See CRIMINAL LAW, Vol. XIV., pp. 276 281, 411, Nos. 2878 2961, 4669-4674.

6709. Whether admissible Witness in England.] Deposition of a witness examined before a judge, because going beyond sea, cannot be read if he

upon sufficient grounds being shown. If sufficient grounds are afterwards shown that the order should not have been made, the ct. can refuse to allow the depositions of the witness examined to be put in evidence at the trial.—**THOMPSON v. PICTON BOROUGH COUNCIL** (1907), 26 N. Z. L. R. 668.—N.Z.

d. Witness giving evidence at trial.]—The deposition of an aged witness, which had been taken on commission to lie in *retentia*, was entirely superseded on the witness appearing & giving evidence in ct., & therefore could not be used for the purpose of proving that the witness had made a statement before the comr.

different from her evidence given in ct.—**FORREST v. LOWE'S TRUSTEES**, [1907] S. C. 1210; 15 S. L. T. 330.—SCOT.

PART VIII. SECT. 3, SUB-SECT. 2. — B. (b).

6696 i. Whether admissible.]—Publication of depositions taken *de bene esse*, refused after one trial had, on which some of the persons who had been examined *de bene esse*, & who had since died, were examined, & the others might have been examined *in chief*.—**FITZPATRICK v. WEBB** (1826), 2 Mol. 313.—IR.

6696 ii. — — —.]—**HICKMAN v. O'BRIEN** (1830), 3 Ir. L. Rec. 1st. ser. 262.—IR.

PART VIII. SECT. 3, SUB-SECT. 2. — B. (c).

e. Whether admissible. Whether proof of absence essential.]—If a witness be examined under a commission in a foreign country, it is not necessary at the trial to prove that he is still without the jurisdiction. **WATSON v. LEE** (1842), 2 Ont. Dig. 2137.—CAN.

f. — — —.] It is not necessary before putting in depositions to prove that the witnesses are out of the Province; having been shown to be out of the Province when their evidence was taken, it will be presumed they continued so, unless contrary

6728. ———.]—The deposition of a sick witness had been taken under Evidence on Commission Act, 1831 (c. 22), s. 4:—*Held*: admissible under sect. 10, upon proof by an attorney's clerk, that such witness was too ill to attend, without the evidence of a medical man.—*JOHNSON v. THOMPSON* (1850), 15 L. T. O. S. 437, N. P.

6729. ———.]—Evidence on Commission Act, 1831 (c. 22), s. 10, makes the deposition of a witness taken under it inadmissible in evidence, unless it shall appear to the satisfaction of the judge that the deponent is unable from permanent sickness or other permanent infirmity to attend the trial:—*Held*: although it was competent to the ct. to review his decision, it was for the judge to satisfy himself of the deponent's inability to attend, by such evidence as he should think fit, & the ct. would not interfere, unless it was shown that the judge had been misled by false evidence, or that injustice had resulted from the course pursued at the trial.

Qu.: whether an affidavit of the witness's ordinary medical attendant would be admissible evidence for such a purpose.—*BEAUFORT (DUKE) v. CRAWSHAY* (1866), L. R. 1 C. P. 609; Har. & Ruth. 638; 35 L. J. C. P. 342; 14 L. T. 729; 12 Jur. N. S. 709; 14 W. R. 989.

6730. ———.]—*McPHERSON & FRANZMAN v. PARNELL*, No. 6359, *ante*.

C. Extent of Admissibility.

6731. Whole examination of witness must be read.]—(1) In a suit by the assignees of an uncertificated bkpt. for the recovery of property fraudulently delivered by him to defts., plffs. read the examination of one of defts. taken before the comrs. on the first day, but declined to read the examination taken on the second day:—*Held*: the whole must be read.

(2) Pltf. cannot read the cross-examination of one of deft.'s witnesses if deft. declines to read the examination in chief.—*SMITH v. BIGGS* (1832), 5 Sim. 391; 58 E. R. 383.

Annotation:—As to (2) *Distd.* *Cazenove v. Boazman* (1844), 14 Sim. 352.

6732. How far evidence of opponent's witness may be read.]—*SMITH v. BIGGS*, No. 6731, *ante*.

6733. ———.]—If pltf. reads the examination in chief of one of deft.'s witnesses, he may read the cross-examination of that witness.—*CAZENOVE v. BOAZMAN* (1844), 14 Sim. 352; 60 E. R. 391.

6734. Illegal questions may be objected to.]—Illegal questions or answers returned by comrs. appointed by the ct. under Evidence on Commission Act, 1831 (c. 22), for the *voir dire* ex-

amination of witnesses, may be objected to & struck out at the trial; but counsel cannot object to the answers to illegal questions put on his own side.—*HUTCHINSON v. BERNARD* (1836), 2 Mood. & R. 1, N. P.

SECT. 4.—EVIDENCE FOR USE BEFORE FOREIGN TRIBUNALS.

See Foreign Tribunals Evidence Act, 1856 (c. 113), ss. 1, 2; Extradition Act, 1870 (c. 52), s. 24; R. S. C. Ord. 37, rr. 54–58, 60.

6735. Jurisdiction of foreign court—What amounts to proof of.]—*SIMPSON v. HAZARD*, [1887] W. N. 115, D. C.

6736. Conduct of examination.]—*DESILLA v. FELS & Co.*, No. 6471, *ante*.

6737. Power of English court—To order discovery of documents.]—It, [Foreign Tribunals Evidence Act, 1856 (c. 113)], is an act which, in the case of an action pending in the ct. of a foreign country, enables that ct. to request the English ct. to take part in the trial of the action brought in the foreign country to this extent, namely that, on the request of the foreign ct. it empowers the English ct. to make such an order as will enable the evidence of a witness in this country to be given before a comr. appointed to take his evidence. This is not a power given to the ct. in this country to order discovery of documents (*VAUGHAN WILLIAMS, L.J.*).—*ECCHES & Co. v. LOUISVILLE & NASHVILLE RAILROAD CO.*, [1892] 1 K. B. 135; 81 L. J. K. B. 445; 105 L. T. 2; 28 T. L. R. 67; 56 Sol. Jo. 107, C. A.

SECT. 5.—COSTS.

6738. General rule—In discretion of court.]—*RUCCO v. PEARCE*, No. 6265, *ante*.

6739. Whether allowed to successful party—When order obtained by consent.]—Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expense of taking the depositions in the taxation of costs, though he succeed.—*TAYLOR v. ROYAL EXCHANGE ASSURANCE CO.* (1807), 8 B. R. 103 E. R. 391.

—*Consd.* *Fairlie v. Parker* (1828), 1 Moo. & P. 438.

6740. ———.]—**Examination especially for his benefit.]**—Costs of commission to examine witness abroad are not allowed to the party who obtains the commission, although successful in the action.

PART VIII. SECT. 3, SUB-SECT. 2.—C.

6732 i. How far evidence of opponent's witness may be read.]—If a commission to examine witnesses abroad, issued at the instance of one party & executed at his expense, be returned by the comrs. into ct. according to the statute, the opposite party has a right to call for & make use of the evidence at the trial of the cause.—*GORDON v. FULLER* (1836), 5 O. S. 174.—CAN.

6732 ii. ———.]—Pltf. is not bound to read deft.'s evidence taken under commission, but only the evidence which he himself gave before comrs.—*BURKE v. CARVILL* (1875), 3 Pug. 141.—CAN.

6732 iii. ———.]—A party who has procured evidence to be taken on commission is not bound to put it in at the trial, but if it has been duly returned into ct., the opposite party has a right to put it in on his own behalf if he desires.—*RICHARDSON v. McMILLAN* (1908), 18 Man. L. R. 339; 9 W. L. R. 632.—CAN.

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6732 iv. ———.]—Whether all the evidence taken upon commission in an action shall be read at length, or read in part, or stated in part, or stated by counsel at the trial is a matter in the discretion of the trial judge.—*MARKS v. MARKS* (1907), 13 B. C. R. 161.—CAN.

6732 v. ———.]—*THE MARGA v. SEARX* (1903), 20 S. C. 485.—S. AF.

6732 vi. ———.]—Where evidence had been taken on commission on the application of defts.:—*Held*: such evidence was available to be put in for pltf. during the hearing of pltf.'s case.—*McWILLIAM'S INSOLVENT ESTATE v. BANK OF AFRICA* (1911), 32 N. L. R. 251.—S. AF.

PART VIII. SECT. 4.

1. For use of French Court.]—Letters rogatory were issued from a French ct. seeking the aid of the Supreme Ct. of Ontario in obtaining

the testimony of a person within the jurisdiction of the Ontario Ct. in relation to criminal proceedings pending against him in the French ct.—*HEISLER* (1915), 9 O. W. N. 18; 31 O. L. R. 375.—CAN.

m. For use of English Court.]—Comr. appointed to take evidence of certain persons resident in Cape Colony, pursuant to Letters of Request directed to it & issued by the Q. B. Div., England, wherein an action was pending in which such evidence was required.—*MANCHESTER CORPN. v. PERKINS, GRAHAM & Co., LTD.* (1897), 14 S. C. 211.—S. AF.

PART VIII. SECT. 5.

n. General rule—Costs in cause.]—Cost of recommission to examine witnesses are costs in the cause under 5 Wm. 4, c. 34.—*FERGUS v. MCINTOSH* (1835), 2 N. B. R. (Ber.) 173.—CAN.

o. ———.]—*COLBORNE v. THOMAS* (1853), 4 Gr. 109.—CAN.

Sect. 5.—Costs.]

where the examination is more peculiarly for his benefit.—*BRIDGES v. FISHER* (1835), 1 Bing. N. C. 510; 4 L. J. C. P. 117; 131 E. R. 1214; *sub nom.* *BRYDGES v. FISHER*, 1 Hodg. 36; 1 Scott, 485.

Annotation :—*Mentd.* *Steinkeller v. Newton* (1840), 1 Scott, N. R. 148.

6741. — *Irregularity in form of order—Place of examination not specified.*—A commission issued under Evidence on Commission Act, 1831 (c. 22), s. 4, at the instance of *pltf.*, for the examination of witnesses in Ireland. *Deft.* did not join in the commission. Neither the order for a commission nor the commission specified the place of examination. By agreement between the attorneys, prior to the granting of the order, the examination was taken at a particular place in Ireland. Cross-interrogatories were administered on behalf of *deft.*, & on the return of the commission he obtained copies of the examinations. On the trial, documents obtained under the commission were used by *pltf.*, who obtained a verdict. On taxation the master allowed *pltf.* the costs of the commission. On a rule to review his taxation :—*Held* : the omission to specify the place of examination in the order was, at most, an irregularity, which was waived by *deft.*'s conduct, & the costs were properly allowed.—*HOWKINS v. BALDWIN* (1851), 16 Q. B. 375; 2 L. M. & P. 250; 15 Jur. 749; 117 E. R. 923; *sub nom.* *HAWKINS v. BALDWIN*, 20 L. J. Q. B. 198; *sub nom.* *HOCHINS v. BALDWIN*, 16 L. T. O. S. 437.

Annotation :—*Mentd.* *Hodges v. Cobb* (1867), L. R. 2 Q. B. 652.

6742. — *Evidence mainly relevant to issue on which successful.*—A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed. The true question is, for what purpose were they called? A commission was taken out by *deft.* to

6742 i. *Whether allowed to successful party—Evidence mainly relevant to issue on which successful.*—A party is entitled to the costs of a commission to take evidence if it relates substantially to issues on which he succeeds; & it will not disentitle him to those costs if unimportant questions are asked or witnesses examined relating to issues on which he fails. Where on such a commission one class of evidence given relates solely to a question on which the party obtaining the commission succeeds, he will be entitled to the costs of the witnesses giving this evidence & the proportionate costs of preparing briefs & instructions for counsel to attend the commission.—*HUNT v. GORDON* (1884), 2 N. Z. L. R. C. A. 326.—N.Z.

6743 i. — *Where evidence not used at trial.*—The charges of a solicitor attending the execution of a commission to examine witnesses in England, & the expenses of taking evidence *de bene esse* in this province, were not allowed on the taxation of costs, the evidence not having been used on the trial.—*McGIVERN v. STYMEST* (1869), 5 All. 340.—CAN.

6743 ii. — *—*—The expense of a commission to examine witnesses taken before the first trial of a cause, but not used, will not be allowed to *pltf.* as a necessary preparation for the second trial.—*WOOD v. STYMEST* (1869), 5 All. 439.—CAN.

6743 iii. — *—*—*DOMINION, ETC.* *CO. v. STINSON* (1881), 9 P. R. 177.—CAN.

6743 iv. — *—*—In an action for libel *deft.* obtained a commission & had the evidence of certain witnesses out of the jurisdiction taken thereunder for use at the trial. The evidence, however, was not used :—*Held* : *deft.* were entitled to tax against *pltf.* the costs of executing the commission.—*RONDOT v. MONETARY TIMES PRINTING CO.* (1898), 18 P. R. 141.—CAN.

6743 v. — *—*—*It. v. NICHOL* (1901), 8 B. C. R. 276.—CAN.

6743 vi. — *—*—The party obtaining a commission will be entitled to the costs attending it, even though, owing to a verdict being directed by the judge on points of law, the evidence taken becomes unnecessary.—*HUNT v. GORDON* (1884), 2 N. Z. L. R. C. A. 326.—N.Z.

6743 vii. — *—*—When a commission to take evidence abroad is taken out *bond fide*, the *ct.* will allow the costs of same to the successful party notwithstanding that the witness has returned previous to the trial & that the evidence so taken abroad has not been used at the trial.—*MORRISON v. HOGAN* (1857), 4 Nfld. L. R. 180.—NFLD.

p. — *Plaintiff not proceeding to trial.*—Notice of trial was given & duly countermanded. *Deft.* obtained a judgment as in case of nonsuit, *pltf.* not having proceeded to trial according to the practice, & claimed costs of a commission to examine witnesses in the U.S. :—*Held* : the costs of the commission should be allowed, notwithstanding the countermand.—*PEGO*

examine a witness at Paris. At the trial, *pltf.*'s counsel abandoned that part of his case to which the evidence under the commission applied, & *deft.* had a verdict on that issue :—*Held* : *deft.* was entitled to the costs of the commission.—*JEWELL v. PARR* (1856), 17 C. B. 636; 25 L. J. C. P. 179; 139 E. R. 1226; *subsequent proceedings* (1857), 2 C. B. N. S. 809.

6743. — *Where evidence not used at trial.*—In the taxation of the costs of an action in which the examination of a witness under the common order before trial has not been used at the trial for some reason, such as the attendance of the witness at the trial or the taking of a judgment by consent, the costs of the examination should not be disallowed under R. S. C., Ord. 65, r. 27 (29), merely on the ground that the use of the examination had become unnecessary. The true test in exercising the discretion given to the taxing master by the rule is whether the costs of the examination were "necessary or proper for the attainment of justice" under the circumstances existing at the time the examination was ordered, irrespective of the eventual state of circumstances at the trial.

There is no hard & fast rule of taxation that the costs of a proceeding should not be allowed unless it has been actually used for some purpose.—*BARTLETT v. HIGGINS*, [1901] 2 K. B. 230; 70 L. J. K. B. 621; 84 L. T. 509; 49 W. R. 449, C. A.

6744. *What costs will be allowed—Expenses of bringing witnesses to place named for examination.*—If the rule of *ct.* for the examination of witnesses by commission express that the depositions of witnesses at H. & L. are to be taken, & the commission is directed to persons at H., the expenses of bringing witnesses from L. to H. ought to be allowed upon taxation.—*MULLER v. HARTSHORNE* (1803), 3 Bos. & P. 556; 127 E. R. 300.

Annotation :—*Mentd.* *Twemlow v. Brock* (1810), 2 Taunt. 361.

6745. — *Costs of detention of witnesses till trial—Subject to deduction of costs of cross-examination by other party.*—*Deft.* put off the

v. PEGG (1849), 7 U. C. R. 220.—CAN.

q. — *Evidence not establishing claim on which successful.*—Where a commission is issued apparently to obtain evidence to establish a particular average loss, & some slight evidence is obtained tending to show a general average loss, & *pltf.* succeeds in establishing the latter, but fails to make out the former claim, he is not entitled to the costs of the commission.—*SEARLE v. NEW ZEALAND INSURANCE CO.* (1885), 4 N. Z. L. R. 48.—N.Z.

r. — *Witness afterwards examined at trial.*—The evidence of a witness was taken on commission, on behalf of a pursuer, on Mar. 1. The witness attended the trial on Mar. 31, & was examined as a witness. The unsuccessful defenders having objected to the auditor's report on pursuer's account of expenses, in so far as it allowed the expenses of taking the evidence of the witness on commission :—*Held* : the execution of the commission was not reasonably necessary, & objection sustained.—*SPRIMS v. CALEDONIAN RY. CO.*, [1921] S. C. 889; 58 So. L. R. 573.—SCOT.

s. — *Commission on first trial of action—Depositions read on new trial & witness examined viva voce.*—In an action for libel a new trial was ordered; after which it was consented that the deposition of the witnesses, taken under a commission obtained by *pltf.*, & made use of in evidence, might be used again on the next trial, whereat the witness himself appeared, & was examined for *pltf.* *viva voce*;

trial, on terms that a witness going abroad should be examined on interrogatories:—*Held*: *pltf.*, having detained the witness until the trial, after he had been examined on interrogatories & cross-examined by *deft.*, was entitled to the costs of the detention, but *deft.* was entitled to have his costs of the cross-examination interrogatories deducted.—*PATTERSON v. EVANS* (1819), 1 Chit. 89.

6746. — *Attendance of attorney.*—The *ct.* will not interfere with the discretion of the master as to the costs of an attorney for going abroad to attend a commission for the examination of a witness.—*CORNET v. DEMPSEY* (1841), 1 Dowl. N. S. 422.

Annotation:—*Reld*. *Le Cocq v. S. E. Ry.* (1866), 7 B. & S. 415.

6747. — *—*—The costs of a London attorney attending the execution of a commission for the examination of witnesses in the country may, under special circumstances, be allowed on taxation of costs between party & party.

Under particular circumstances the *ct.* allowed the *comr.* a small fee for perusing the pleadings.—*HOWELL v. TYLER* (1843), 2 Y. & C. Ch. Cas. 284; 12 L. J. Ch. 223; 7 Jur. 525; 63 E. R. 125.

6748. — *Attendance of counsel abroad.*—To entitle the successful party in an action to the costs of the attendance of counsel on a commission to examine witnesses abroad, it must be shown that the attendance of counsel was necessary for the conduct of the commission.—*Le Cocq v. SOUTH EASTERN RY. CO.* (1866), 7 B. & S. 415; 14 L. T. 401; 14 W. R. 649.

6749. — *Attendance of one counsel before examiner.*—The costs of more than one counsel attending the examination of witnesses before an examiner will not be allowed on taxation.—*HALLOWS v. FERNIE* (1867), 17 L. T. 347; 16 W. R. 175.

6750. — *Costs of shorthand writer.*—On a taxation of a *solr.*'s bill of great complexity it became necessary to examine witnesses orally before the taxing master, who, before the examination, stated his opinion to be that a shorthand writer ought to be employed. Neither party objected, each employed a shorthand writer, & the taxing master stated that he should rely on

the notes. More than one-sixth having been taxed off, he allowed against the *solr.* half the costs of the shorthand notes of the evidence, on the ground that the parties ought to have employed one shorthand writer. The *solr.* objected to the allowance of any part of the expense of the shorthand notes:—*Held*: neither a judge nor taxing master had jurisdiction to order a shorthand note of evidence to be taken, but as neither party had objected to having it taken, but had acceded to the taxing master's view, the allowance to the successful party of the same costs as if they had agreed on one shorthand writer ought not to be disturbed.—*Re HILLEARY & TAYLOR* (1887), 30 Ch. D. 262; 56 L. J. Ch. 758; 56 L. T. 867; 35 W. R. 705; 3 T. L. R. 642, C. A.

6751. On what scale allowed.—Scale allowed in country where evidence taken.—In the course of a suit in this country, special examiners were appointed to take evidence in Sydney. That evidence was duly taken. The costs of taking it, which were very heavy, were taxed as between *solr.* & client, at Sydney, & paid by *defts.* The scale of taxation there was larger than here. The bill in the suit was dismissed by the Master of the Rolls at the hearing, & ultimately on appeal by the House of Lords. Upon the question what was the proper course to adopt with reference to the final taxation of the costs of taking the evidence at Sydney:—*Held*: the bill of costs ought to be finally taxed in this country on the same scale as it would have been taxed in Australia, & if the taxing master here felt any difficulty, he must refer to Sydney for information to guide him.—*WENTWORTH v. LLOYD* (1865), 31 Beav. 455; 12 L. T. 226; 13 W. R. 486; 55 E. R. 711.

6752. Witnesses examined by both parties.—Costs shared ratably.—Under a commission issued forth for the examination of witnesses, both *pltf.* & *deft.* examined witnesses:—*Held*: *deft.* was liable to pay his proportion of the expenses of the execution of the commission.—*GROVE v. YOUNG* (1850), 20 L. J. Ch. 167; 16 L. T. O. S. 320; 15 Jur. 97.

6753. Applicant suing in form *pauperis*—Deposit dispensed with.—*SKEATS v. HURST* (1862), 1 New Rep. 50.

after which his depositions under the commission were put in & read with the consent of all parties:—*Held*: the taxing officer was right in disallowing the expenses of the commission.—*ANDREWS v. WILSON* (1846), 3 Kerr. 127.—CAN.

t. — *Examination of plaintiff not completed.*—Owing to ill-health—Used by defendant.—An order was obtained by *pltf.*, who sued for damages for bodily injuries sustained, for his own examination *de bene esse* before the trial, but owing to the state of his health his examination was not completed:—*Held*: the examination of *pltf. de bene esse* was a proper & reasonable proceeding, & as the failure to complete it was through no fault of *pltf.* or his *solr.*, & as it was not without use to *defts.*, the costs of it should have been taxed to *pltf.* as part of the costs of the action.—*CARTY v. LONDON (CITY)* (1889), 13 P. R. 285.—CAN.

6748 i. What costs will be allowed.—Attendance of counsel abroad.—The *ct.* will not usually give the successful party the costs of counsel attending a commission to examine witnesses abroad, even though the opposite side employed counsel. It must be shown there was something special in the case necessitating such employment. The

ct. will rarely interfere with the discretion of the taxing master.—*MONROE v. FALE* (1882), 6 Nfld. L. R. 407.—NFLD.

a. — *Attendance of solicitor.*—*GREY v. SMITH*, 7 C. L. T. Occ. N. 108.—CAN.

b. — *—*—Where a judge's order ordering a commission to issue for the examination of witnesses stated that the costs of the order, of the examination, & of the proceedings incidental to it were to be taxed & be costs in the cause, the costs of the *solr.* of the successful party who attended the commission were restricted to such reasonable costs as would have been allowed for an agent residing in the place where the commission was held.—*BANK OF NEW ZEALAND v. PITT* (1890), 8 N. Z. L. R. 496.—N.Z.

c. — *Fees of physician attending party during examination.*—Amount already included in verdict.—*Pltf.*'s own physician attended on him during an examination *de bene esse*, & was called as a witness at the trial, when he stated what his charges for attendance on the *pltf.* would amount to:—*Held*: there being nothing to show that he did not include in his statement the charges for attendance at the examination, they must be taken to have

been included in the verdict, & could not be taxed to *pltf.* as part of the costs of the action.—*CARTY v. LONDON (CITY)* (1889), 13 P. R. 285.—CAN.

d. Principle of taxation.—Where, in a suit in India, a commission to take evidence has been issued to England, the bill of costs with respect to such commission is to be taxed by the taxing master of the *ct.* in India, & not in England. It is to be taxed on the same scale & on the same principle as would be adopted in England, & if the taxing master finds any difficulty, he must refer to England for information.—*GODULAS BULARDAS MANUFACTURING CO., LTD. v. SCOTT* (1890), 1 L. R. 15 Bom. 209.—IND.

e. Commission sued out unnecessarily.—Any party to an inquiry who unnecessarily sues out a commission must pay the costs of it in any event.—*DONOVAN v. THOMPSON* (1824), 1 Hog. 150.—IR.

f. Commission sued out at party's own expense.—Costs of cross-examination by opponent.—A party who sues out a commission at his own expense must pay the costs of cross-examination of his witnesses by his opponent.—*O'HARA v. O'HARA* (1825), 1 Hog. 234.—IR.

Part IX.—Action for Perpetuation of Testimony.

SECT. 1.—IN GENERAL.

See, now, R. S. C., Ord. 37, rr. 35–38.

6754. Form of bill.]—HUNT v. WHITE (1598), *Calendars of Chancery Proceedings temp. Queen Elizabeth*, Vol. I., p. cxlvii.

6755. Extent of powers.]—It was not intended by 5 & 6 Vict., c. 69, to give to the person who wished to perpetuate testimony, as against the person with whom he contemplated a future litigation rights of any stronger character than those which would be possessed by him in a suit actually commenced; & it is of course that, when parties are in immediate litigation, they cannot investigate the title deeds of the opponent.

—CAMPBELL v. DALHOUSIE (EARL) (1869), 1 R. 1 Sc. & Div. 402; 22 L. T. 879, H. L.

Annotation :—**Refd.** West v. Sackville, [1903] 2 Ch. 378.

6756. In what court.—Whether at common law.]—The testimony of witnesses cannot be perpetuated by a *vivâ voce* examination at common law. —MORDAUNT (LORD) v. PETERBOROUGH (EARL) (1674), 1 Mod. Rep. 114; 86 E. R. 773.

6757. ——— On question of title.]—BEGUALL v. OWEN (1628), *Hct.* 29; 124 E. R. 317.

6758. ——— Colonial court.]—A bill may be brought in the Ct. of Ch. of Jamaica, to perpetuate the testimony of witnesses notwithstanding a bill was brought for that purpose before in England. —BECKFORD v. BECKFORD (1710), *Barn. Ch.* 268; 27 E. R. 640, L. C.

6759. Distinguished from bill of discovery.]—(1) The distinctions between a bill to perpetuate testimony & a bill of discovery are: that the former is not a bill of discovery in the strict technical sense of the term; that a bill of discovery must be in aid of proceedings pending or about to be instituted but the existence of such proceedings would be fatal to a bill to perpetuate testimony; that a bill to perpetuate testimony cannot, by amendment be converted into a bill of discovery.

(2) A bill for perpetuating testimony, if brought to a hearing, will be dismissed with costs. —ELLICE v. ROUPELL (No. 2) (1863), 32 Beav. 308; 2 New Rep. 3; 32 L. J. Ch. 624; 8 L. T. 191; 9 Jur. N. S. 530; 11 W. R. 579; 55 E. R. 121; *subsequent proceedings*, 32 Beav. 318.

Annotation :—**Generally**, **Mentd.** Bostock v. Floyer (1865), 35 Beav. 603.

6760. Must not pray relief.]—ANON. (1684), 2 Vent. 365; 86 E. R. 489.

Annotations :—**Mentd.** Fisher v. Wigg (1699), 1 Ld. Raym. 622; Goodtitle d. Hood v. Stokes (1753), 1 Wils. 341.

6761. ———.]—WELBY v. RUTLAND (DUKE) (1773), 2 Bro. Parl. Cas. 39; 1 E. R. 778, H. L.

Annotations :—**Refd.** Cresset v. Mitton (1792), 1 Ves. 449; A.-G. to Prince of Wales v. St. Aubyn (1811), *Wight.* 107; Ellice v. Roupell (No. 2) (1863), 32 Beav. 308. **Mentd.** Weller v. Smeaton (1784), 1 Bro. C. C. 572; Lond v. Murray (1851), 17 L. T. O. S. 248.

PART IX. SECT. 1.

67601. Must not pray relief.]—VAUGHAN v. FITZGERALD (1804), 1 Sel. & Lef. 316.—IR.

g. Order for use of evidence in future action.]—The ct. has no power to make an order authorising the use in a future action of evidence taken in a pending action. —ERDMAN v. WALKERTON TOWN (1892), 14 P. R. 467.—CAN.

h. Motion to examine de bene esse.—Defendants entitled to notice.]—Where depts. have appeared to a bill to perpetuate testimony, & examine de bene esse, they are entitled to notice of a motion for liberty to examine

witnesses de bene esse. —TRIMLESTON v. KEMMIS (1838), *Craw. & D. Abr. C.* 209.—IR.

k. Whether plea of title in defendant allowed.]—A plea of title in deft. will not be allowed to a bill to perpetuate testimony. —TRIMLESTON (LORD) v. KEMMIS (1838), 6 Ir. L. Rec. N. S. 180.—IR.

l. Defence of purchase for value without notice.—Whether sufficient answer to suit.]—The defence of purchase for value, without notice, is no answer to a suit to perpetuate testimony. —TALBOT v. KENNEDY 14 Ir. Jur. 50.—IR.

m. Petition to produce & exhibit

6762. If brought to hearing.—Dismissed with costs.]—Bill to perpetuate the testimony of a will, if brought to hearing, will be dismissed with costs. —HALL v. HODDESDON (1723), 2 P. Wms. 162; 24 E. R. 683.

Annotation :—**Refd.** Ellice v. Roupell (No. 2) (1863), 32 Beav. 308.

6763. ———.]—WELBY v. RUTLAND (DUKE) (1773), 2 Bro. Parl. Cas. 39; 1 E. R. 778, H. L.

Annotations :—**Refd.** Cresset v. Mitton (1792), 1 Ves. 449; A.-G. to Prince of Wales v. St. Aubyn (1811), *Wight.* 107; Ellice v. Roupell (No. 2) (1863), 32 Beav. 308. **Mentd.** Weller v. Smeaton (1784), 1 Bro. C. C. 572; Lond v. Murray (1851), 17 L. T. O. S. 248.

6764. ——— But without prejudice to testimony.]—ANON. (1754), No. 6702, *ante*.

6765. ———.]—ELLICE v. ROUPELL (No. 2), No. 6759, *ante*.

See, now, R. S. C., Ord. 37, r. 38.

6766. Service of writ out of jurisdiction.—Whether allowed.]—Where an action to perpetuate testimony is brought with a view to obtaining & preserving evidence to be used in a future action to establish a title to land situate within the jurisdiction, service of the writ out of the jurisdiction cannot be allowed under R. S. C., Ord. 11, r. 1 (a), the whole subject-matter of the action not being land, but evidence. —SLINGSBY v. SLINGSBY, [1912] 2 Ch. 21; 81 L. J. Ch. 449; 106 L. T. 666, C. A.

See, now, R. S. C., Ord. 11, r. 1 (a).

6767. Supplemental bill.—Must state grounds of application.]—Where a supplemental bill, to perpetuate the testimony of witnesses, on the ground of facts discovered since the filing of the original bill, did not state what these facts were :—**Held** : the bill could not be sustained. —KNIGHT v. KNIGHT (1819), 4 Madd. 1; 56 E. R. 609.

SECT. 2.—FOR WHAT PURPOSES.

See, now, R. S. C., Ord. 37, r. 35.

6768. To prove claim to dignity.]—*Qu.* : whether a ct. of equity has jurisdiction to entertain a bill filed to perpetuate testimony in support of a claim to a dignity.

Semble : the issue in tail cannot file a bill to perpetuate testimony, even in the case of an entail that cannot be barred. —BELFAST (EARL) v. CHICHESTER (1820), 2 Jac. & W. 139; 37 E. R. 696, L. C.

Annotations :—**Mentd.** Davis v. Angel (1862), 31 Beav. 223; *Re Sheppard's Trusts* (1862), 31 L. J. Ch. 788; *Re Willes Peerage Claim* (1869), 1 L. R. 4 H. L. 126.

6769. For purposes of foreign proceedings.]—It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony that the proceedings, for which they

documents—When dealt with by court.]—

A suit to perpetuate testimony having been instituted, pltf. presented a petition praying for an order to produce & exhibit a number of writings specified in the petition. The ct. intimated that any question as to these would be properly brought before the ct., on its arising before the examiner. —CAMPBELL v. BREAUALBANE (EARL) (1867), 5 Macph. (Ct. of Sess.) 850; 39 Sc. Jur. 478.—SCOT.

PART IX. SECT. 2.

n. To prove papistry.]—Bill to perpetuate testimony of a person's being a papist, who had been always esteemed a protestant, allowed, ten

are required, are in the ct. of a foreign country, or that other depositions taken in a similar suit in that country have already been published.

Semble: this ct. has jurisdiction to perpetuate testimony with a view to proceedings in foreign cts.—*MORRIS v. MORRIS* (1847), 2 Ph. 205; 16 L. J. Ch. 286; 8 L. T. O. S. 509; 11 Jur. 93; 41 E. R. 920, L. C.

Annotation.—*Mentd.* *Dreyfus v. Peruvian Guano Co.* (1889), 41 Ch. D. 151.

6770. To prove legitimacy—Alternative procedure under Legitimacy Declaration Act, 1858 (c. 93), s. 1.—An action was brought to perpetuate testimony concerning the validity of the marriage of pltf.'s mother with a view to establish his claim to succeed, on the death of his father, to a peerage & to the family estates, to which pltf. claimed to be entitled as next tenant in tail male in remainder expectant on the death of his father:—*Held*: inasmuch as the sole question really in dispute was the validity of the marriage of pltf.'s mother, & he could, by proceedings under above Act, obtain an immediate judicial determination of that question, an order for the examination of witnesses abroad, for the purpose of perpetuating their testimony, ought not to be made.—*WEST v. SACKVILLE (LORD)*, [1903] 2 Ch. 378; 72 L. J. Ch. 649; 88 L. T. 814; 51 W. R. 625; 19 T. L. R. 511; 47 Sol. Jo. 581, C. A.

Annotation.—*Mentd.* *Sackville-West v. A.-G.* (1909), 26 T. L. R. 33.

Mode of determining question of legitimacy.—*See BASTARDY*, Vol. III., pp. 369–372, Nos. 98–130.

SECT. 3.—GROUNDS FOR GRANTING OR REFUSING ORDER.

6771. Infirmary of witnesses.—*ROBINS v. FOSTER* (1558), Cary, 35; 21 E. R. 19.

6772. ———— *BAGSHAW v. —* (1558), Cary, 35; 21 E. R. 19.

6773. ———— *Bill lies to perpetuate testimony before trial, on affidavit annexed that pltf.'s witnesses were infirm & unable to travel.*—*PHILIPS v. CAREW* (1709), 1 P. Wms. 117; 21 E. R. 318, L. C.

Annotation.—*Refd.* *Angell v. Angell* (1822), 1 Sim. & St. 83.

6774. ———— *BUTE (MARQUESS) v. JAMES*, No. 6449, *ante*.

6775. Old age of witnesses.—*HEARING v. FISHER* (1579), Cary, 110; 21 E. R. 58.

6776. ———— *Whether information & belief sufficient.*—Upon an application for a commission to

examine a witness to perpetuate his testimony:—*Qu.*: whether an affidavit that the deponent was informed & believed that the witness was above eighty years of age is sufficient.—*BLAIR v. ORMOND* (1844), 4 L. T. O. S. 171.

6777. ———— *BUTE (MARQUESS) v. JAMES*, No. 6449, *ante*.

See, also, No. 6783, *post*.

6778. Demurrer allowed to supplemental bill.—In a suit to perpetuate testimony motion for a further examination of witnesses as to facts lately discovered refused on the ground that a demurrer to a supplemental bill for the same purpose had been allowed.—*KNIGHT v. KNIGHT* (1820), 1 Jac. & W. 165; 37 E. R. 338, L. C.

SECT. 4.—AT WHAT STAGE ORDER MADE.

6779. Before defence—Defendant in default.—*COVENY v. ATHILL* (1762), 1 Dick. 355; 21 E. R. 306.

Annotations.—*Folld.* *Lancaster v. Lancaster* (1834), 6 Sim. 439; *Bute v. James* (1866), 33 Ch. D. 157.

6780. ———— *Leave was given to pltf., before answer, to sue out a commission in a suit to perpetuate testimony, deft. having been attached, & still refusing to answer.*—*LANCASTER v. LANCASTER* (1834), 6 Sim. 439; 58 E. R. 659.

6781. ———— *BUTE (MARQUESS) v. JAMES*, No. 6449, *ante*.

6782. Before appearance—Defendants in contempt.—*Examination de bene esse* was granted to pltf's. in a bill to perpetuate testimony after *subpoena* served, but before appearance of infant defts., in contempt by the messenger's return, that they had absconded & were not to be found, on affidavit of the materiality of the evidence & danger of its loss, & undertaking to proceed with all due diligence to issue & examination in chief, to be proved before publication of the depositions *de bene esse*.—*PIERCE v. GREEN* (1815), 10 Ves. 319; 31 E. R. 536, L. C.

6783. ———— *Of some parties Witnesses old & infirm & resident abroad.*—Witnesses being old & infirm, & resident out of the jurisdiction, the ct., in a suit to perpetuate testimony, before appearance of some of the parties, made an order for their examination *de bene esse*.—*CAMPBELL v. A.-G.* (1865), 13 L. T. 356; 11 Jur. N. S. 922; 11 W. R. 45.

witness would be necessary & material to enable them to establish this claim: that he was aged & about to leave the province, & though they could obtain his evidence now, they might not be able to do so at the time of an action hereafter brought:—*Held*: sufficient had been set out to sustain pltf's, & the bill to perpetuate testimony, & the bill was not demurrable.—*STEELE v. CANADA, LTD. v. VANCE* (1881), R. E. D. 428.—*CAN.*

6. Within discretion of court.—The granting of an order perpetuating testimony is in the discretion of the ct., & will not be made in a case in which, in the opinion of the ct., it is not necessary.—*KELLY v. KELLY*, [1917] 1 L. R. 51.—*IR.*

PART IX. SECT. 4.

1. Before appearance—Defendant not in contempt.—A commission to examine witnesses *de bene esse*, upon a bill to perpetuate testimony, granted though deft. had not appeared, & was not in contempt.—*ALLEN v. ANNELLY* (1836), 2 Jo. Ex. 1r. 260.—*IR.*

years after his death.—*CLOSE v. HAMILTON* (1729), How. P. L. 30.—*IR.*

o. Whether confined to foreclosure suits.—13 *Geo.* 2, c. 9, s. 2.—The above sect. relates to all bills to perpetuate the testimony of witnesses in suits in equity, & is not confined to foreclosure suits.—*CHENEVIX v. TAYLOR* (1763), How. C. S. 30.—*IR.*

p. To prove demand made under Tenancy Act.—A landlord may file a bill to perpetuate the evidence of a demand made under the above Act on his tenant to renew.—*KRATING v. SPARROW* (1810), 1 Ball & B. 372.—*IR.*

q. Rebellion—Deeds destroyed.—During the rebellion in Ireland in Apr. 1916, the offices of certain solrs. in the city of Dublin were destroyed, & certain title-deeds & documents, of which the solrs. were custodians, perished:—*Held*: the ct. had jurisdiction on an originating summons to order that the evidence of witnesses be taken, & be preserved by being filed in the Record & Writ Office; & the evidence should, *inter alia*, be directed to the following points: (a) the existence

of the deed before the rebellion which caused its destruction; (b) the fact of its destruction; (c) its due execution; (d) its contents.—*SHANAHAN v. SHANAHAN*, [1917] 1 L. R. 57.—*IR.*

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6775 i. Old age of witness.—The ct. ordered a commission for examination of an aged witness to issue, the object of the suit being to perpetuate testimony, & it having been sworn that there was danger of testimony being lost.—*HUNT v. PRETIUS* (1854), 4 Gr. 487.—*CAN.*

r. ———— Departure of witness from province.—Pltf's. alleged in their bill that one of defts. accepted & executed a lease for fourteen years, determinable on six months' notice, that notice was given, but the period had not expired; that deft. intended to contest the right of pltf's, & set up a title in the other deft. to defeat pltf's; & while this litigation was threatened no action could be brought, & that the evidence of a certain

SECT. 5.—WHAT MUST BE PROVED.

SUB-SECT. 1.—THAT PLAINTIFF HAS RIGHT AT LAW.

6784. General rule.—A bill to examine witnesses in *perpetuum rei memoriam* is not proper until the party has established his right at law.—**PAWLET v. INGRES** (1684), 1 Vern. 308; 23 E. R. 487.

6785. —[.]—Devisee shall not examine witnesses in *perpetuum rei memoriam* to prove a will against a purchaser without notice till the will has been established by a verdict at law.—**BECHINALL v. ARNOLD** (1685), 1 Vern. 354; 23 E. R. 519, L. C.

6786. —[.]—A man cannot bring a bill to examine witnesses in *perpetuum rei memoriam* to establish his title, until he has made it good by a verdict at law, if he is under no impediment of trying his title at law.—**PARRY v. ROGERS** (1686), 1 Vern. 441; 23 E. R. 574, L. C.

6787. Exception to rule—If prevented from trial at law.—**ANON.** (prior to 1710), Wyatts' Practical Register in Chancery, p. 74.

6788. —[.]—**PARRY v. ROGERS**, No. 6786, *ante*.

SUB-SECT. 2.—THAT PLAINTIFF HAS AN INTEREST.

6789. General rule—Any interest however slight.—(1) A bill was filed to perpetuate testimony of the legitimacy of plffs., entitled in remainder in tail after an estate for life. On demurrer by the seventh & eighth in remainder after plffs. & the other defts., all being infants:—**Held**: as any interest, however slight, was sufficient, this would be overruled.

(2) The ct. will not perpetuate testimony of a right, which may be immediately barred by deft.—**DURSLEY (LORD) v. FITZHARDINGE BERKELEY** (1801), 6 Ves. 251; 31 E. R. 1036, L. C.; *subsequent proceedings*, *sub nom.* **BERKELEY (EARL) v. FITZHARDINGE BERKELEY** (1809), 2 Russ. & M. 143, L. C.; *sub nom.* **BERKELEY PEERAGE CASE** (1811), 4 Camp. 401, H. L.

Annotations:—As to (1) **Consd.** **Belfast v. Chichester** (1820), 2 Jac. & W. 439. **Refd.** **Allan v. Allan** (1808), 15 Ves. 130; **Ray v. Sherwood & Ray** (1836), 1 Curt. 193; **Davis v. Angel** (1862), 31 Beav. 223; **Re Parsons, Stockley v. Parsons** (1890), 45 Ch. D. 51. **Generally, Mentd.** **Gordon v. Gordon** (1821), 3 Swan. 400; **Moseley v. Davies** (1822), 11 Price, 162; **Rosecommon's Claim** (1828), 6 Cl. & Fin. 97; **Barnsdale v. Lowe** (1831), 2 Russ. & M. 142; **Davies v. Morgan** (1831), 1 Cr. & J. 587; **Monkton v. A.-G.** (1831), 2 Russ. & M. 147; **Walker v. Beauchamp** (1834), 6 C. & P. 552; **Meath (Bp.) v. Winchester** (1836), 10 Bl. 330; **Davies v. Lowndes** (1843), 6 Man. & G. 471; **Geo. v. Ward** (1837), 7 E. & B. 509; **Shedden v. Patrick** (1860), 2 Sw. & Tr. 170; **Re Sheppard's Trusts** (1862), 31 L. J. Ch. 788; **Ellice v. Roupell** (No. 2) (1863), 32 Beav. 308.

6790. —[.]—To support a bill to perpetuate testimony plff. must have an interest, but the minuteness or remoteness of it is no objection. A mere contingency, however near & valuable, with the exception of the case of a wager, the expectation of issue in tail, heir apparent, or next of kin of a lunatic, is not sufficient. Therefore on demurrer to a bill by tenant in tail in remainder & his issue to perpetuate testimony of the validity of his marriage:—**Held**: it would be allowed.

Qu.: whether a bill could be maintained by the trustees to preserve contingent remainders, representing also the legal inheritance of the whole estate.—**ALLAN v. ALLAN** (1808), 15 Ves. 130; 33 E. R. 704, L. C.

Annotations:—**Refd.** **Davis v. Angel** (1862), 31 Beav. 223. **Mentd.** **Re Sheppard's Trusts** (1862), 31 L. J. Ch. 788.

6791. Not spes successionis.—A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will, in his lifetime, made before his

lunacy.—**SACKVILL v. AYLEWORTH** (1682), 1 Vern. 105; 23 E. R. 346.

Annotation:—**Refd.** **Smith v. A.-G.** (1777), Rom. 54.

6792. —[.]—A bill to perpetuate testimony cannot be filed but by a person who has some interest present or future & not by those who would be next of kin to a lunatic if he was to die immediately.—**SMITH v. A.-G.** (1777), Rom. 54, L. C.

Annotations:—**Consd.** **Dursley v. Fitzhardinge** (1801), 6 Ves. 251; **Allan v. Allan** (1808), 15 Ves. 130. **Refd.** **Berkeley Peerage Case** (1811), 4 Camp. 401; **Davis v. Angel** (1862), 31 Beav. 223; **Re Parsons, Stockley v. Parsons** (1890), 45 Ch. D. 51. **Mentd.** **Page v. Fry** (1800), 2 Bos. & P. 240; **Ray v. Sherwood & Ray** (1836), 1 Curt. 193.

6793. Not right which may be immediately barred.—**DURSLEY (LORD) v. FITZHARDINGE BERKELEY**, No. 6789, *ante*.

6794. Entail which cannot be barred.—**BELFAST (EARL) v. CHICHESTER**, No. 6788, *ante*.

SUB-SECT. 3.—MATTER INCAPABLE OF IMMEDIATE DETERMINATION.

See, now, R. S. C., Ord. 37, r. 35.

6795. General rule.—**SEABOURN v. CHILSTON** (1668), Nels. 125; 21 E. R. 806; *sub nom.* **SEYBOURNE v. CLIFTON**, cited in 2 Vern. 159; 1 Eq. Cas. Abr. 234.

Annotations:—**Consd.** **Smith v. A.-G.** (1777), Rom. 54; **Dursley v. Fitzhardinge** (1801), 6 Ves. 251. **Refd.** **Hitchcock v. Sedgwick** (1690), 2 Vern. 156; **Langdale v. Briggs** (1856), 8 De G. M. & G. 391.

6796. —[.]—**NORTH (LORD) v. GRAY (LORD)** (1680), 1 Dick. 14; 21 E. R. 171.

6797. —[.]—A man who is in possession of a fishery may bring a bill to examine his witnesses in *perpetuum rei memoriam*, & establish his right, though he has not recovered in affirmance of it at law; *secus*, if he is not in possession.—**DORSET (DUKE) v. GIRDLER** (1720), Prec. Ch. 531; 2 Eq. Cas. Abr. 181; 24 E. R. 238.

Annotation:—**Mentd.** **York Corpn. v. Pilkington** (1737), 1 Atk. 282.

6798. —[.]—Where a party pleads his title, & swears himself a purchaser for a valuable consideration, without notice of plff.'s title, it is contrary to the usual practice of cts. of equity to allow an examination of witnesses in *perpetuum rei memoriam*, in order to defeat the title of such purchaser; but plff. ought to proceed to recover as he can, without the aid of a ct. of equity.—**ROSS v. CLOSE** (1720), 5 Bro. Parl. Cas. 562; 2 E. R. 863, H. L.

Annotation:—**Mentd.** **Rice v. Oatfield** (1738), 2 Stra. 1095.

6799. —[.]—A tenant in tail, out of possession, cannot bring a bill to perpetuate testimony.—**BRANDLYN v. ORD** (1738), 1 Atk. 571; 26 E. R. 359, L. C.

Annotations:—**Refd.** **Ellice v. Roupell** (No. 2) (1863), 32 Beav. 308. **Mentd.** **Doe d. Blight v. Pett** (1840), 11 Ad. & El. 842; **Osborne v. Eales** (2) (1864), 2 Moo. P. C. C. N. S. 125; **Moss v. Anglo-Egyptian Navigation Co.** (1865), 1 Ch. App. 108; **Tredegar v. Windus** (1875), L. R. 19 Eq. 607; **Ross v. Tyser Line, The Celtic King** (1894), 10 T. L. R. 222.

6800. —[.]—A demurrer will hold to a bill to perpetuate testimony if it do not state that no action can be immediately brought.

If it be possible that the matter in question can be by the party who files the bill, be made the subject of judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter in question into present judicial interpretation, which may happen when his title is in remainder or when he is himself in possession, then cts. of equity will entertain such a suit

(LEACH, V.-C.).—*ANGELL v. ANGELL* (1822), 1 Sim & St. 83; 1 L. J. O. S. Ch. 6; 57 E. R. 33.

Annotations.—*Consd. Spencer v. Peek* (1867), L. R. 3 Eq. 415; *Brooking v. Maudslay & Field* (1888), 38 Ch. 636; *West v. Sackville*, [1903] 2 Ch. 378. *Glasscott v. Copper Miners' Co.* (1840), 11 Sim. 305.

6801. —[.]—A bill to perpetuate testimony alleged that pltf. was in possession of lands, & if any proceedings were taken by deft. to recover those pieces of land, pltf. would be able by the testimony of credible witnesses to prove their title & disprove that of deft. Deft. put in a voluntary answer, whereby he deposed that it was not true that pltf. was in possession, but, on the contrary, that he, deft., was in possession. Pltf. replied. Thereupon, deft. did not plead, but moved to dismiss pltf.'s bill on the ground that a pltf. out of possession could not bring a bill of this nature without alleging that he could not immediately bring an action of ejectment:—*Held*: the motion must stand over, with liberty to either party to examine such witnesses as he might be advised to prove that he was in possession, & no costs would be ordered.—*BRISTOCKE v. ROCH, WEDGWOOD v. ROCH* (1860), 3 L. T. 401; 7 Jur. N. S. 63.

6802. —[.]—A bill to perpetuate testimony relating to a matter which is the subject of an existing suit against pltf. is demurrable, although pltf. could not himself have made such matter the subject of present judicial investigation.

The principle which is laid down in all the cases is, that if the matter to which the required testimony is alleged to relate can be immediately investigated in a ct. of law, & the witnesses are resident in England, a demurrer will hold (*LORD ROMILLY, M.R.*).—*SPENCER (EARL) v. PECK* (1867), L. R. 3 Eq. 415; 15 W. R. 478.

Annotation.—*Consd. Brooking v. Maudslay & Field* (1888), 38 Ch. D. 636.

6803. —[.]—If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a ct. of equity has jurisdiction to direct its delivery up & cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation but an action to perpetuate testimony.—*BROOKING v. MAUDSLAY, SON & FIELD* (1888), 38 Ch. D. 636; 57 L. J. Ch. 1001; 58 L. T. 852; 36 W. R. 664; 4 T. L. R. 421.

Annotations.—*Reid. West v. Sackville*, [1903] 2 Ch. 378. *Mentd. London Assn. of Shipowners & Brokers v. London & India Docks Joint Committee*, [1892] 3 Ch. 242; *The Manar*, [1903] 1 P. 95; *Guaranty Co. of New York v. Hannay*, [1915] 2 K. B. 536.

6804. Admission by defendant in answer that matter could not be judicially determined.—*Subsequent action commenced by plaintiff*.—[.]—Pltf. filed a bill to perpetuate testimony on the ground that the matters in dispute with defts. could not then be made the subject of judicial investigation. Defts. answered, & pltf. then amended the bill in immaterial matters. Defts. then pleaded that, since the answer, pltf. had themselves filed another bill, raising the point in dispute & showing that the matters in question could now be made the subject of judicial investigation:—*Held*: the plea could not be sustained, & if at all, it ought to have been pleaded in the first instance.—*ELICE*

v. ROUFELL (No. 1) (1863), 32 Beav. 299; 2 New Rep. 3; 32 L. J. Ch. 503; 9 Jur. N. S. 530; 11 W. R. 579; 55 E. R. 117; *subsequent proceedings*, 32 Beav. 308.

Annotation.—*Mentd. Bostock v. Floyer* (1865), 35 Beav. 603.

6805. —[.]—Pltf. filed a bill to perpetuate testimony as to the validity of a deed, which question, they alleged, could not at present be tried. After defts. had, by answer, admitted pltf.'s right to perpetuate the testimony, pltf. filed another bill, raising the question of the validity of the same deed:—*Held*: a motion by defts., to stay proceedings in the suit to perpetuate testimony, on the ground of the existence of the second suit, would be refused with costs.—*ELICE v. ROUFELL* (No. 3) (1863), 32 Beav. 318; 2 New Rep. 150; 32 L. J. Ch. 778; 8 L. T. 486; 9 Jur. N. S. 533; 11 W. R. 679; 55 E. R. 125.

Annotation.—*Mentd. Bostock v. Floyer* (1865), 35 Beav. 603.

6806. Suit subsisting against plaintiff.—*SPENCER v. PREK*, No. 6802,

SECT. 6.—CONDUCT OF EXAMINATION.

6807. Service of subpoena on defendant.—[.]—*HATCHAM v. WINCHCOMBE* (1558), Cary, 34; 21 E. R. 18.

6808. Examination of witness through third party.—*Concurrence of defendant*.—[.]—Order to read on the trial of an issue the depositions of a living witness taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial.

Deft. having obtained an order for the payment of his costs by pltf., which order recited that the testimony of the witness had been taken, the depositions of the witness must be regarded as having been completely taken, & are not therefore to be excluded on the ground of the want of a sufficient cross-examination.

On the examination & cross-examination of an aged & infirm witness labouring under deafness the questions were put, & answers received, through the medium of the daughter of the witness; & the examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life; & that much of the cross-examination, & all the re-examination, had been pretermitted. Deft. afterwards obtained an order for his costs, which recited that the testimony of the witness had been taken:—*Held*: deft., having concurred in the mode of examination adopted, could not afterwards object to the use of the testimony by impeaching its fidelity on that ground.—*WATKINS v. ATCHISON, ATCHISON v. LE MANN* (1853), 10 Hare, App. II., xlv.; 68 E. R. 1141.

Annotation.—*Reid. Beresford v. A.-G.*, [1918] P. 33.

6809. Examination in Scottish court.—*Duty of court to conduct examination*.—[.]—Where application is made to a Scottish ct., under Evidence by Commission Act, 1859 (c. 20), to enforce the attendance of witnesses in an English suit for examination in Scotland, before a special examiner appointed in the English suit, it is the duty of the Scottish ct. to determine what witnesses are to be summoned & what documents they are to produce, as well as

PART IX. SECT. 6.

a. *Right of plaintiff to examine witnesses*.—When issue is joined upon a bill to perpetuate testimony, pltf. may proceed to examine his

whether they be or be not old & infirm, & deft. to cross-examine them. If he shall think fit.—*KELLY v. ECHLIN*, How C. 68.—IR.

b. — *Whether order necessary*.—[.]—After a replication filed in a suit

to perpetuate testimony, it is not necessary to obtain an order to examine witnesses.—*ALLEN v. HACKET* (1847), 11 L. Eq. R. 355.—IR.

c. — *Claim of reverendary interest under lost deed*.—A petition

Sect. 6.—Conduct of examination. Sects. 7 & 8. Part X.]

to decide all questions as to privilege on the evidence which may arise on the examination.—*CAMPBELL v. A.-G.* (1867), 2 Ch. App. 571; 30 L. J. Ch. 600; 15 W. R. 915, L. J.J.

6810. Before whom examined—Examiner of court.]—BUTE (MARQUESS) v. JAMES, No. 6449, *ante*.

6811. When interpreter necessary.]—BUTE (MARQUESS) v. JAMES, No. 6449, *ante*.

SECT. 7.—PUBLICATION OF TESTIMONY.

6812. General rule.]—On a bill for examining witnesses in *perpetuum rei memoriam*:—Held: publication of the depositions should not be allowed unless in a strong case.—*HARRIS v. COTTERELL* (1808), 3 Mer. 677; 36 E. R. 260.

6813. For use at common law.]—TYNDALL v. (1558), Ch. Cas. in Ch. 112; 21 E. R. 69.

6814. Reason for granting publication—Death of witness.]—SENIHAWES v. SENIHAUES (1579), Cary, 88; 21 E. R. 47.

6815. ———.]—On a bill to perpetuate the testimony of witnesses, depositions taken *de bene esse* after a commission to answer, & deft. in contempt, though before any answer comes in, may, on the death of two of the witnesses examined, be read in evidence on a trial after the answer is put in.—HOWARD v. TREMAINE (1692), Carth. 205; 4 Mod. Rep. 146; 1 Salk. 278; 1 Show. 363; 90 E. R. 757.

Annotation:—Reid. *Robins v. Wolsey* (1757), 2 Lec. 421.

6816. ———.]—Depositions taken in *perpetuum rei memoriam* shall not be read if deponent can be subpoenaed.—ANON. (1701), 12 Mod. Rep. 493; 88 E. R. 1470.

6817. ———.]—Depositions in *perpetuum rei memoriam*, are not evidence in any case as long as the witnesses live.—TILLY'S CASE (1704), 2 Ld. Raym. 1008; 1 Salk. 280; 91 E. R. 253.

Annotations:—Consd. *Blakemore v. Glamorganshire Canal Co.* (1835), 2 Cr. M. & R. 133. *Reid.* *Baker v. Fairfax* (1718), 1 Stra. 101.

6818. ——— Delay by plaintiff.]—MORSE v. STEVENS (1777), 2 Dick. 686; 21 E. R. 438, L. C.

6819. ———.]—The motion that publication of the depositions of a witness, taken on a bill to perpetuate his testimony, may pass publication, he being since deceased, is of course.—BOURNE v. BLEGU (1815), 1 Price, 307; 145 E. R. 1412.

6820. ———.]—Publication ordered of the depositions of a deceased witness, examined on behalf of deft., under pltf.'s commission, on a bill to perpetuate testimony.—ABERGAVENNY (EARL) v. POWELL (1810), 1 Mer. 434; 35 E. R. 733, L. C. *Annotations:—Fold.* *Barnsdale v. Lowe* (1831), 2 Russ. & M. 142, n. *Reid.* *Cass v. Cass* (1845), 4 Harc. 278; *Edwards v. Brown* (1845), 5 L. T. O. S. 70.

6821. ——— To perfect title.]—The ct. will not order copies of depositions taken to perpetuate the testimony of witnesses to be delivered out for the purpose of perfecting the title to an estate, even where the witnesses are dead.—TEALE v. TEALE (1823), 1 Sim. & St. 385; 57 E. R. 154.

6822. ———.]—The ct. will not make an order for the publication of depositions taken in a suit to perpetuate testimony whilst the witnesses

are alive.—*BARNSDALE v. LOWE* (1831), 2 Russ. & M. 142; 39 E. R. 348, L. C.

Annotation:—Reid. *Beresford v. A.-G.*, [1918] P. 33.

6823. ———.]—An order for the publication of depositions taken in an action to perpetuate testimony should not be made unless it is proved to the satisfaction of the ct., that the witnesses are either dead or so ill or otherwise incapacitated as to be unable to attend & give evidence in open ct. at the trial of the issue in the subsequent action with reference to which their evidence is desired.

Where depositions had been taken in an action to perpetuate testimony & subsequently published, & it was proved to the satisfaction of the Ct. of Appeal that the witnesses, although alive, were incapacitated by age & infirmity from attending the trial of a legitimacy suit in contemplation of which the depositions were taken, the ct. reversed an order of the Probate Division directing the evidence of the witnesses to be taken over again before an examiner & ordered that the depositions, saving all just exceptions, should be admitted at the trial without further evidence & that the attendance of the witnesses should be dispensed with.—*BERESFORD v. A.-G.*, [1918] P. 33; 87 L. J. P. 40; 118 L. T. 133; 31 T. L. R. 100; 62 Sol. Jo. 103, C. A.

6824. ——— Witness incapable of attending trial.]—SENIHAWES v. SENIHAUES (1579), Cary, 88; 21 E. R. 47.

6825. ———.]—Depositions in *perpetuum rei memoriam* not published in the life of the witness except on incapacity to travel by sickness, etc.; such orders, except in the excepted cases, proceeding on affidavit of the death of the witness; some expressly declaring, that the depositions of the other witnesses shall not be read.—MORRISON v. ARNOLD (1817), 19 Ves. 670; 2 Russ. & M. 145; 34 E. R. 661, L. C.

Annotations:—Fold. *Barnsdale v. Lowe* (1831), 2 Russ. & M. 142; *Beresford v. A.-G.*, [1918] P. 33. *Reid.* *Boyse v. Rossborough* (1853), Kay, 71.

6826. ———.]—WATKINS v. ATCHISON, ATCHISON v. LE MANN, No. 6808, *ante*.

6827. ———.]—A witness, examined under a bill to perpetuate testimony, was very old, & unable, through illness, to leave his home without danger; another was resident in Canada. Their depositions were ordered to be published, & produced at the trial, about to take place, & that either party might make such use of them "as by law they can."—BIDDULPH v. CAMOYS (LORD) (1855), 20 Beav. 402; 52 E. R. 658.

Annotation:—Fold. *Beresford v. A.-G.*, [1918] P. 33.

6828. ———.]—BERESFORD v. A.-G., No. 6823, *ante*.

6829. ——— Witness abroad—Refusing to attend trial.]—Depositions of witnesses examined under a bill to perpetuate testimony in aid of an ejectment & who were resident abroad & refused to come to this country ordered to be published.—BIDDULPH v. CAMOYS (LORD) (1854), 19 Beav. 407; 52 E. R. 432.

Annotation:—Fold. *Vane v. Vane* (1876), 34 L. T. 477.

6830. ———.]—BIDDULPH v. CAMOYS (LORD), No. 6827, *ante*.

6831. For use in subsequent suit—One party stranger to original suit.]—Depositions in the custody of the ct., which were taken in a former suit

to perpetuate testimony of the contents of a lost deed was filed by one claiming a reversionary interest thereunder.—*Held:* respd. could not examine on their own behalf.—*TALBOT v. KENNEDY* (1862), 1. Jur. 60.—*IR.*

PART IX. SECT. 7.

6812 i. General rule.]—Whe. ——— is joined upon a bill to perpetuate testimony, pltf. may proceed to examine his witnesses whether they be or be not old & infirm, & deft. to ex-

them, if he shall think fit; & pltf. may then proceed to publication of the depositions, as in ordinary cases is usual.—*KELLY v. ECHLIN*, How C. 58.—*IR.*

e. Necessity for special motion.]—

to perpetuate testimony, were ordered to be published, on the application of one of the parties to a subsequent suit, the other of whom was a stranger to the former suit, & the time for taking evidence in the second suit was extended in order to give both parties an opportunity of considering the information so obtained; the ct. being of opinion that though the depositions might not themselves be evidence, they might be the means of supplying valuable information to both parties.—*VANE v. VANE* (1878), 45 L. J. Ch. 589; 31 L. T. 477; 24 W. R. 565, C. A.

SECT. 8.—COSTS.

6832. Whether defendant entitled to costs.—*BOWER v. TOMSON* (1742), 1 Fowler's Exchequer Practice 2nd ed. p. 45.

6833. — Cross-examination of plaintiff's witnesses only.—Where a devisee brings a bill merely in *perpetuum rei memoriam*, & the heir-at-law only cross-examines the witnesses, he is entitled to his costs, but if to encounter the will he shall not. —

BERNEY v. EYRE (1746), 3 Atk. 387; 26 E. R. 1023, L. C.

longs — *Consd. Roberts v. Kerslake* (1855), 1 K. & J. 751. *Reid. Boyse v. Rossborough* (1854), 3 De G. M. & G. 817.

6834. — — — — —]—*BLINKEHORNE v. FEAST* (1751), 1 Dick. 153; 21 E. R. 227.

Annotation :—*Consd. Roberts v. Kerslake* (1855), 1 K. & J. 751.

6835. — — — — —]—Deft. to a bill to perpetuate testimony entitled to his costs immediately after the commission executed upon the allegation, that he did not examine any witnesses.—*FOULDS v. MIDDLEY* (1812), 1 Ves. & B. 138; 35 E. R. 54, L. C.

— *If case brought to hearing.*—*See* Nos. 6759, 6760, 6762, *ante*.

6836. Power of court to make provision for.—A wealthy lunatic had made two wills before he was found lunatic. The ct., without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the master should think proper of a bill to be filed with his approbation for that purpose should be paid out of the lunatic's estate.—*Re TAYLEUR* (1871), 6 Ch. App. 416; 19 W. R. 492, L. J.J.

Part X.—Evidence on Appeal or Rehearing.

On appeal—Fresh evidence.—*See* R. S. C., Ord. 58, r. 4, & generally, PRACTICE.

— **Criminal appeal.**—*See* CRIMINAL LAW, Vol. XIV., pp. 512 *et seq.*

6837. On rehearing—Evidence at former hearing—Conditions precedent to admissibility—Proof of former proceedings.—Proceedings at former trial must be proved before evidence of what done there.—*ANON.* (1701), 12 Mod. Rep. 555; 88 E. R. 1514.

— **Evidence given in former proceedings.**—*See* generally, Part II., Sect. 10, *ante*.

6838. — Admissions for purposes of former trial.—Previously to the trial of an ejectment deft.'s then attorney signed admissions commencing: "We hereby agree to admit on the trial of this cause," etc. On the trial the admissions were read. The Ct. of King's Bench afterwards granted a new trial, & the attorney for deft. died. The second trial took place on Feb. 11, & on Feb. 7, deft.'s then attorney gave notice to the attorney of the lessor of plff. that he should make no admissions, & the latter sent back an answer stating that the admissions already made were binding:—*Held*: on the second trial these admissions were receivable in evidence.—*DOE d. WETHERELL v. BIRD* (1835), 7 C. & P. 6, N. P.

6839. — Execution of instrument.—An

agreement by the attorneys to admit on the trial of a cause the execution of an instrument, is evidence on every trial of the cause, though not renewed after the first trial.—*ELTON v. JARVIS* (1832), 5 C. & P. 385; 1 Mood. & R. 190, N. P.

6840. — Admission of handwriting—Under judge's order.—In an action on a bond, to which deft. had pleaded *non est factum*, the judge made it one of the terms of an order to change the venue, that deft. should admit the handwriting of the attesting witness on the trial of the cause. The cause was tried, & plff. obtained a verdict, which the ct. afterwards set aside & granted a new trial on payment of costs, giving deft. leave to amend the *oyer* & set out the condition more fully, which was accordingly done, & deft. then pleaded a special plea, alleging that the condition had been altered since the execution of the bond:—*Held*: plff. was entitled to use the admission contained in the judge's order on the second trial, & it was binding on deft. —*LANGLEY v. OXFORD* (EARL) (1836), 1 M. & W. 508; 2 Gale, 63; Tyr. & Gr. 808; 5 L. J. Ex. 166; 150 E. R. 535.

Admissions generally, *see* Part II., Sect. 3, sub-sect. 2, *ante*.

6841. — Fresh evidence.—New evidence admitted on a rehearing, & a petition of rehearing permitted to be amended, to state the discovery

Publication of depositions of witnesses examined in *perpetuum rei memoriam*, cannot pass by a side bar rule; but there must be a special motion for the purpose.—*GREEN v. GREEN* (1825), 1 Bog. 312.—*IR.*

f. Where witnesses examined de bene esse.—In a suit to perpetuate the testimony of witnesses, liberty given to plff. under 13 Geo. 3, c. 9, to pass publications of depositions of witnesses examined *de bene esse* in the cause.—*SCALLAN v. MCCOY* (1841), Fl. & K. 366.—*IR.*

costs—**Cross-examination of plaintiff's witnesses only.**—A bill was filed by plffs. to perpetuate testimony, & plffs. sued for a commission in which deft. would not join. Dft. nevertheless cross-examined plff.'s witnesses, but did not examine any witnesses in chief:—*Held*: deft. was to have his costs in the cause.—*CALLOW v. AUSTIN* (1830), 3 Ir. L. Rec. 1st ser. 259.—*IR.*

g. — Upon motion & notice for *dismissis*.—It is not necessary for deft. to set down a bill to perpetuate testimony for a *dismissis*; but deft. may get his costs upon a motion & notice for the purpose.—*LOFTUS v. LOFTUS*, How. C. 59.—*IR.*

h. — Witnesses not examined.—

On a bill to perpetuate testimony deft. entitled to costs of answering; there being no examination of witnesses.—*LECKY v. MURRAY* (1801), 1 Ball & B. 391.—*IR.*

PART X.

k. On appeal—Proof of evidence given in court below.—Affidavits are admissible in a superior ct., to show that when jurisdiction has attached the inferior ct. acted on insufficient evidence in coming to a decision on the matter before it.—*Re KEZOH* (1889), 15 V. L. R. 395.—*AUS.*

6841 l. On rehearing—Fresh evidence.—An appeal from the Small Debts Ct. is by way of rehearing, & *et cetera*

PART IX. SECT. 8.

6833 i. Whether defendant entitled to

of such new evidence.—*WYLD v. WARD* (1828), 2 Y. & J. 381; 148 E. R. 966.

Annotations:—*Reid. Cutten v. Sanger* (1829), 3 Y. & J. 374; *Hood v. Pimm* (1831), 4 Sim. 101.

6842. ——— **Evidence not in possession of party at original hearing.]**—(1) Though on a rehearing, documents & new evidence not in the party's possession at the time of the original hearing may be produced, that will not be permitted where such party has been negligent, & might with diligence have produced the same evidence earlier.

(2) Mere slips & accidental defects may usually be corrected at any stage of the cause, but where the party mistakes the effect of the adverse case, & deliberately refrains from producing evidence of the existence of which he was aware, & which on the hearing turns out to have been necessary in his case, he will not be allowed afterwards to correct his miscarriage.—*TULLOCK v. HARTLEY* (1845), 4 L. T. O. S. 409, L. C.

6843. ——— **Evidence discovered after former hearing—Evidence raising fresh issue.]**—Evidence discovered after the hearing, but raising a new

issue, cannot be admitted upon the hearing on further consideration under 13 & 14 Vict. c. 35, s. 28; if, however, the justice of the case require it, the ct. will direct an inquiry.—*HOWARD v. CHAFFERS, HOWARD v. ROBINSON* (1863), 2 New Rep. 10; 9 Jur. N. S. 634; 11 W. R. 585.

6844. ——— **Matters occurring since former hearing.]**—Affidavits relating to matters which have occurred since decree cannot be used on a rehearing of the decree.—*LAMBE v. ORTON* (1863), 2 New Rep. 435; 33 L. J. Ch. 81; 11 W. R. 1043.

6845. ——— **Discretion of court.]**—*Re LEA'S SETTLEMENT, LEA v. LEA* (1908), 124 L. T. Jo. 335.

6846. ——— **Witness at former hearing convicted of perjury.]**—If after hearing a witness is convicted of perjury, the party may take advantage of it upon a rehearing.—*NEEDHAM v. SMITH* (1704), 2 Vern. 403; 23 E. R. 897.

Annotations:—*Mentd. Vaughan v. Worrall* (1817), 2 Madd. 322; *Jacobs v. Laybourn* (1843), 1 Dow. & L. 352.

Fresh evidence as ground of new trial.]—*See PRACTICE.*

Part XI.—Colonial and Foreign Law.

SECT. 1.—IN GENERAL.

6847. Reference to master for report.]—A question whether an interest in a heritable bond charged upon lands in Scotland will pass by will referred to the master to report the law of Scotland.—*GLOVER v. STROTHOFF* (1786), 2 Bro. C. C. 33; 29 E. R. 18, L. C.

Annotation:—*Mentd. Chandless v. Price* (1796), 3 Ves. 99.

6848. ——— **—[ANSTRUTHER v. ADAIR (1834), 2 My. & K. 513; 39 E. R. 1040, L. C.]**

6849. ——— **—[WILLIAMS v. WILLIAMS (1841), 3 Beav. 547; 49 E. R. 215.]**

Annotation:—*Reid. Di Sora v. Philipps* (1863), 10 H. L. Cas. 625.

SECT. 2.—HOW FAR JUDICIALLY NOTICED.

Judicial notice, generally, *see* Part III., Sect. 5, ante.

6850. By House of Lords—English law—In Scottish appeal.]—The rules of English law are matters of evidence in Scottish cts., but the House of Lords, sitting as a ct. of appeal from the decision of a Scottish ct., is equally an English as a Scottish ct., & will act on its own knowledge of English law, & not be bound by the report of that law made by English lawyers to the Scottish cts.—*DOUGLAS v. BROWN* (1831), 2 Dow. & Cl. 171; Mont. 93; 6 E. R. 692, H. L.

6851. ——— **Prevalence of English law in Ireland—In Scottish appeal.]**—Appl't., the widow of a domiciled Scotsman, brought an action in the Ct. of Session for the reduction of an ante-nuptial contract, by which, in consideration of a provision made by her husband, she purported to discharge her legal rights of *terce* & *jus relicte*. The contract

was executed in Ireland by appl't., who was then an infant domiciled in Ireland, but it was contemplated that she & her husband should reside, & they actually resided, during their married life, in Scotland. The grounds upon which appl't. sought to obtain reduction of the contract were, that being an infant she was incapable of contracting by the law of Ireland, & minority & lesion according to the law of Scotland, but no evidence was adduced before the Ct. of Session as to the Irish or English law with regard to the capacity of an infant to enter into contracts:—*Held*: notwithstanding the absence of such evidence in the ct. below, the wife's incapacity according to Irish law being a substantial ground of reduction on the record, it was competent for the House on appeal to take judicial notice of the English law prevailing in Ireland.—*COOPER v. COOPER* (1888), 13 App. Cas. 88; 59 L. T. 1, H. L.

Annotations:—*Mentd. Dreyfus v. Peruvian Guano Co.* (1889), 43 Ch. D. 316; *North Western Bank v. Poynter* (1894), 11 R. 125; *Viditz v. O'Hagan*, [1900] 2 Ch. 87; *Banque Internationale de Commerce de Petrograd v. Goukassow*, [1923] 2 K. B. 682.

6852. ——— **Scottish law—In English appeal.]**—Scottish parish registers or certified extracts from them, receivable in Scottish cts. as kept under the sanction of public authority, are receivable in English cts. as to matters properly & regularly recorded in them.

Certified extracts from Scottish parochial registers have been produced in this case from the General Register Office in Scotland, where they are now kept under Registration of Births, Deaths & Marriages (Scotland) Acts, 1854 (c. 80); 1855 (c. 29); 1860 (c. 85). Those statutes do not make anything evidence, either here or in Scotland, which without them would not have been so. But,

may be called although not called at trial.—*MALKIN v. TOBIN* (1900), 7 B. C. R. 386.—*CAN.*

1. ——— *Appeal from judge sitting alone.*—On an appeal from a judgment by a trial judge sitting alone, the hearing of the appeal is a rehearing of the cause.—*VOIGHT v. GROVES* (1905), 12 B. C. R. 170; 3 W. L. R. 428.—*CAN.*

PART XI. SECT. 1.

6847 i. Reference to master for report.]—When a question arises, in consequence of estates in Scotland being devised to a specified person, the ct. will not adjudicate thereon until it has ascertained, by a reference to the Master, whether the estate did pass by the Scottish Law.—*M'CALL v. M'CALL* (1843), 2 Con. & Law. 184.—*IR.*

PART XI. SECT. 2.

m. Victorian courts—Law of Tasmania.—The ct. can take judicial notice that Tasmania is a British Colony so acquired, that no previous law of succession would be operative in it; & will assume that its law is British, until a change be shown.—*DRYDEN v. DRYDEN* (1876), 2 V. L. R. 153.—*AUS.*

n. By Supreme Court of Canada

if your Lordships may act upon that judicial knowledge of Scottish law which you possess, as the ct. of ultimate appeal from all parts of the United Kingdom, & within my experience you have so acted upon your knowledge of English law, when questions of English law have arisen in Scottish appeals, it is certain that these registers would be receivable in Scotland, subject to just exceptions as to particular entries in them, as parochial registers kept under the sanction of public authority, for whatever they may be worth; anything imperfect or unsatisfactory, in the way in which they were generally kept, affecting only their weight in *re dubia*, & not their admissibility (LORD SELBORNE).—LYELL v. KENNEDY, KENNEDY v. LYELL (1880), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353. H. L.

Annotations.—**Mentd.** Trevor v. Hutchins (1897), 76 L. T. 183; Kelghley, Maxsted v. Durant, [1901] A. C. 240; Reid-Newfoundland Co. v. Anglo-American Telegraph Co., [1912] A. C. 555; Henry v. Hammond, [1913] 2 K. B. 515; Finn v. Shelton Iron Steel & Coal Co. (1924), 131 L. T. 213.

6853. Judicial Committee of Privy Council.—Law of country from which appeal comes.—The Judicial Committee are bound to take notice of the law of the country from which the appeal comes, & to decide according to it, although it has not been noticed in the ct. below.—SUMROO CHUNDER CHOWDRY v. NARAIN DIBEH & RAMKISHOR (1835), 3 Knapp, 55; 12 E. R. 568.

Annotation.—**Mentd.** Nagindas Bhugwandas v. Bachoo Hurkissodas (1915), 32 T. L. R. 132.

6854. — How prerogative exercised.—(1) Acquiescence by the Crown in a quasi-legislative order of a governor of a colony is not to be presumed.

(2) Judicial notice is to be taken by the Judicial Committee of the mode in which the prerogative has been exercised in a colony as part of the law of the colony.—CAMERON v. KYTE (1835), 3 Knapp, 332; 3 State Tr. N. S. 607; 12 E. R. 678, P. C.

Annotations.—*As to (1)* **Refd.** Musgrave v. Pulido (1879), 5 App. Cas. 102. *Generally*, **Mentd.** Hill v. Bigge (1841), 3 Moo. P. C. 465; Secretary of State for India v. Sahaba (1859), 13 Moo. P. C. 22; A.-G. for Canada v. Cain, A.-G. for Canada v. Gilhula, [1906] A. C. 542.

6855. By English courts.—Irish marriage laws.—*Qu.*: whether the English judges will take notice of the common law of Ireland [*re marriage*] without the ordinary proof of a foreign law.—R. v. SUNDERLAND (1837), 2 Lew. C. C. 109.

6856. — Application of English Common Law to Ireland.—The ct. would take judicial notice that the common law of England extended to Ireland & that a riot was a sufficient statement of an offence.—R. v. NESBITT (1844), 2 Dow. & L. 529; *sub nom.* *Re NESBITT*, 1 New Sess. Cas. 366; 14 L. J. M. C. 30; *sub nom.* *Ex p. NESBITT*, 8 Jur. 1071.

6857. — American law.—(1) The ct. refused

—*Provincial law.*—As an appellate tribunal for the Dominion of Canada, the Supreme Ct. of Canada requires no evidence of the laws in force in any of the provinces or territories of Canada. It is bound to take judicial notice of the statutory or other laws prevailing in every province or territory in Canada, even where they may not have been proved in the ct. below, or although the opinion of the judges of the Supreme Ct. of Canada may differ from the evidence adduced upon those points in the ct. below.—LODGE v. LEE (1907), 39 S. C. R. 311.—CAN.

Quebec courts.—Foreign law.—ADAMS & WORDEN (1855), 6 L. C. R. 237.—CAN.

*Canadian courts.—Law of public *cr.**—Murder being an extraditable offence under the Treaty of

Washington (1842) the ct. of this country will take notice that it is punishable as a crime in the United States.—PORTER v. McMAHON (1885), 25 N. B. R. 211.—CAN.

q. ———.—**CONSUMERS** COLDRAE CO. v. CONNOLLY (1901), 31 S. C. R. 214.—CAN.

r. By Natal courts.—English law.—English law is not foreign law & in a case governed thereby it is unnecessary to prove in evidence what are the provisions of that law.—SOUTH AFRICAN BREWERIES, LTD. v. MURIEL (1905), 26 N. L. R. 362.—S. AF.

PART XI. SECT. 3.

6859. Must be proved as fact.—Whether foreign law for judge or jury.—Foreign law is a question of fact,

to take judicial cognisance that the law of America is, in this respect [limitation of liability of a shipowner under Merchant Shipping Act, 1854 (c. 104), s. 504] the same as our own.

(2) *Semble*: if that circumstance be averred & proved the ct. can administer American law between Americans.—COPE v. DOWERTY (1858), 4 J. & J. 367; 27 L. J. Ch. 600; 4 Jur. N. S. 451; 70 E. R. 154; *on appeal*, 2 De G. & J. 611, L. J.J.

Annotations.—*Generally*, **Mentd.** Burns v. Chapman (1858), 5 C. B. N. S. 481; General Iron Screw Collier Co. v. Schurmanns (1860), 1 John. & H. 180; The Johannes (1860), Lush. 189; The Victor (1860), Lush. 72; The Annapolia, The Johanna Stoll (1861), Lush. 295; The Wild Ranger (1863), Lush. 553; The Amalia (1863), Brown & Lush. 151; The Scotia (1869), 20 L. T. 375; R. v. Keyn (1876), 2 Ex. D. 63; Davidson v. Hill, [1901] 2 K. B. 606; Poll v. Dabbe, [1901] 2 K. B. 579; Vareskok v. British Columbia Copper Co. (1906), 1 B. W. C. C. 446; The Wilhelmina, [1923] P. 112.

6858. British judge in extra-territorial court.—Law of country in which court situate.—Although by virtue of the treaty grant the British Sovereign becomes an authority in Zanzibar, exercising powers independently of the Sultan, Zanzibar remains foreign territory & the British Sovereign acts in all respects as a Zanzibar authority; & a British judge acting within these limits is a Zanzibar judge, & bound to take judicial notice of the Zanzibar law, & not to treat that law as mere matter of evidence.—SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & CO., [1901] A. C. 373; 70 L. J. P. C. 25; 84 L. T. 212; 17 T. L. R. 265, P. C.

Annotation.—**Refd.** Casdagli v. Casdagli, [1918] P. 89.

SECT. 3. — NECESSITY FOR PROOF.

How far judicially noticed.—*See* Sect. 2, *ante*.

6859. Must be proved as fact.—Whether question for judge or jury.—The way of knowing foreign laws is, by admitting them to be proved as facts, & the ct. must assist the jury in ascertaining what the law is (LORD MANSFIELD, C.J.).—MOSTYN v. FABRIGAS (1775), 1 Cowp. 161; 98 E. R. 1021, Ex. Ch.; *affg.* S. C. *sub nom.* FABRIGAS v. MOSTYN (1773), 2 Wm. Bl. 920.

Annotations.—**Refd.** Shackell v. Macaulay (1824), 3 L. J. O. S. Ch. 30; Di Sora v. Phillips (1863), 10 H. L. Cas. 824. **Mentd.** Sutton v. Johnstone (1786), 1 Term Rep. 493; Goldsmith v. Sefton (1796), 3 Anst. 808; R. v. Johnson (1805), 3 Wm. M. 591; Mure v. Kaye (1811), 4 Taunt. 34; Warden v. Bailey (1811), 4 Taunt. 67; Morris v. Robinson (1824), 5 Bow. & Ry. K. B. 34; Bedreechund v. Elphinstone (1830), 2 State Tr. N. S. 379; Price v. Severn (1831), 7 Bing. 316; Hill v. Bigge (1841), 4 State Tr. N. S. 725; A.-G. v. Boyet (1846), 15 M. & W. 60; Munden v. Brunswick (1847), 16 L. J. Q. B. 300; R. v. Upton St. Leonarda (1847), 10 Q. B. 827; Houlden v. Smith (1850), 19 L. J. Q. B. 170; Truckmaboyo v. Lullooboy McMahond (1852), 8 Moo. P. C. C. 4; Magnay v. Edwards (1853), 21 L. T. O. S. 103; *Ex p.* Baker (1857), 26 L. J. M. C. 155; A.-G. v. Kent (1862), 1 H. & C. 12; Scott v. Seymour (1862), 32 L. J. Ex. 61;

to be found by the jury, & not to be determined by the Judge.—OWGROD v. HATCH (1872), N. B. Dig. 387.—CAN.

6859. H. ———.—*Upon the trial of an issue whether or not goods had been supplied to deft.'s wife, evidence was given of the fact of a Scottish & conflicting professional upon the Scottish law of* ———.—**Held**: the Judge was right in leaving the entire question as a question of fact to the jury, & he ought not to have decided the law of Scotland in those respects in which the professional witnesses differed, nor to have applied it to the facts of the case in those respects in which they agreed, so as to give the jury a direction.—THETWALL v. YELVERTON (1862), 14 Ir. Jur. 347.—IR.

3.—Necessity for proof.]

Feather v. R. (1865), 6 B. & S. 257; *The Halley* (1868), L. R. 2 P. C. 193; *Phillips v. Eyre* (1870), 10 B. & S. 1004; *Ellis v. McHenry* (1871), L. R. 6 C. P. 228; *Hart v. Gumpach* (1872), L. R. 4 P. C. 439; *Whitaker v. Forbes* (1875), 45 L. J. Q. B. 140; *De Greuchy v. Wills* (1879), 43 J. P. 818; *Musgrave v. Pulido* (1879), 5 App. Cas. 102; *Le Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602; *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *Gilbey v. Cossey* (1912), 106 L. T. 607; *Board v. Board*, [1919] A. C. 956.

6860. ———.]—Foreign law & the construction of a foreign contract, just as much as the construction of an English one, are matters for the decision of the judge after having the foreign law, or the language of the foreign contract, interpreted & explained to him by the evidence of foreign experts, & are not in any case questions for the jury.—*COPIN v. ADAMSON*, *COPIN v. STRACHAN* (1874), as reported in 31 L. T. 242; *affd.* (1875), 1 Ex. D. 17, C. A.

Annotations :—*Mentd.* *Wood v. Wood* (1874), 43 L. J. Ex. 153; *Re Studer, Ex p. Chatteris* (1875), 32 L. T. 290; *Rouillon v. Rouillon* (1880), 14 Ch. D. 351; *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509; *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49; *Emanuel v. Symon*, [1908] 1 K. B. 302.

6861. ———.]—In Administration of Justice Act, 1920 (c. 81), s. 15, the words "any action or other matter . . . tried by a judge with a jury" include a criminal trial, & any question of foreign law thereat is for the judge & not for the jury. —*R. v. HAMMER*, [1923] 2 K. B. 787; 92 L. J. K. B. 1045; 129 L. T. 479; 87 J. P. 194; 39 T. L. R. 670; 68 Sol. Jo. 120; 27 Cox, C. C. 458; 17 Cr. App. Rep. 142, C. C. A.

See, also, Administration of Justice Act, 1920 (c. 81), s. 15.

6862. ———.]—Laws & customs of France & Holland must be proved else the ct. cannot take notice of them.—*FREMOUT v. DEDIRE* (1718), 1 P. Wms. 429; 21 E. R. 458, L. C.

Annotations :—*Refd.* *Omychund v. Barker* (1745), 1 Atk. 21; *Lushley v. Hog* (1804), 2 Coop. temp. Cott. 449; *R. v. Griffin* (1879), 14 Cox, C. C. 308. *Mentd.* *Plunket v. Penson* (1742), 2 Atk. 290; *Williams v. Lucas* (1789), 2 Cox, Eq. Cas. 169; *Ravenshaw v. Hollier* (1835), 4 L. J. Ch. 119; *Wellesley v. Wellesley* (1839), 4 My. & Cr. 561; *Powdrell v. Jones* (1854), 2 W. R. 513; *Mornington v. Keane* (1858), 2 De G. & J. 292; *Montagu v. Sundwich* (1886), 32 Ch. D. 525; *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A. C. 266.

6863. ———.]—The English cts. cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country.—

6862 i. ———.]—*M. E. G.* made a will in Tasmania appointing *M. G. & X.* exors. She went to Southern Rhodesia, where she married & died leaving her husband *W.* & an infant son surviving her. The High Ct. of Southern Rhodesia granted administration with the will annexed to *M. G.* who was then in Rhodesia as "extrix. testamentary," the right being reserved of making a similar grant to *X. M. G.* returned to Tasmania where *M. E. G.* had property & applied for probate of the will or in the alternative administration with the will annexed:—*Held*: evidence was necessary to prove the Rhodesian Ct. by appointing *M. G.* "extrix. testamentary" recognised the will as valid & to prove the powers vested in an extrix. testamentary.—*Re WILLIAMSON* (1912), 8 Tas. L. R. 33.—*AUS.*

6862 ii. ———.]—Proper proof was adduced of the law of Iowa, & it was shown that in 1873, a Justice of the Peace was by that law authorised to solemnise marriage.—*R. v. DEBARD* (1918), 44 O. L. R. 427; 15 O. W. N. 250; 31 Can. Crim. Cas. 122.—*CAN.*

6862 iii. ———.]—*HUTCHINSON v. R.*

GANER v. LANESBOROUGH (LADY) (1790), Peake, 25, N. P.

Annotations :—*Refd.* *Sussex Peerage* (1844), 11 Cl. & Fin. 85; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812.

6864. ———.]—In order to establish the fact of a marriage in Scotland it is necessary that some witness conversant with the law of Scotland as to marriage should be called.—*R. v. POVEY* (1852), *Dears. C. C.* 32; 22 L. J. M. C. 19; 16 J. P. 745; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83, C. C. R. *Annotations* :—*Consd.* *R. v. Fanning* (1866), 10 Cox, C. C. 411. *Refd.* *R. v. Griffin* (1879), 14 Cox, C. C. 308; *R. v. Naguib*, [1917] 1 K. B. 359.

6865. ———.]—Where the prosecution relies upon a foreign marriage this marriage must be proved valid according to the law of the foreign country by some witness conversant with such law (LORD READING, C.J.).—*R. v. NAGUIB*, [1917] 1 K. B. 359; 86 L. J. K. B. 709; 116 L. T. 640; 81 J. P. 116; 25 Cox, C. C. 712; 12 Cr. App. Rep. 187, C. C. A.

6866. ———.]—By authenticated document.]—To prove the laws of a foreign country, it must be done by documents properly authenticated from that country; & cannot be proved by parol.—*BOEITLINCK v. SCHNEIDER* (1799), 3 Esp. 58, N. P. *Annotation* :—*Consd.* *De Bode's Case* (1845), 8 Q. B. 208.

6867. ———.]—If a stamp is necessary to the validity of an agreement made in a foreign country, an agreement made there, unless it has such stamp, cannot be received in evidence in our cts. of justice; but it is incumbent upon the party who objects to the validity of the agreement, to prove the law requiring the stamp, by an authenticated copy, if it be in writing, & if not, by the testimony of a witness acquainted with the laws of the foreign country.—*CLEGG v. LEVY* (1812), 3 Camp. 166, N. P.

Annotation :—*Consd.* *De Bode's Case* (1845), 8 Q. B. 208.

6868. ———.]—The written laws of a foreign state can only be proved by copies properly authenticated.—*MILLAR v. HEINRICK* (1815), 4 Camp. 155, N. P.

Annotation :—*Distd.* *De Bode's Case* (1845), 8 Q. B. 208.

6869. ———.]—By expert evidence.]—A marriage purporting to be according to the usages of the Jews is void unless the Jewish law is complied with, & the validity of such marriage is determined by the evidence of an expert in the Jewish law, as in the case of foreign marriages.—*LINDO v. BELISARIO* (1795), 1 Hag. Con. 216; 161 E. R. 530.

Annotations :—*Refd.* *Ruding v. Smith* (1821), 2 Hag. Con. 371; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812;

dictory, as was also the evidence as to the ownership of the business. In these circumstances the ct. refused to restrain the carrying on of the business, but directed deft. to keep an account of the dealings thereof, & continued an interim injunction obtained *ex parte*, restraining the withdrawal of the money from the bank.—*SMITH v. SMITH* (1878), 25 Gr. 317.—*CAN.*

6869 iv. ———.]—Advocates were examined to prove the law of Scotland.—*BUTLER v. MOUNTGARRETT* (1855), 8 Ir. Jur. 474.—*IR.*

6869 v. ———.]—The effect of general British statutes in regulating bankruptcy proceedings in England & the colonies is matter of foreign law to be proved by foreign lawyers.—*COLVILLE v. JAMES* (1862), 1 Macph. (Ct. of Sess.) 41; 35 Sc. Jur. 25.—*SCOT.*

s. ———.]—*Case laid before counsel.*]—In a question as to the interpretation of an English will, a joint case had been laid before English counsel, who returned an opinion thereon; it being proposed by one of the parties to put certain additional queries to the counsel as to the principles of con-

IR. (1845), 8 L. Eq. R. 394.—

6869 i. ———.]—By expert evidence.]—The question being whether an agreement made in Queensland was properly stamped. A Queensland solr. being referred to a copy of the Queensland Stamp Act printed by the Government Printer stated he should act upon it & that by virtue of sect. 18 the agreement was admissible:—*Held*: the law of Queensland was sufficiently proved, & the ct. might refer to the Queensland Act as evidence in the cause.—*JANNING v. BROWN* (1867), 6 N. S. W. S. C. R. (L.) 169.—*AUS.*

6869 ii. ———.]—It is not desirable, even with the consent of parties, that the ct. should construe the law of a foreign country, instead of the fact of what is the law there being proved by lawyers of such foreign country.—*MEAGHER v. AETNA INSURANCE CO.* (1873), 20 Gr. 354.—*CAN.*

6869 iii. ———.]—The evidence of experts, lawyers practising in the States of Ohio & New York respectively, as to what was the proper distribution of the fund was contra-

Di Sora v. Phillips (1863), 10 H. L. Cas. 624. *Mentid. R. v. Burke* (1843), 1 L. T. O. S. 319; *R. v. Mills* (1844), 10 Cl. & Fin. 534; *Nelson v. Bridport* (1845), 8 Beav. 527; *Ardaseer Cursetjee v. Perozeboy* (1856), 6 Moo. Ind. App. 348; *Re De Wilton, Do Wilton v. Montefiore*, [1900] 2 Ch. 481.

6870. ———.]—A witness expert in the law of a foreign country was called to prove what that law was:—*Held*: he should state on his responsibility what the law was, & not read any fragments of a code.—*COCKS v. PURDAY* (1846), 2 Car. & Kir. 269, N. P.

6871. ———.]—(1) Foreign law, & its application, must, in English cts., be proved like any other facts, by properly qualified witnesses who can state from their own knowledge & experience, gained by study & practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words, & the legal meaning & effect of them, as applied to the case in question.

(2) It seems to me that witnesses in giving their testimony may, if they think fit, refer to laws or to treatises for the purpose of aiding their memory upon the subject of their examination. But, in general, it is the testimony of the witness, & not the authority of the law or of the text writer detached from the testimony of the witness, which is to influence the judge (*LORD LANGDALE, M.R.*).—*NEILSON (EARL) v. BRIDPORT (LORD)* (1845), 8 Beav. 527; 8 L. T. O. S. 18; 10 Jur. 871; 5 E. R. 207.

Annotation:—As to (1) *Consd. Di Sora v. Phillips* (1863), 10 H. L. Cas. 624.

6872. ———.]—Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law; but where the evidence of the experts is unsatisfactory & conflicting, the appellate ct., not having an opportunity of personally examining the witnesses to ascertain the weight due to each of their opinions, will examine for itself the decisions of the foreign cts. & the text writers, in order to arrive at a satisfactory conclusion upon the question of foreign law.—*BREMER v. FREEMAN* (1857), 10 Moo. P. C. C. 306; 29 L. T. O. S. 251; 5 W. R. 618; 14 E. R. 508, P. C.

Annotations:—*Expld. Concha v. Murrieta, De Mora v. Concha* (1889), 40 Ch. D. 543; *Consd. Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K. B. 111. *Refd. Di Sora v. Phillips* (1863), 10 H. L. Cas. 624; *Hanstaeng v. Em.*

Mentid. Hodgson v. De Beauchene (1858), 12 Moo. P. C. C. 285; *Whicker v. Hume* (1858), 7 H. L. Cas. 124; *Crookenden v. Fuller* (1859), 1 Sav. & Tr. 411; *Dogliani v. Crispin* (1866), 15 L. T. 44; *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Wilkinson v. Corfield* (1881), 6 P. D. 27; *Bloxham v. Favre* (1884), 50 L. T. 766; *Barretto v. Young*, [1900] 2 Ch. 339; *Re Martin, Loutalan v. Loutalan*, [1900] P. 211; *Peplin v. Bruyere*, [1900] 2 Ch. 504; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *Re Wernher, Wernher v. Belt*, [1918] 1 Ch. 339.

6873. ———.]—*COPIN v. ADAMSON, COPIN v. STRACHAN*, No. 6800, *ante*.

6874. ———.]—In our cts. foreign law is a

matter of fact to be decided on the evidence of advocates practising in the cts. of the country whose law is to be ascertained, but if the witnesses in their evidence refer to any passages in the code of their country, as containing the law applicable to the case, the ct. is at liberty to look at those passages & consider what is their proper meaning.

—*CONCHA v. MURRIETA, DE MORA v. CONCHA* (1889), 40 Ch. D. 543; 60 L. T. 798, C. A.; *on appeal, sub nom. CONCHA v. CONCHA*, [1892] A. C. 670, H. L.

Annotations:—*Consd. Perlak Petroleum Maatschappij v. Deen*, [1924] 1 K. B. 111. *Refd. Re De Rosaz, Rymer v. De Rosaz* (1883), 49 L. T. 133.

6875. ———.]—Expert evidence is required to prove the validity of a foreign marriage, even though in a suit previously determined in this division, between same petitioner & resp., to annul that marriage it has been proved & admitted that the marriage was valid upon the assumption that a decree of divorce, upon which the capacity of the parties to contract the marriage depended, was a valid decree.—*BATER v. BATER*, [1907] P. 333.

6876. ———.]—Where in a suit for the restitution of conjugal rights it appeared that the parties had been married in the Gold Coast Colony:—*Held*: the production of the ordinance of the colony relating to marriages was insufficient to prove the validity of a marriage there, & it was necessary to have the evidence of an expert witness as to the law in force in the colony.—*BROWN v. BROWN* (1917), 116 L. T. 702; 61 Sol. Jo. 351.

6877. ———.]—Colonial law must be verified by evidence, if intended to be used in a cause in this country.—*WILLINK v. BENTINCK* (1844), 2 L. T. O. S. 325, L. C.; *previous proceedings* ——— 1 L. T. O. S. 410.

6878. ———.]—*BRENAN'S CASE*, No. 6026, *post*.

6879. ———.]—The ct. having the proper parties before it, may administer foreign law, treating that law as a question of fact to be ascertained by evidence (*WIGRAM, V.-C.*).—*Re DENNIE VALLEY RAILWAY & CANAL CO., Ex p. Moss* (1850), 19 L. J. Ch. 474; 15 L. T. O. S. 210; 14 Jur. 754.

6880. ———.]—*Not proved by previous decision on similar facts.*—A question of foreign law, being one of fact, must be decided in each case on evidence adduced in it, & not by a decision or on evidence adduced in another case, although similarly circumstanced.—*McCORMICK v. GARNETT* (1851), 5 De G. M. & G. 278; 2 Eq. Rep. 530; 23 L. J. Ch. 777; 23 L. T. O. S. 130; 18 Jur. 412; 43 E. R. 877, L. J.

6881. ———.]—A Prussian vessel laden with timber shipped in Russia, & consigned to Hull, went ashore on the coast of Norway. The captain, without instructions & without necessity, then sold the timber there in a manner recognised by the

struction upon which he had interpreted the will, etc.—*Held*: parties were not entitled to go back upon, or endeavour to open up the opinion, which now fell only to be applied.—*CRANSTON (LORD) v. CUNNINGHAME* (1839), 1 Dunl. (Ct. of Sess.) 521.—*SCOT.*

1. ———.]—Where an action is pending in this Ct. which involves questions of English law, & a remit had been made to two English counsel for their opinion, & they differ in opinion:—*Held*: the proper course to be adopted for extricating the case is to remit to other English counsel.—*FYFFE v. FYFFE* (1840), 2 Dunl. (Ct. of Sess.) 1001.—*SCOT.*

a. ———.]—A party who had concurred in a judicial remit to a

barrister in New York, with regard to a point in the law of South Carolina:—*Held*: not entitled upon an unfavourable opinion being returned to have a new remit made to lawyers in South Carolina, on the allegation that the practice of that State differed from that stated in the opinion of the New York lawyer.—*WELSH v. MILNE* (1844), 7 Dunl. (Ct. of Sess.) 213; 17 Sc. Jur. 101.—*SCOT.*

b. ———.]—*By admission.*—Proof of a foreign statute by admission is as effective as proof by an expert in *haec verba*.—*MERRITT v. COPPER CROWN CO.* (1902), 36 N. S. R. 383.—*CAN.*

c. ———.]—Action for criminal conversation. The evidence showed that plff. & the woman had lived together as man & wife, & had been

so regarded by deft., who had admitted the relationship in certain letters. Plff. swore he had been married to the woman in Hungary according to the rites of the Roman Catholic Church, but tendered no other evidence of his marriage than a document in the Hungarian language purporting to be a marriage certificate. This latter document was not made a Ct. exhibit, nor was it literally translated, but a Hungarian who was called gave evidence that it purported to be a marriage certificate.—*Held*: In actions of crim. con. it was necessary to prove the fact of marriage strictly, & this involved proof of the marriage laws of Hungary, & the proof that they had been complied with. The evidence of plff. who, apparently, possessed no knowledge of the marriage laws of

Sect. 3.—Necessity for proof. Sect. 4: Sub-sects. 1 & 2.]

law of Norway to G., who sold to defts., who brought it to England. The underwriters by their agents in Norway appealed there against this sale, but the courts of Norway confirmed it:—**Held**: the question of what is the foreign law was one of fact, & the conclusion to be drawn from the evidence was, that by the law of Norway the captain, under orders such as existed in this case, could not as between himself & his owners, or the owners of the cargo, justify the sale, but that he remained liable to them for a sale not justified under the orders, while on the other hand an innocent purchaser would have a good title to the property bought by him from the agent of the owners. The property there vested in the purchaser, & in defts. as sub-purchasers from him, & having once so vested, it did not become divested by being brought to this country.—**CAMMELL v. SEWELL** (1860), 5 H. & N. 728; 29 L. J. Ex. 350; 2 L. T. 799; 6 Jur. N. S. 918; 8 W. R. 639; 157 E. R. 1371, Ex. Ch.

Annotations:—**Mentd.** *Simpson v. Fogo* (1860), 1 John. & H. 18; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163; *The Justyn* (1862), 6 L. T. 553; *Simpson v. Fogo* (1863), 1 Hem. & M. 195; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Empire of Peace* (1869), 39 L. J. Adm. 12; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Meyer v. Talli* (1876), 45 L. J. Q. B. 741; *Eglinton v. Norman* (1877), 46 L. J. Q. B. 557; *Vadala v. Lawes* (1890), 25 Q. B. 11, 310; *Alcock v. Smith*, [1892] 1 Ch. 238; *Dulaney v. Merry*, [1901] 1 K. B. 536.

6882. —[.]—To establish bigamy as a ground for the sentence of the ct., there must be proof of such a ceremony as, but for the former marriage, would constitute a valid marriage. Thus, if the bigamy relied upon took place abroad, it will be necessary to give formal proof of the marriage law of that country.—**BURT v. BURT** (1860), 2 Sw. & Tr. 88; 29 L. J. P. M. & A. 133; 2 L. T. 439; 8 W. R. 552; 164 E. R. 925.

Annotations:—**Consd.** *R. v. Griffin* (1879), 14 Cox, C. C. 308. **Reid.** *R. v. Fanning* (1866), 10 Cox, C. C. 411. **Mentd.** *R. v. Allen* (1872), L. R. 1 C. C. R. 367.

6883. —[.]—Foreign law is always a question of fact for the English ct.—**CARLIN v. CARLIN** (1906), 70 J. P. 143, D. C.

SECT. 4. —ONUS OF PROOF.

SUB-SECT. 1.—IN GENERAL.

Conflict of Laws, generally, see **CONFLICT OF LAWS**, Vol. XI., pp. 300 *et seq.*

6884. Differences from English law must be alleged.—An instrument, executed by foreigners in a foreign country, must, on demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it

Hungary, was insufficient proof of the marriage, & the admissions of deft. were no proof at all.—**ZDRAHAL v. SHATNEY** (1912), 22 W. L. R. 336; 20 Can. Crim. Cas. 205; 7 D. L. R. 554; 22 Man. L. R. 521.—**CAN.**

d. —[.]—*By affidavit.*—Affidavits to prove Chinese law & show the non-existence of martial law in Kuang Tung, were admitted.—**RE CHUNG SAN NAM** (1914), 9 Hong Kong L. R. 26.—**HONG KONG.**

e. —[.]—Proof of the law of the Transvaal by affidavit was admitted.—**GARLICK v. BROIDO** (1897), 7 C. T. R. 159.—**S. AF.**

PART XI. SECT. 4, SUB-SECT. 1.

6884 i. Differences from English law

must be alleged.—The law of New Zealand is presumed to be the same as the common law of England, & any difference should be alleged.—**PROUDFOOT v. DRAKE** (1882), 3 N. S. W. L. R. 381.—**AUS.**

6884 ii. —[.]—Where an action is brought upon a note payable in Queensland & indorsed in New South Wales, it lies on the deft. to show that the law of Queensland differs from the law of New South Wales.—**WRIGHT, HEATON & CO. v. BARRETT** (1892), 13 N. S. W. L. R. 206; 9 N. S. W. W. N. 13.—**AUS.**

6884 iii. —[.]—The law of Grenada, if different from that of Ireland, should be pleaded.—**KENNEDY v. KELLY** (1864), 14 Ir. Jur. 326.—**IR.**

6887 i. Onus rests on party alleging foreign law.—A prayer for pro-

was executed, the true construction of it is different.—**SPAIN (KING) v. MACHADO** (1827), 4 Russ. 220; 6 L. J. O. S. Ch. 61; 38 E. R. 790, L. O.

Annotations:—**Consd.** *Goodwin v. Roberts* (1876), 1 App. Cas. 476. **Mentd.** *Wade v. Cox* (1835), 4 L. J. Ch. 105; *Davies v. Quarterman* (1840), 4 Y. & C. Ex. 257; *Brunswick (Duke) v. Hanover (King)* (1844), 13 L. J. Ch. 107; *Doyle v. Muntz* (1846), 5 Hare, 509; *Clay v. Ruford* (1849), 8 Hare, 281.

6885. —[.]—A purchaser of scrip in a projected Spanish railway co. filed his bill against the provisional committee of that co., praying that an agreement entered into by them with a promoter of the railway, whereby he was to receive a large sum out of the subscribed funds of the co., might be declared void; & also praying a general account of the affairs of the co.; *semble*: where a bill contains averments as to the effect of certain arts. of a foreign law, but is silent as to others, the ct. will presume that the foreign law only differs from the English in the particulars stated.—**HARVEY v. COLLETT** (1846), 15 Sim. 332; 4 Ry. & Can. Cas. 387; 15 L. J. Ch. 376; 10 Jur. 603; 60 E. R. 646.

Annotation:—**Mentd.** *Stewart v. Austin* (1866), 36 L. J. Ch. 162.

6886. —[.]—An attorney of the Supreme Ct. of New South Wales, who, as such, claims a general lien on a deed belonging to his client, must state on his pleading the law of New South Wales as to the general lien of attorneys, for the courts here will not take judicial notice of it, notwithstanding Australian Cts. Act, 1828 (c. 83), s. 24. *Semble*: if the law of a foreign country, or of a colony, be stated in any pleading, the allegation may be traversed as matter of fact; but where the allegation is that certain transactions took place abroad, by virtue of which the party pleading acquired certain rights, the *virtute cuius* is matter of law, & cannot be traversed.—**ASTLEY v. FISHER** (1848), 6 C. B. 572; 18 L. J. C. P. 59; 12 Jur. 1051; 150 E. R.

6887. Onus rests on party alleging foreign law.—When the cause of action accrued in Scotland, & infancy pleaded, deft. must show that infancy is a legal defence to the demand, by proving the law of that country in that respect.—**MALE v. ROBERTS** (1790), 3 Esp. 163, N. P.

Annotations:—**Reid.** *Sottomayer v. De Barros* (1879), 5 P. D. 94; *Ogden v. Ogden*, [1908] P. 46.

6888. —[.]—To an action of *assumpsit* on several bills of exchange, deft. pleaded that, after the time mentioned for the payment thereof elapsed, deft., being then resident in Scotland, in consideration of forbearance by creditors to sue, made a deed or writing duly stamped & attested, according to the law of Scotland, by which he alienated, etc., all his goods for the benefit of his creditors in discharge of his debts; that notice was given to the creditors, of whom plff. was one; & that plff., by his writing, signed by him, which

visional sentence on a judgment obtained in a landdrost's Court of the South African Republic eight years previously was opposed on the ground that the judgment was superannuated:—**Held**: the onus of proving the law of the Transvaal was upon deft.—**GARLICK v. BROIDO** (1897), 7 C. T. R. 159.—**S. AF.**

6887 ii. —[.]—In an action for divorce, where the matrimonial domicile was situated in Russia, & deft. pleaded that the marriage was not in community:—**Held**: the onus of proving what the law of Russia was rested on deft.; & a postponement should have been granted to enable him to produce evidence as to what that law was.—**SCHAPIRO v. SCHAPIRO** (1904), T. S. 673.—**S. AF.**

writing was valid by the law of Scotland, did appoint R. as his attorney, etc., who adopted the deed: that all & singular the proceedings aforesaid were pursuant to & in conformity with the law of Scotland; whereby & by reason of the several premises, & by effect of the aforesaid law, he, deft., hath become absolutely discharged, in respect, of his person, lands, goods, & chattels, from the several causes of action in the declaration. The replication alleged, that deft. had not become, nor was he discharged, etc., in manner & form:—*Held*: by this replication, the law of Scotland was traversed, & it was incumbent on deft. at the trial to give evidence, in support of the issue, of what was the law of Scotland in this matter, & to show that, by that, the facts stated operated as a discharge.—*WOODHAM v. EDWARDS* (1836), 5 Ad. & El. 771; 2 Har. & W. 443; 1 Nev. & P. K. B. 207; 6 L. J. K. B. 38; 111 E. R. 1358.
Annotation:—*Reid*. *Benham v. Mornington* (1846), 3 C. B. 133.

6889. —[.]—If reliance is placed upon a difference between the law of England & a foreign State, the party relying upon the difference is bound by witnesses or authorities to prove such fact.—*SMITH v. GOULD, THE PRINCE GEORGE* (1842), 4 Moo. P. C. C. 21; 6 Jur. 543; 13 E. R. 208, P. C.
Annotations.—*Mentd.* *The Osmanti* (1849), 3 Wm. Rob. 198; *The Edmond* (1869), Lush. 57; *The Edmond* (1861), Lush. 211; *The Laurel* (1864), 11 Jur. N. S. 46; *The Karnak* (1868), L. R. 2 A. & E. 289; *The Ida* (1872), L. R. 3 A. & E. 542.

SUB-SECT. 2.—PRESUMPTION OF IDENTITY OF LAWS.

6890. Onus rests on party alleging foreign law—In absence of evidence presumption that foreign

PART XI. SECT. 4, SUB-SECT. 2.

6890 i. *Onus rests on party alleging foreign law—In absence of evidence presumption that foreign law is same.*—Where no difference between our own law & the law of Utah is shown, the effect of compounding a felony must be presumed to be the same in both countries.—*TORPENCE v. MARTIN* (1876), 38 U. C. R. 411.—*CAN.*

6890 ii. —[.]—One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R., & with his consent, applied here for letters of administration to be granted to him by the Surrogate Ct. E., however, residing at Toronto, & as next of kin to R., also applied here for administration to R.'s estate. S. now applied to have the matter transferred into this Ct. or for a writ of prohibition to the Surrogate Judge preventing him granting letters to E., & a mandamus ordering him to grant them to S.—*Held*: falling any proof as to the law in Maine, it must be assumed to agree with the law here according to which the Ct. will not grant administration to a creditor, so long as one having a better claim is willing to act.—*Re O'Brien* (1882), 3 O. R. 326.—*CAN.*

6890 iii. —[.]—The fact of a bill of lading having been made in the Province of Quebec did not deprive plffs. of the benefit of R. S. O., c. 116, for not only was this not set up by the pleadings but also it did not appear that the Quebec law was different from that of Ontario, & in the absence of proof it would be assumed to be the same.—*LANGDON v. ROBERTSON* (1887), 13 O. R. 497.—*CAN.*

6890 iv. —[.]—A testator domiciled in U.S.A., at the time of the execution of his will, & at the time of his death, bequeathed personal prop-

erty situate in this Province to a lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorised by law to take & hold, in the names of trustees, property devised to the lodge. In an action to test the validity of the bequest.—*Held*: the parties having selected their *forum* in this Province, the action must be dealt with here according to the law of the testator's domicile, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province.—*GRAHAM v. CANADIAN LODGE* (1893), 24 O. R. 255.—*CAN.*

6890 v. —[.]—In the absence of proof it will be assumed that the law of the foreign country is the same as that here.—*McCAULAY v. O'BRIEN* (1897), 5 B. C. R. 510.—*CAN.*

6890 vi. —[.]—Where the law of a foreign State has not been proved, the Ct. in this province is justified in assuming, in the absence of special circumstances, that the common law prevails in that foreign State.—*PINK v. PERLIN & Co.* (1898), 40 N. S. R. 250.—*CAN.*

6890 vii. —[.]—A share in the annual income of an estate in Ireland payable under a will, through the hands of the exor. living in New Brunswick, to the beneficiary living & domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to a trustee in trust, first to maintain the assignor & his family, & second, to pay his creditors a limited sum. In a suit in New Brunswick to set aside the assignment as fraudulent & void against a judgment creditor of the assignor, under 13 Eliz. c. 5.—*Held*: assuming that the validity of the assignment should be determined by the law of Massachu-

setts, the *onus* of proving that the assignment was invalid by that law was upon deft., & in the absence of such proof, it must be assumed that the law of Massachusetts was the same as that of New Brunswick.—*BLACK v. MOORE* (1900), 20 C. L. T. Occ. N. 463; 2 N. B. Eq. Rep. 98.—*CAN.*
6890 viii. —[.]—Prisoner & his wife were absolutely divorced in the State of Illinois, where they were domiciled, by a decree which gave the custody of their child, five years old, to the wife, with permission to prisoner to take it out with him in the daytime, but to return it the same day. Prisoner, having thus obtained the child, brought it to Canada.—*Held*: "child stealing" being mentioned in the existing Extradition Treaty between the United States & Great Britain, as one of the extradition crimes, the Ct. should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries, & the *onus* did not rest upon the prosecutor of proving what the foreign law was.—*LE WATTS* (1902), 22 C. L. T. 199; 3 O. L. R. 368; 1 O. W. R. 133; 5 Can. Crim. Cas. 246.—*CAN.*

6890 ix. —[.]—The *onus* of establishing that a rule of law on a given subject is different from that in force in this province, prevails in a foreign country is upon the party who relies on it. In default of proof of its existence, the law of this province will be applied.—*GOGO v. KOUKI* (1905), Q. R. 29 S. C. 47.—*CAN.*
6890 x. —[.]—It lies on him, who asserts it, to prove that the law of the Native State differs from the law in British India & in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.—

law same as English.]—The master of a French ship undertook by charterparty to convey cargo belonging to plff. from the West Indies to Liverpool. The vessel put into Fayal in distress, where the master hypothecated the vessel for repairs. On her arrival in this country proceedings were had in the Admiralty Ct. on the bottomry bond, & plff. was obliged to pay money to release the cargo. To an action on an implied promise to indemnify plff., defts. pleaded that the ship was a French ship, & defts. French subjects domiciled in France, & that by the laws of France the owners of any French ship may in all cases free themselves from the acts & engagements of the master by the abandonment of the ship & freight, & that they had done so. Plff. demurred in this plea, & also replied that he had elected that his goods should be carried to England, & that the law of the country where the charterparty was made & where the bottomry bond was given, was similar to the law of England, & not to that of France:—*Held*: a party who relies upon a right or an exemption by foreign law, is bound to bring such law properly before the Ct., & to establish it by proof, otherwise the Ct., not being entitled to notice such law without judicial proof, must proceed according to the law of England.—*LLOYD v. GUBBERT* (1865), L. R. 1 Q. B. 115; 6 B. & S. 100; 35 L. J. Q. B. 74; 13 L. T. 602; 2 Mar. L. C. 283; 122 E. R. 1131, Ex. Ch.

Annotations.—*Consd.* *De Clermont v. Brasch* (1885), 1 T. L. R. 370. *Appld.* *R. v. Naguib*, [1917] 1 K. B. 359.
Reid. *The Empire of Peace* (1869), 39 L. J. Adm. 12; *Nouvelle Banque de l'Union v. Ayton* (1891), 7 T. L. R. 377. *Mentd.* *The Bahia* (1864), Brown, & Lush. 292; *The Nina* (1867), 17 L. T. 391; *Droege v. Stuart*, *The Karnak* (1869), L. R. 2 P. C. 505; *Ellis v. McHenry* (1871), L. R. 6 C. P. 228; *The Patria* (1871), L. R. 3 A. & E. 436; *James v. South Western Ry.* (1872), L. R. 7 Exch. 287; *The San Roman* (1872), L. R. 3 A. & E. 583;

Sect. 4.—Onus of proof: Sub-sect. 2. Sect. 5: Sub-sect. 1.]

The *M. Moxham* (1875), 1 P. D. 43; *Nugent v. Smith* (1875), 1 C. P. D. 19; *Moore v. Harris* (1876), 1 App. Cas. 318; *Cohen v. S. E. Ry.* (1877), 25 W. R. 475; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *The Gaetano & Maria* (1882), 7 P. D. 137; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589; *Re Missouri S.S. Co.* (1889), 42 Ch. D. 321; *The August*, [1891] P. 328; *The Industrie*, [1894] P. 58; *Abdul Aziz Khan Sahib v. Commercial Bank of India* (1903), 20 T. L. R. 46; *Krell v. Henry*, [1903] 2 K. B. 740; *Shrichand v. Lacon* (1906), 22 T. L. R. 245; *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *Matthey v. Curling*, [1922] 2 A. C. 180.

6891. ———.]—It is not a mere canon of English municipal law, but a great & broad principle, which must be taken, in the absence of proof to the contrary, as part of any given system of jurisprudence, that the governing body of a corp'n. which is a trading partnership, that is to say, the ultimate authority within the society itself, cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority, whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the assocn., however absolute in terms, are always to be construed as subject to a paramount & inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of assocn.

English directors of a foreign railway co., which was subject to Turkish law, as to which there was no evidence before the ct., were restrained from applying the funds of the co. in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the co.; but were not, in the circumstances of the case, ordered to repay the amount of certain of the costs already so satisfied by them.—*PICKERING v. STEPHENSON* (1872), 1 L. R. 14 Eq. 322; 41 L. J. Ch. 493; 26 L. T. 608; 20 W. R. 654.

Annotations:—Mentd. *Studdert v. Grosvenor* (1886), 33 Ch. D. 528; *Tomkinson v. S. E. Ry.* (1887), 35 Ch. D. 775; *Re Faure Electric Accumulator Co.* (1888), 40 Ch. D. 141; *Cullerne v. London & Suburban General Permanent Bldg. Soc.* (1890), 25 Q. B. D. 485; *Re Liverpool Household Stores Assocn.* (1890), 59 L. J. Ch. 616; *Re Sharpe*, *Re Bennett*, *Masonic & General Life Assocn. v. Sharpe*, [1892] 1 Ch. 154; *Brow v. Royal British Nurses' Assocn.* (1897), 76 L. T. 735; *Peel v. L. & N. W. Ry.*, [1907] 1 Ch. 5.

6892. ———.]—The law of a foreign country is presumed to be similar to the law of England until the contrary is shown, & it is for the party relying upon any difference in the laws to show what the foreign law is.—*DE CLEREMONT & Co. v. BRASCH & Co.* (1885), 1 T. L. R. 370, D. C.; *subsequent proceedings*, 2 T. L. R. 116, D. C.

6893. ———.]—Technically it must be presumed, in the absence of evidence to the contrary,

that Belgian law is the same as English law (*HAMILTON, J.*).

I am far from saying that it would be unreasonable for a Belgian subject or merchant domiciled in Belgium to take advantage of the Belgian law, which appears to have enabled the present pl'tfs. to get the captain whose ship was in Antwerp placed in such a position that in view of the judgment he could be treated as having been domiciled on board his steamer, which was in territorial waters, & that pl'tfs. should prefer a tribunal of their own country to suing defts. in their country; but I think that before taking that course it would have been unreasonable for pl'tfs. not to ascertain what their legal position was (*HAMILTON, J.*).—*VINCENTELLI & Co. v. ROWLETT (JOHN) & Co.* (1911), 105 L. T. 411; 12 Asp. M. L. C. 34; 16 Com. Cas. 310.

6894. ———.]—An English co., owning cupreous ore mines in Spain, on various dates prior to the outbreak of the war between Great Britain & Germany, contracted to sell to three German cos. large quantities of this ore, to be shipped from Spain to Rotterdam or certain other continental ports & to be delivered to the several buyers by instalments extending over a number of years. Each of the contracts contained a suspensory clause providing that, if owing to strikes, war, or any other cause, over which the sellers have no control, they should be prevented from shipping or delivering the ore, the obligation to ship & deliver should be suspended during the continuance of the impediment & for a reasonable time afterwards, & the clause contained a corresponding provision in favour of the buyers, suspending the obligation to receive in the like event. At the date of the outbreak of war some of the contracts had been partially executed, the others were wholly executory. The contracts with one of the German companies were in English form; those with the two other companies were made in Germany & were in the German language. The English co., by actions commenced under Legal Proceedings against Enemies Act, 1915, claimed declarations that all the contracts were abrogated on Aug. 4, 1914, by the existence of a state of war between Great Britain & Germany:—*Held:* as regards the German contracts, in the absence of evidence to the contrary, the presumption was that the law of Germany was the same as the law of England.—*ERTEL, BIEBER & Co. v. RIO TINTO CO., DYNAMIT ACT. v. RIO TINTO CO., VEREINIGTE KÖNIGS & LAURAHÜTTE ACT. v. RIO TINTO CO.*, [1918] A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208, H. L.

Annotations:—Consd. *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623. *Mentd.* *Clapham S.S. Co. v. Handels-en-Transport Maatschappij Vleum van Rotterdam*, [1917] 2 K. B. 639; *Blackburn Bobbin Co. v. Allen*, [1918] 1 K. B. 540; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251; *Naylor, Benzon v. Krainsche Industrie Gesellschaft*, [1918] 2 K. B. 486; *Fried Krupp Akt. v. Oronera Iron Ore Co.* (1919), 88

HUGHANATH v. VARJIVANDAS (1906), 1 L. R. 30 Bom. 578.—*IND.*

6890 xi. ———.]—It does not seem contrary to natural justice that if a minor may trade under the laws of a foreign country, he may also be made an insolvent there. Upon demurrer, the ct. will assume the colonial law to be so.—*STEPHENS v. McFARLAND* (1845), 8 I. Eq. R. 444.—*IR.*

6890 xii. ———.]—In an action of *assumpsit* on a promissory note, made at Cape Town, in the Cape of Good Hope:—*Held:* when a party is sued on a contract made in a foreign country, the ct. will presume it is a legal contract according to the law of

that country, unless the contrary be proved; & the onus of such proof lies upon the party objecting to the legality.—*RUSSELL v. KITCHEN* (1854), 31 L. C. L. R. 613; 6 Ir. Jur. 218.—*IR.*

6890 xiii. ———.]—Where a minor, having made a Scottish "matrimonial contract" on her marriage, the validity of which was doubtful, afterwards became a widow, & entered into the enjoyment of her jointure under it, the Ct. preferred holding it to be confirmed as there was no evidence of the Scots law on that subject.—*LOCKHART'S TRUST, Ex p. LOCKHART (LADY), LOCKHART'S TRUST, Ex p. JERVISWOOD (LORD)* (1866), 18 Ir. Jur. 245.—*IR.*

6890 xiv. ———.]—A party relying on a contract, be it matrimony or any other contract, if he shows that the *factum* has what may be called the natural essence of a contract of the kind in question, is not bound to show, in the first instance, when the contract is made in a foreign country, that the foreign country has a law relating to contracts of the kind, & that the contract is conformable to such law. If proper evidence be given that it has what is of the essence of the contract, it will be presumed to be according to the foreign law if any such there be, without any evidence of such foreign law, until the contrary is shown.—*R. v. GRIFFIN* (1879), 4 L. R. Ir. 497.—*IR.*

L. J. Ch. 304; Central India Mining Co. v. Soc. Colonial Anversoise, [1920] 1 K. B. 753; *Re* Badische Co., *Re* Bayer Co., etc., [1921] 2 Ch. 331; Larrinaga v. Soc. Franco-Americana Des Phosphates De Medulla (1923), 92 L. J. K. B. 455.

SECT. 5.—COMPETENCY OF WITNESSES.

SUB-SECT. 1.—COLONIAL LAW.

6895. Scottish law — Opinion of Scottish advocate.—*BEAMISH v. BEAMISH* (1788), cited in 2 Hag. Con. p. 83; 161 E. R. 675.

Annotations.—*Reid*, Dalrymple v. Dalrymple (1811), 2 Hag. Con. 54. *Mentid*, M'Adam v. Walker (1813), 1 Dow. 148.

6896. ———— *DALRYMPLE v. DALRYMPLE* (1811), 2 Hag. Con. 54; 161 E. R. 665; *on appeal* (1814), 2 Hag. Con. 137, n.

Annotations.—*Conad*, Sussex Peerage Case (1844), 11 Cl. & Fin. 85. *Reid*, Nelson v. Bridport (1845), 8 Beav. 527; De Bode v. R. (1846), 10 Jur. 217. *Mentid*, M'Adam v. Walker (1813), 1 Dow. 148; Lantour v. Teesdale (1816), 8 Taunt. 830; Lacon v. Higgins (1822), 3 Stark. 178; Smith v. Maxwell (1824), Ry. & M. 80; Macneil v. Macgregor (1828), 2 Bl. N. S. 393; Honyman v. Campbell (1831), 2 Dow. & Cl. 265; Doe d. Birtwhistle v. Vardill (1835), 2 Cl. & Fin. 571; Escott v. Martin (1842), 4 Moo. P. C. C. 104; Johnstone v. Beattie (1843), 10 Cl. & Fin. 42; It. v. Mills (1844), 10 Cl. & Fin. 534; Ward v. Day (1846), 5 Notes of Cases, 60; Maclean v. Cristall (1849), 7 Notes of Cases, Supp. xvii.; Connelly v. Connelly (1851), 7 Moo. P. C. C. 438; Brook v. Brook (1858), 3 Sm. & G. 481; Hope v. Hope (1858), 1 Sw. & Tr. 64; Fenton v. Livingstone (1859), 33 L. T. S. 335; Beechey v. Brown (1860), 29 L. J. Q. B. 105; Simons v. Malle (1860), 2 Sw. & Tr. 67; Di Sorra v. Phillips (1863), 10 H. L. Cas. 625; Sicchi v. Lambert (1864), 15 C. B. N. S. 781; The Halley (1867), L. R. 2 A. & E. 3; Longworth (or Yelverton) v. Yelverton (1867), L. R. 1 Sc. & Div. 218; The M. Moxham (1875), 1 P. D. 43; Sottomayor v. De Barros (1877), 2 P. D. 81; Dysart Peerage Case (1881), 6 App. Cas. 489; *Re* Goodman's Trusts (1881), 17 Ch. D. 266; Mackonochie v. Penzance (1881), 6 App. Cas. 424; Collins v. Collins (1884), 9 App. Cas. 205; Mitford v. Mitford, [1923] P. 130.

6897. ———— *—* An opinion of a Scottish advocate was in evidence. The judge considering that there was implied therein an opinion on a question of Scottish law raised in the suit, decided the question on that evidence.—*MACDONALD v. MACDONALD* (1872), L. R. 14 Eq. 60; 41 L. J. Ch. 560; 26 L. T. 685.

6898. ———— *Opinion of "solicitor practising in Supreme Courts of Scotland."*—Where it is sought to have funds belonging to a domiciled Scottish *feme covert* paid out of etc., & any Scottish settlement exists, the ct. requires the testimony of a Scottish advocate to show that it does not affect the fund.—*Re Todd, Shand v. Kidd* (1851), 19 Beav. 582; 52 E. R. 476.

6899. ———— *Questions of marriage law* Whether evidence of lawyer necessary. *—* On an indictment for bigamy, it is not essential that a witness, who is called to prove the law of Scotland as to marriage, should be at all connected with the legal profession; & the evidence of a gentleman, who stated that he was born & educated in Scotland, & lived there until he was twenty, & that he was

acquainted with the law of marriage in Scotland, was held to be sufficient for this purpose.—*R. v. DENT* (1813), 1 Car. & Kir. 97.

Annotations.—*Overd*, Sussex Peerage Case (1844), 11 Cl. & Fin. 85. *Conad*, Vander Donckt v. Thellusson (1849), 8 C. B. 812; Perlek Petroleum Maatschappij v. Deen, [1924] 1 K. B. 111. *Reid*, R. v. Povey (1832), 22 L. J. M. C. 19; Rowley v. L. & N. W. Ry. (1873), 29 L. T. 180.

6900. ———— *—* In order to prove that a marriage in Scotland is valid according to the law of Scotland, a witness conversant with Scottish law as to marriage ought to be called.—*R. v. POVEY* (1852), Dears. C. C. 32; 22 L. J. M. C. 19; 16 J. P. 745; 17 Jur. 120; 1 W. R. 40; 6 Cox, C. C. 83, C. C. R.

Annotations.—*Reid*, R. v. Griffin (1879), 14 Cox, C. C. 308; R. v. Nuguib, [1917] 1 K. B. 359. *Mentid*, R. v. Fanning (1866), 10 Cox, C. C. 411.

6901. ———— *Evidence of Roman Catholic priest.*—In an indictment for bigamy everything relating to the first marriage must be proved strictly & evidence of a marriage in Scotland by a Roman Catholic priest, who has previously performed similar ceremonies there, will not suffice without due proof of what the law as to such marriage is, although the prisoner may have admitted that he was, in fact, married in Scotland. — *R. v. SAVAGE* (1876), 13 Cox, C. C. 178.

Annotations.—*Reid*, R. v. Nasliski (1897), 61 J. P. 520; R. v. Lindsay (1902), 66 J. P. 505; It. v. Nuguib, [1917] 1 K. B. 359; R. v. Raven & Dellow (1920), 84 J. P. 139.

6902. Colonial law — English barrister practising in Canadian appeals.—An English barrister practising in Canadian appeals before the Privy Council is not competent to give evidence as an expert as to the validity, according to the law of Canada, of a marriage solemnised in that country. — *CARTWRIGHT v. CARTWRIGHT & ANDERSON* (1878), 26 W. R. 681.

6903. ———— *Ex-Governor of Hong Kong.*—Where, upon the hearing of a petition to dissolve a marriage which had been celebrated in the colony of Hong Kong, it was stated on behalf of petitioner that the only legal expert available to give evidence of the validity of the marriage, according to the laws & ordinances of Hong Kong, demanded a prohibitive fee, the ct. gave leave to prove the marriage by reading an affidavit of an Ex-Governor of the colony, who was not a member of the legal profession, but who deposed that he was conversant with the laws & ordinances in force in the colony. — *COOPER-KING v. COOPER-KING*, [1900] P. 65; 69 L. J. P. 33.

Annotation.—*Apid*, Barford v. Barford & McLeod (1918), 87 L. J. P. 68.

6904. ———— *English barrister specially qualified by professional study Marriage in Malta.*—In a matrimonial suit, where there is a practical difficulty in the way of petitioner adducing the usual evidence of a lawyer who is or has been practising in the cts. of the colony [Malta] where the marriage of petitioner was celebrated, the ct. may accept the evidence of a gentleman, who, not

PART XI. SECT. 5, SUB-SECT. 1.

6899 1. Scottish law — Questions of marriage law — Whether evidence of lawyer necessary.—Upon a trial for bigamy, it appeared that the first marriage was solemnised in Scotland: *Held*: a Presbyterian minister, educated at Glasgow, was not a competent witness for the purpose of proving the law of Scotland with respect to marriage.—*R. v. CHARLTON* (1839), 1 Craw. & D. 315.—*IR.*

f. ———— *Opinion of Writer to Signet.*—A holograph will executed in India by a person whose domicile is Scottish is a valid testamentary document. On such a document being

propounded the High Ct. declined to treat as evidence of the law applicable thereto a treatise on Scotch law but accepted the opinion, attested before a notary public, of a Writer to the Signet of Edinburgh.—*In the Goods of McIntyre* (1918), 1 L. L. R. 11 All. 248.—*IND.*

g. *Colonial law — Opinion of dead authority.*—*Qu.*: whether the holograph statement of a party, regarding the usage & law of Penang, be admissible evidence, though not taken on oath or under cross-examination, the party being now dead, and being alleged to have possessed accurate information on the subject. — *Mac-*

ALISTAIR'S TRUSTEES v. MACALISTAIR'S TRUSTEES (1833), 12 Sh. (Cl. of Sess.) 198.—*SCOT.*

h. *Queensland law — Evidence of solicitor of that province.*—An agreement produced bore Queensland stamps for the proper amount of duty; but it was admitted that the stamps had been affixed in Sydney the day before the trial. A Queensland solicitor, being referred to a copy of the Queensland Stamp Act printed by the Government Printer stated he should act upon it & that by virtue of sect. 18 the agreement was admissible.—*Held*: the law of Queensland was sufficiently proved, & the ct. might refer to the Queensland

Sect. 5.—Competency of witnesses: Sub-sects. 1 & 2.]

as a mere amateur, but from his professional research & experience in relation to the marriage laws of the colony in question, is, in the opinion of the ct., sufficiently qualified to express an opinion as to the validity of a marriage there celebrated.—*WILSON v. WILSON*, [1903] P. 157; 72 L. J. P. 53; 80 L. T. 77.

Annotation:—*Apld.* *Barford v. Barford & McLeod* (1918), 87 L. J. P. 68.

6905. — Ex-Chief Justice of Transvaal.]—Testator domiciled in England made an English will by which he gave, devised, & bequeathed all his real & personal estate, both in England & South Africa, to his wife for her widowhood, with remainders over.

The property included long leaseholds in the Transvaal, where the Roman-Dutch law prevails:—*Held*: the Roman-Dutch law, as stated in an uncontested opinion of an Ex-Chief Justice of the Transvaal, was applicable to the Transvaal leaseholds, & the widow was consequently entitled to enjoy them *in specie*.—*Re MOSES, MOSES v. VALENTINE*, [1908] 2 Ch. 235; 77 L. J. Ch. 783; 99 L. T. 519.

6906. — Expert in Roman-Dutch law not practising in Rhodesia.—As to Rhodesian law.]—Evidence of an expert in Roman-Dutch law admitted although he had not practised in Rhodesia.—*BRAILEY v. RHODESIA CONSOLIDATED, LTD.*, [1910] 2 Ch. 95; 79 L. J. Ch. 491; 102 L. T. 805; 17 Mans. 222.

SUB-SECT. 2.—FOREIGN LAW.

6907. Knowledge acquired as student insufficient.]—A witness, whose knowledge of the law of a foreign country is derived solely from his having studied it at an university in another country, is incompetent to prove what the law of that foreign country is.—*BRISTOW v. SEQUEVILLE* (1850), 5 Exch. 275; 3 Car. & Kir. 61; 19 L. J. Ex. 289; 14 Jur. 674; 155 E. R. 118.

Annotations:—*Consd.* *In the Goods of Bonelli* (1875), 1 P. D. 69. *Refd.* *Rowley v. L. & N. W. Ry.* (1873), L. R. 8 Exch. 221.

6908. —]—The evidence of a person whose only knowledge of the laws of a foreign country is

derived from having studied them cannot be received in proof of the operation or effect of such laws.—*In the Goods of BONELLI* (1875), 1 P. D. 69; 45 L. J. P. 42; 34 L. T. 32; 40 J. P. 216; 24 W. R. 255; *subsequent proceedings* (1876), 34 L. T. 33.

6909. —]—*Re TURNER, MEYDING v. HINCH-LIFF*, [1906] W. N. 27.

6910. In what cases evidence accepted—Certificate by advocates.]—*In the Goods of DA CUNHA (COUNTRESS)* (1828), 1 Hag. Ecc. 237; 162 E. R. 570.

Annotations:—*Mentd.* *In the Goods of Veiga* (1862), 32 L. J. P. M. & A. 9; *In the Goods of Karl* (1867), L. R. 1 P. D. 450.

6911. — Certificate of ambassador.]—*In the Goods of DORMOY* (1832), 3 Hag. Ecc. 707; 162 E. R. 1338.

Annotation:—*Mentd.* *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24.

6912. —]—The certificate of the Hanoverian Ambassador under the seal of the legation was admitted as evidence of the law of Hanover as to the validity of a testamentary paper.—*In the Goods of KLINGEMANN* (1862), 3 Sw. & Tr. 18; 32 L. J. P. M. & A. 16; 8 L. T. 172; 27 J. P. 263; 11 W. R. 218; 164 E. R. 1178.

6913. —]—D., a Persian subject, was by a decree of a Persian ct. declared entitled to certain property in this country. The decree, though founded partly upon a will, made no mention of it, & the ct. which had custody of the will refused to give a copy of it. The Ct. of Probate granted letters of administration limited to the property mentioned in a duly authenticated copy of the decree. The ct. allowed the law applicable to the case to be proved by the Persian Ambassador.—*In the Goods of DOST ALY KHAN* (1880), 6 P. D. 6; 49 L. J. P. 78; 29 W. R. 80.

6914. —]—A member of the Imperial family of Russia left a will, which by the Russian law was not valid until sanctioned by the Emperor. An *acte definitif* was signed by the Emperor, & the ct. granted probate of it with the will annexed. A certificate by the ambassador of a foreign country is sufficient evidence of the law of that country.—*In the Goods of OLDENBURG (PRINCE)* (1884), 9 P. D. 234; 53 L. J. P. 46; 49 J. P. 104; 32 W. R. 724.

6915. — Opinion of foreign advocate—On translated documents.]—*BERNAL v. BERNAL* (1838),

Act. as evidence in the cause.—*CANNING v. BROWN* (1867), 6 N. S. W. S. C. R. (L.) 109.—**AUS.**

k. New South Wales Law—Question of bigamy law.]—The Crown in a trial for bigamy called a clergyman, who stated that he was a clergyman of the Church of England at Canterbury, New South Wales, & duly licensed to celebrate marriages. He produced a register of marriages containing an entry of a marriage which he claimed to have celebrated between a person of prisoner's name & a certain woman. The register was a book issued by the Registrar-General of New South Wales for the use of ministers. It contained instructions to ministers. These instructions confirmed the statement of the minister that no notice & no certificate authorising the marriage were necessary.—*Held*: the evidence of the clergyman was admissible not to prove in detail the marriage law of New South Wales, but to show that the book produced was an official register of marriages, & certain suggested preliminaries, notice, & a certificate authorising the marriage were not required in that State.—*R. v. FORD* (1913), 32 N. Z. L. R. 1219.—**N.Z.**

PART XI. SECT. 5, SUB-SECT. 2.

l. Evidence of mandarin & newspaper editor.]—In the first instance it was attempted to prove the law of China by the evidence of a mandarin, a Chinese merchant, & the editor of a Chinese newspaper, neither of whom had ever resided permanently in China.—*Held*: the evidence was insufficient.—*Re LEE HING'S WILL* (1901), 1 S. R. N. S. W. 199; 18 N. S. W. N. 239.—**AUS.**

m. Non-professional witness.]—The witness called to prove the first marriage swore that it was solemnised by a justice of the peace in the State of New York, who had power to marry, but this witness was not a lawyer nor inhabitant of the United States & did not state how the authority of the justice was derived.—*Held*: insufficient.—*R. v. SMITH* (1857), 14 U. C. R. 365.—**CAN.**

n. — Source of knowledge must be stated.]—A witness must state some ground, professional or practical, upon which his knowledge rests, to qualify him to speak of the law of a foreign state. It is not enough for such a witness to say that he is familiar with the foreign law, without stating the

ground on which his knowledge rests.

Where a witness has resided in this Province as American Consul, for six years, during which time certain currency laws were passed in the United States, of which his only knowledge was derived from having them transmitted to him:—*Held*: this was not a sufficient qualification in the absence of an assertion that his official duties required him to acquaint himself with the currency laws of his country.—*MCKENZIE v. GORDON* (1867), 7 N. S. R. 153.—**CAN.**

o. — Knowledge from printed circulars.]—The witnesses called to prove the imposition of a duty on goods in the United States derived their knowledge from printed circulars.—*Held*: insufficient.—*FRASER v. GRAND TRUNK RY. CO.* (1867), 26 U. C. R. 488.—**CAN.**

p. — Consul—Knowledge must be proved.]—A consul's certificate as to the law of the country which he represents is not in itself conclusive evidence of the foreign law, but it must appear that such consul is *peritus virtute officii* in such foreign law, or has otherwise had exceptional opportunities of gaining expert knowledge of it.—**LEVY**

3 My. & Cr. 559; Coop. Pr. Cas. 55; 7 L. J. Ch. 115; 2 Jur. 273; 40 E. R. 1042, L. C.

Annotations.—*Mentl. Slinnett v. Herbert* (1872), 7 Ch. App. 232; *Re Cliff's Trusts*, [1892] 2 Ch. 229; *Pelham Clinton v. Newcastle*, [1902] 1 Ch. 34.

6916.—Based on study of abrogated law.]—A foreign written law may be proved by parol evidence of a witness learned in the law of that country. Therefore an advocate of France, having stated that the feudal law affecting the matter in question ceased in Alsace, in 1789, by a decree of the National Assembly, & that he had become acquainted with that decree in the course of his study of the law, may be asked as to the contents of it.—*DE BODE'S CASE* (1844), 8 Q. B. 208; 115 E. R. 854; *sub nom. DE BODE v. R.*, 10 Jur. 217; *subsequent proceedings, sub nom. DE BODE v. R.* (1848), 13 Q. B. 364, Ex. Ch.; (1851), 3 H. L. Cas. 449, H. L.

Annotations.—*Consd. Sussex Peerage Case* (1844), 11 Cl. & Fin. 85. *Reid. Nelson v. Bridport* (1846), 10 Jur. 871; *R. v. Brixton Prison, Re Percival* (1907), 76 L. J. K. B. 619. *Mentl. Wall's Case* (1848), 6 Moo. P. C. C. 216; *Boosey v. Davidson* (1849), 18 L. J. Q. B. 174; *Wadsworth v. Spain (Queen)* (1851), 17 Q. B. 171; *R. v. Birmingham Overseers* (1861), 1 B. & S. 763; *Tobin v. R.* (1864), 16 C. B. N. S. 319; *Thomson v. R.* (1874), L. R. 10 Q. B. 31; *Rustomjee v. R.* (1876), 2 Q. B. D. 68; *Marconi's Wireless Telegraph Co. v. R.*, [1918] 1 K. B. 193; *Ruffy-Arnell v. R.*, [1922] 1 K. B. 599.

6917.—As to law of Uruguay.—Practice in other Spanish speaking countries in South America.]—Petition for the dissolution of a marriage celebrated in Monte Video in the Republic of Uruguay. No lawyer practising in Uruguay could be found in England. The ct. accepted, to prove the legality of the marriage, the evidence of a Doctor of Law who had been called to the Bars of England, Madrid, & three Spanish-speaking countries in South America. He was by virtue of a treaty entitled on application to a diploma permitting him to practise in Uruguay & had for some years been studying & advising on the laws of Spanish-speaking countries.—*BARFORD v. BARFORD & McLEOD*, [1918] P. 140; 87 L. J. P. 68; 118 L. T. 820; 34 T. L. R. 306; 62 Sol. Jo. 439.

6918.—Evidence of Roman Catholic bishop.—As to matrimonial cases affected by the law of Rome.]—(1) A Roman Catholic bishop exercising jurisdiction in England is admissible as a witness to prove the matrimonial law of Rome in 1793 being *peritus virtute officii*. A Jesuit priest having received a similar training is not admissible.

(2) A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence.—*SUSSEX PEERAGE CASE* (1844), 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 8 Jur. 793; 8 E. R. 1034, H. L.

Annotations.—As to (1) *Consd. Perlat Petroleum Maatschap*.

S. LEVY (1904), 18 E. D. C. 164.—**S. AF.**

q. In what cases evidence accepted.—*Opinion of professional man of the country.*—To render a witness competent to give evidence of foreign law, he must either be a professional man of the country whose law is in question, or must hold some official situation which requires a knowledge of its law. The Ct. will not act upon the evidence of a Foreign Consul, as to the law of his country, unless it is proved that he is required by the power appointing him, to be versed in the law of the country, & that there are no professional lawyers in his country.—*GOLDENSTEDT v. GOLDENSTEDT & WAUGH* (1886), 12 V. L. R. 321.—**AUS.**

r.—Proof of foreign law by oral evidence of professional men.—*WEATHERBIE v. GREEN* (1853), 1 P. E. I.

97.—CAN.

s.—The written law of a foreign country may be proved by a skilled witness, without the production of the law itself; but where it can be produced, it is more satisfactory than verbal testimony.—*OSAGOON v. HATCH* (1872), N. B. Dig. 387.—**CAN.**

t.—*President of foreign bank.*—On question of currency.—A president of a bank in a foreign country, whose business it is to deal with money therein, though not a lawyer, is an admissible witness to prove the law of that country as to what is money there.—*THIRD NATIONAL BANK OF CHICAGO v. COBBY* (1878), 43 U. C. R. 58.—**CAN.**

u.—*Evidence of clergyman.*—Question of marriage law.]—In order to prove a second marriage which took

place in Michigan the evidence of the officiating minister was tendered, who showed that during the last 25 years he had solemnised hundreds of marriages, that he was a clergyman of the Methodist church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the Secretary of State regarding those laws, & that this so-called marriage was solemnised by him according to the laws of the State:—*Held.*—this evidence was admissible in proof of the validity of the second marriage & was sufficient proof of the same even assuming that such ought not to have been presumed.—*R. v. BRIDLEY* (1887), 14 O. R. 525.—**CAN.**

6919.—Foreign stockbroker.—As to law of negotiable instruments.]—The law of a foreign country on a given subject may be proved by any person who, though not a lawyer or a person, who, by reason of his having filled any public office, may be presumed to be acquainted with the law, is, or has been, in a position to render it probable that he would make himself acquainted with it. Therefore an hotel-keeper in London, a native of Belgium, who stated that he had formerly carried on the business of a merchant & compr. of stocks in Brussels, was permitted to prove the law of Belgium on the subject of the presentment of a promissory note made in that country payable at a particular place.—*VANDER DONCKT v. THELLUSON* (1819), 8 C. B. 812; 19 L. J. C. P. 12; 14 L. T. O. S. 253; 137 E. R. 727.

Annotations.—*Reid. R. v. Povey* (1852), 10 J. P. 745; *Rowley v. L. & N. W. Ry.* (1873), 42 L. J. Ex. 153.

6920.—Solicitor & notary public practising in London.—"Well acquainted with the law of South American republics."—A testator died domiciled in Chili, leaving a will, appointing two exors., one of whom died without taking probate. The other was believed to be in Bolivia, but no response had been obtained to repeated applications made to him. The only property in this country of any value consisted of a debt which it was desired to collect. The ct. accepted the affidavit of a notary, who was not a qualified Chilean lawyer, as evidence of the law of Chili, & upon his evidence that the powers & duties of an exor. in that country would only extend to seeing that the estate was duly administered by the acting heiress, who in this case was testator's

place in Michigan the evidence of the officiating minister was tendered, who showed that during the last 25 years he had solemnised hundreds of marriages, that he was a clergyman of the Methodist church, that he understood the laws of Michigan relating to marriage, that he had been all the while resident in Michigan, that he had had communications with the Secretary of State regarding those laws, & that this so-called marriage was solemnised by him according to the laws of the State:—*Held.*—this evidence was admissible in proof of the validity of the second marriage & was sufficient proof of the same even assuming that such ought not to have been presumed.—*R. v. BRIDLEY* (1887), 14 O. R. 525.—**CAN.**

b.—*Holder of position implying knowledge of law.*—An ordained minister of a church denomination

Sect. 5.—Competency of witnesses: Sub-sect. 2. Sects. 6, 7 & 8: Sub-sect. 1.]

widow, the ct. made to her a grant of administration, with the will annexed.—*In the Goods of WHITELEGG*, [1890] P. 267; 68 L. J. P. 97; 81 L. T. 234.

6921. ——— **English lawyer—Where no foreign lawyer available.**—The evidence of an English lawyer acquainted with German law will be admitted to prove a marriage in Germany if no German lawyer is available.—*MEDINA v. MEDINA* (1919), 63 Sol. Jo. 477.

SECT. 6.—REFERENCE TO DOCUMENTS.

6922. Whether text-books admissible.—The text-writers furnish us with their statement of the law, & that would certainly be good evidence upon the same principle which renders histories admissible (LORD ELLENBOROUGH, C.J.).—*R. v. PICTON* (1805), 30 State Tr. 225, 492.

Annotations.—*Reid*, *Lacon v. Higgins* (1822), 3 Stark. 178; *Rowe v. Brenton* (1828), 3 Man. & Ry. K. B. 133; *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119; *De Bode's Case* (1846), 8 Q. B. 208. **Mentd.** *Scott v. Seymour* (1862), 1 H. & C. 219; *Re Pyre* (1868), 16 W. R. 754; *Anderson v. Gorrilo*, [1895] 1 Q. B. 668.

6923. ——— **DALRYMPLE v. DALRYMPLE** (1811), 2 Hag. Con. 51; 161 E. R. 605; *on appeal* (1811), 2 Hag. Con. 137, n.

Annotations.—*Reid*, *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; *Nelson v. Bridport* (1845), 8 Beav. 527; *De Bode v. R.* (1846), 10 Jur. 217. **Mentd.** *M'Adam v. Walker* (1813), 1 Dow, 148; *Lautour v. Teesdale* (1816), 8 Taunt. 830; *Lacon v. Higgins* (1822), 3 Stark. 178; *Smith v. Maxwell* (1824), 1 Cy. & M. 80; *MacNeill v. Macgregor* (1828), 2 Bl. N. S. 393; *Honyman v. Campbell* (1831), 2 Dow. & Cl. 265; *Doe d. Dirlwhistle v. Vardill* (1835), 2 Cl. & Fin. 571; *Escott v. Martin* (1842), 4 Moo. P. C. C. 104; *Johnstone v. Beattie* (1843), 10 Cl. & Fin. 42; *R. v. Mills* (1844), 10 Cl. & Fin. 534; *Ward v. Day* (1846), 5 Notes of Cases, 66; *Maclean v. Cristall* (1849), 7 Notes of Cases Supp. xvii.; *Connolly v. Connelly* (1851), 7 Moo. P. C. C. 438; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Hope v. Hope* (1858), 1 Sw. & Tr. 94; *Fenton v. Livingstone* (1859), 33 L. T. O. S. 335; *Beechey v. Brown* (1860), 29 L. J. Q. B. 105; *Simoni v. Mallac* (1860), 2 Sw. & Tr. 67; *Di Sora v. Phillips* (1863), 10 H. L. Cas. 625; *Sichel v. Lambert* (1864), 15 C. B. N. S. 781; *Yelverton v. Longworth* (1864), 11 L. T. 118; *The Halley* (1867), L. R. 2 A. & E. 3; *Longworth (or Yelverton) v. Yelverton* (1867), L. R. 1 S. & Div. 218; *The M. Moxham* (1875), 1 P. D. 43; *Sottomayor v. De Barros* (1877), 2 P. D. 81; *Dysart Peerage Case* (1881), 6 App. Cas. 489; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Mackonochie v. Penzance* (1881), 6 App. Cas. 424; *Collins v. Collins* (1884), 9 App. Cas. 205; *Mitford v. Mitford*, [1923] P. 130.

6924. ——— **To refresh memory of witness.**—*SUSSEX PEERAGE CASE*, No. 6918, *ante*.

6925. ——— **NELSON (EARL) v. BRIDPORT (LORD)**, No. 6871, *ante*.

6926. ——— **The law of Jersey, like that of any other foreign country, is matter of fact in our ct.s., & cannot be proved by any number of books (PATTERSON, J.).—BRENNAN'S CASE** (1817), 10 Q. B. 492; 116 E. R. 188; *sub nom.* *R. v. BRENNAN*, 16 L. J. Q. B. 289; 11 J. P. 727; *sub nom.* *RE BRENNAN & GILLON*, 9 L. T. O. S. 147; 11 Jur. 775; 2 Cox. C. C. 193.

Annotation.—*Reid*, *Re Crawford* (1849), 13 Q. B. 613.

6927. ——— **The Coutumes Reformées de Normandie are not written laws. They are written illustrations & evidence of what the common law**

or custom of Normandy was, & unless some new principle has been introduced into the Duchy of Normandy since the separation of Jersey from the Duchy, they are evidence of the law of Jersey.

—*LA CLOCHE v. LA CLOCHE* (1872), L. R. 4 P. C. 325; 9 Moo. P. C. C. N. S. 87; 41 L. J. P. C. 51; 20 W. R. 953; 17 E. R. 446, P. C.

Annotations.—*Consd.* *Falle v. Godfray* (1888), 14 App. Cas. 70. *Reid*, *Baudains v. Richardson*, [1906] A. C. 169.

—*J.*—*See, generally*, Part VI., Sect. 4, *ante*.

6928. Whether copy of statute admissible—"Cinq Codes" of France—Printed by Royal printer.—A printed copy of the "Cinq Codes" of France, produced by the French vice-consul, resident in London, purchased by him at a book-seller's shop at Paris, was received as evidence of the law of France, upon which this ct. would act, although the book, purported to have been published at the Royal Printing Office, which was, according to the statement of the witness, authorised to print the laws of France by the govt.—*LACON v. HIGGINS* (1822), 3 Stark. 178; *Dow. & Ry. N. P. 38*.

Annotations.—*Consd.* *De Bodes Case* (1845), 8 Q. B. 208. *Reid*, *R. v. Koops* (1837), 6 Ad. & El. 198; *Lloyd v. Guilbert* (1865), 13 L. T. 602.

6929. ——— **CONCHA v. MURRIETA, DE MORA v. CONCHA**, No. 6874, *ante*.

6930. ——— **I have some doubt as to whether foreign codes are by themselves admissible as evidence of foreign law. I have always thought that the practice is for the ct. not to give effect to a foreign code unless there is a foreign expert present to construe the foreign code & to assist the ct., not so much in construing the code as in arriving at the conclusions of fact at which the English ct. has to arrive as to what is the foreign law, by informing the ct. what has been recognised by the law of the foreign country. I do not think that it is part of the duty of English judges to take a foreign code &, unassisted by foreign experts, to construe that foreign code, for that is to make the question of the foreign law a question of law & not a question of fact (VAUGHAN WILLIAMS, L.J.).—DE HART V. COMPANIA ANONIMA DE SEGUROS "AURORA," [1903] 2 K. B. 503; 72 L. J. K. B. 818; 89 L. T. 154; 52 W. R. 36; 19 T. L. R. 612; 47 Sol. Jo. 709; 9 Asp. M. L. C. 454; 8 Com. Cas. 314, C. A.**

6931. Whether French jurisprudence admissible—To prove Canadian law & usage.—French jurisprudence is admissible in the construction of Canadian law, & in the interpretation of Canadian usage.—*VERCHERES (CURÉ) v. VERCHERES CORPN.* (1875), L. R. 6 P. C. 330; 44 L. J. P. C. 34; 32 L. T. 178; 23 W. R. 712, P. C.

6932. Court may construe foreign law—If expert evidence contradictory.—Upon the point of French law the opinions of the foreign advocates which have been taken . . . appear to be contradictory; but as each of them founds his opinion on the *Code de Commerce*, Arts. 137, 138, we feel ourselves at liberty to refer to the text of that code in order to form our own judgment (TINDAL, C.J.).—*THUMBREY v. VIGNIER* (1834), 1 Bing. N. C. 151; 4 Moo. & S. 695; 3 L. J. C. P. 246; 131 E. R. 1075.

Annotations.—*Mentd.* *Alivon v. Furnival* (1834), 4 Tyr.

stated that during seven years prior to 1890 he had been performing the marriage ceremony in Wisconsin; that in 1890 he married deft. to the first wife in that State; & by the law of Wisconsin any ordained minister was authorised to perform the marriage ceremony:—*Held*: sufficient evidence of a lawful marriage. Any one is competent to give expert evidence of the

foreign law, though not a professional lawyer, if he is the holder of a position requiring, & implying, a knowledge of the law.—*R. v. BLEILER* (1912), 21 W. L. R. 18; 1 D. L. R. 878; 2 W. W. R. 5; *Alta. L. R.* 320.—*CAN.*

PART XI. SECT. 6.

Whether text-books admissible—Where experts disagree.—Where the

opinions of experts on foreign law are conflicting, the ct. will examine for itself the decisions & text-books of the foreign country, in order to arrive at a satisfactory conclusion.—*LIFE v. GUNS* (1884), 4 O. R. 579.—*CAN.*

d. ——— **Unauthorised translation of Code Napoleon.**—A statement contained in an unauthorised translation of the Code Napoleon as to what the

751: *Rothschild v. Currie* (1841), 1 Q. B. 43; *Scott v. Pilkington* (1862), 2 B. & S. 11; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Bradlaugh v. De Rin* (1870), L. R. 5 C. P. 473; *De Greuchy v. Wills* (1879), 43 J. P. 818; *Smallpage's & Brandon's Cases* (1885), 30 Ch. D. 598; *Alcock v. Smith*, [1892] 1 Ch. 238.

6933. ———. ———.]—*BREMER v. FREEMAN*, No. 6872, *ante*.

6934. ———. ———.]—In 1898 testator, domiciled in England, died possessed of English & Indian assets. The Indian assets comprised shares in the Bank of Bengal, & the share certificates were in the custody of C., testator's agent at Calcutta. The exors. in England remained in ignorance of testator's Indian assets until 1903, when they discovered that in 1902 C. had by fraud obtained from the High Ct. at Calcutta the grant of letters of administration to testator's Indian assets as on an intestacy, & acting as such administrator had sold the bank shares in the open market at Calcutta & had squandered the proceeds. Some of the shares C. so sold & transferred to T., who was a purchaser for value without notice. C. was prosecuted for the fraud & convicted, & the grant of letters of administration to him was revoked, & fresh letters of administration with a copy of testator's will annexed were granted to the Administrator-General of Bengal. In an action by the exors. against T. & the Administrator-General claiming to be entitled to the shares T. had purchased from C. on the ground that the grant of letters of administration to the latter was void *ab initio*:—*Held*: on the true construction of the provisions of Indian Succession Act, 1865, the grant of letters of administration to C. was not void *ab initio*, but only void as from the date of the order of revocation.

I think that expert evidence is admissible as to the meaning of the Act, inasmuch as it is a part of foreign law & not the law administered by this Ct. On the other hand, it appears to me that it is a case in which there is a conflict of testimony between the expert witnesses called, & I think that, where there is such a conflict, the judge must construe the statute & in the light of the evidence given by the expert witnesses come to the best conclusion he can as to what the law upon the matter is (*NEVILLE, J.*).—*CRASTER v. THOMAS*, [1909] 2 Ch. 318; 78 L. J. Ch. 734; 101 L. T. 66; 25 T. L. R. 650, C. A.

Annotation:—*Mentd.* *Hewson v. Shelley*, [1911] 2 Ch. 13.

6935. Power of court to put further questions to expert.—Where an opinion on a question of Hindoo law apparently discordant from works of current & established authority is delivered by pundits, it should not be taken, on their authority alone to be a correct exposition of the law; but they should, in such a case, be questioned further as to authorities, usage, & generally received opinions. —*MASULIPATAM COLLECTOR v. CAVALY VENCATA NAIRAINAPAH* (1861), 8 Moo. Ind. App. 529; 10 W. R. 157; 19 E. R. 631.

Annotations:—*Mentd.* *Musamat Thakoor Deyhee v. Rai Baluk Ram* (1866), 11 Moo. Ind. App. 139; *Bajrangli Singh v. Manokarnika Bakhsh Singh* (1907), 24 T. L. R. 46.

Interrogatories as to foreign law.—*See* DISCOVERY, Vol. XVIII., p. 198, Nos. 1464, 1465.

Expert witnesses generally.—*See* Part VI., *ante*.

French law is on a particular matter not relevant under Evidence Act, s. 35. —*CHRISTIAN v. DELANNEY* (1899), 1 L. R. 26 Calc. 931; 5 C. W. N. 614. —*IND.*

PART XI. SECT. 7.

Foreign statute.—In the ab-

sence of proof to the contrary, it will be assumed that the rules of construction in the foreign state are the same as in this province. —*MURPHY v. COPPER CROWN CO.* (1902), 36 N. S. R. 383. —*CAN.*

f. ———.—In applying the law of

SECT. 7.—CONSTRUCTION OF FOREIGN DOCUMENTS.

See, generally, CONFLICT OF LAWS, Vol. XI., pp. 372–374, 394–399, 437–440, Nos. 521–536, 673–707, 980–1005.

6936. General rule.—When a contract is made in a foreign country, & in a foreign language, an English Ct., having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if any; thirdly, evidence of the foreign law applicable to it; & fourthly, evidence of any peculiar rules of construction which may exist in that law; & must then itself interpret the instrument on ordinary principles of construction. —*DI SORA (DUCHESS) v. PHILLIPS* (1863), 10 H. L. Cas. 624; 2 New Rep. 553; 33 L. J. Ch. 129; 11 E. R. 1168, H. L.

Annotations:—*Consd.* U.S.A. *McRae* (1867), 3 Ch. App. 79. *Fold.* *Copin v. Adamson*, *Copin v. Strachan* (1874), 31 L. T. 242. *Appl.* *Great Western (Forest of Dean) Collieries Co. v. Trafalgar Colliery Co.* (1887), 3 T. L. R. 724. *Refd.* *Stearns Kaarsen Fabrick Gonda Co. v. Heintzmann* (1864), 17 C. B. N. S. 56; *Pickering v. Stephenson* (1872), L. R. 14 Eq. 322; *Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607; *Russian Commercial & Industrial Bank v. Comptoir D'Escompte de Mulhouse*, [1923] 2 K. B. 630.

6937. Matter for court.—It is not competent to a witness who is called to interpret a foreign document, to give an opinion as to its construction; that is for the Ct. —*STEARNS KAARSEN FABRICK GONDA CO. v. HEINTZMANN* (1864), 17 C. B. N. S. 56; 10 L. T. 872; 11 L. T. 272; 10 Jur. N. S. 881; 141 E. R. 22.

6938. Foreign power of attorney To be acted upon in England. Evidence of expert witnesses.—

Ptff., a Brazilian subject, executed in Brazil in the Portuguese language a power of attorney to a broker resident in London to buy & sell shares. The broker accordingly sold certain shares of *ptff.* in deft. co. & they were registered in the names of the purchasers. *Ptff.* claimed a rectification of the register on the ground that the sale was not authorised by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law: *Held*: the intention of *ptff.* was to be ascertained by evidence of competent translators & experts, including if necessary Brazilian lawyers & if according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law. —*CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH CO.*, [1891] 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L. T. 739; *sub nom. Re BRAZILIAN SUBMARINE TELEGRAPH CO., LTD.*, 30 W. R. 65; 7 T. L. R. 1, C. A.

Annotations:—*Refd.* *Western Counties Ry. v. Anderson* (1892), 6 T. L. R. 595; *Ralli v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. 287. *Mentd.* *Wehner v. Dene Steam Shipping Co.* (1905), 10 Com. Cas. 139.

SECT. 8.—PROOF OF JUDICIAL DOCUMENTS.

SUB-SECT. 1.—JUDGMENTS.

Foreign judgments generally, *see* CONFLICT OF LAWS, Vol. XI., pp. 444–472, Nos. 1027–1262.

See, now, Evidence Act, 1851 (c. 99), s. 7.

a foreign state, the construction shown by the evidence to be placed upon the provision of its statutes by the Ct. of that state must be given effect to. The interpretation cannot depend on the view taken of it by the Ct. here. —*ALLEN v. STANDARD TRUST CO.*, [1919] 3 W. W. R. 974. —*CAN.*

(1804), 5 East, 473; 2 Smith, K. B. 25; 102 E. R. 1152.

Annotation.—*Reid*. Harris v. Saunders (1825), 4 B. & C. 411.

6947. Certified copies—By clerk of court.—In *assumpsit* on two judgments recovered in the Supreme Ct. of Jamaica, copies of the judgments purporting to be signed by the clerk of the ct., & certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of that ct., & by another certificate of the governor, under the seal of the island that the person so certifying was a notary public were held to be inadmissible evidence to prove the judgments.—*APPLETON v. BRAYBROOK (LORD)* (1817), 6 M. & S. 31; 105 E. R. 1155.

Annotations.—*Folld*. Black v. Braybrook (1817), 6 M. & S. 39. *Reid*. Mackenzie v. Hudson (1822), 1 Dow. & Ry. K. B. 159; Brown v. Thornton (1837), 6 Ad. & El. 185.

6948. ———. ———. ———. *BLACK v. BRAYBROOK (LORD)* (1817), 6 M. & S. 39; 105 E. R. 1157.

Annotation.—*Reid*. Brown v. Thornton (1837), 6 Ad. & El. 185.

6949. ———. ———. ———. An inhabitant of Jersey, entitled to property which had been paid into ct., was found, by proceedings taken in Jersey, of unsound mind, & his brother was appointed his curator, who petitioned the ct. to have the dividends paid to him for his brother's benefit. Verified copies of the proceedings in Jersey were produced. The order was made.—*Re ALBO'S TRUSTS* (1802), 7 L. T. 778; 11 W. R. 80.

6950. ———. ———. ———. An insurance co. was formed in Calcutta, & registered in the Supreme Ct., pursuant to the Act of the Indian Legislature, No. XLIII., of 1850. L., resident in the Mauritius, was a shareholder in this co., which was limited for five years. That time being about to expire, a new co. was formed to take the business of the old co., in which L.'s name was entered by F., the co.'s secretary at Calcutta, whom he verbally authorised to execute the new co-partnership deed. The co. having become insolvent, was wound up by the Supreme Ct. at Calcutta, under the provisions of the Act, No. XLIII., of 1850. L.'s name being on the list of shareholders, certain

orders were made by the Supreme Ct., calling upon him to pay a contribution to the assets of the co. L. refused & repudiated his liability on the ground that he was not a shareholder, never having given authority to F. to execute the deed of partnership. Upon an action in the Supreme Ct. in the Mauritius, by the official assignee of the insolvent co. against L. to recover the amount of contribution ordered by the Supreme Ct. at Calcutta:—*Held*: the certified copies of the orders of the Supreme Ct. at Calcutta in the matter were properly admitted in evidence under Evidence Act, 1851 (c. 99), without proof of the official seals or signatures of that ct.—*LEISHMAN v. COCHRANE* (1863), 1 Moo. P. C. C. N. S. 315; 9 L. T. 101; 12 W. R. 181; 15 E. R. 720, P. C.

*SUB-SECT. 2.—OTHER JUDICIAL DOCUMENTS.

See, now, Evidence Act, 1851 (c. 99), s. 7; Extradition Act, 1870 (c. 52), ss. 10, 14, 15.

6951. Certified copy—Where original retained by foreign tribunal.—In an action of debt by two out of three syndics of a French bkpt., upon an arbitral sentence & ordinance adjudging that debt. should pay a sum of money to the bkpt.:—*Held*: an examined copy of the agreement of reference, which was entered into in France, verified by the attesting witness, although the agreement was expressed to be "*fait au double*," was good evidence, as the original was deposited with a notary, & it was proved to be the usage in France, though there was no written law upon the subject, not to allow the removal of documents so deposited.—*ALIVON v. FURNIVAL* (1831), 1 Ct. M. & R. 277; 4 Tyr. 751; 3 L. J. Ex. 241; 140 E. R. 1081.

Annotations.—*Distd*. R. v. Douglas (1845), 1 Car. & Kir. 670. *Reid*. Boyle v. Wiseman (1853), 10 Exch. 647; *In the Goods of Holl* (1858), 1 Sw. & Tr. 136, n. *Mend*. Ingate v. Austrian Lloyd's Co. (1858), 6 W. R. 659; *Re Henderson, Nouvion v. Freeman* (1887), 35 Ch. D. 701; *Dildheim v. London & Westminster Bank*, [1900] 2 Ch. 15.

6952. ———. ———. ———. Where an acknowledgment of a married woman under Fines & Recoveries Act,

testimony of the witness.—*CLAMPION v. LONG* (1834), N. B. Dig. 332.—*CAN.*

k. ———. ———. ———. Judgments or decrees of foreign Cts. required as auxiliary proof only are properly put in evidence by examined copies authenticated by the evidence of a person who compared them with their originals.—*FURNELL v. STACKPOOLE* (1829), Milw. 247.—*IR.*

6947 i. Certified copies—By clerk of court.—The judgment of a foreign Court is not sufficiently authenticated by a copy certified to be correct by the clerk, although the clerk's signature & authority are verified by a certificate annexed thereto under the hand of the judge & the seal of the ct.: the copy of the judgment itself should be authenticated under the seal of the ct.—*POOL v. HILL* (1843), 2 Kerr, 184.—*CAN.*

6947 ii. ———. ———. ———. To prove a judgment of the supreme ct. of the state of New York, held at Watertown, in the ct. of Jefferson, a copy of the roll was produced, certified by the ct. clerk under the seal of the ct.:—*Held*: insufficient.—*WOODRUFF v. WALLING* (1854), 12 U. C. R. 501.—*CAN.*

6947 iii. ———. ———. ———. In an action on a judgment recovered in the tenth judicial district of the state of California, *pltf.* put in evidence an exemplification under a seal which purported by the impression to be that of the fourteenth district, & the certificate of the clerk of the ct. verifying it was stated to be under the seal of his office, not the seal of the ct.:—*Held*:

the proof was insufficient.—*JUNKIN v. DAVIS* (1863), 22 U. C. R. 369; *affy*. 6 C. P. 408.—*CAN.*

6949 i. ———. ———. ———. In the case of a convicted fugitive the conviction must be properly authenticated according to English law, & it is essential that each sheet of the record should be certified; unless this is done the Ct. has no evidence of the crime having been committed, & cannot know whether the essential condition that the act must also be criminal by the law of this Colony is fulfilled.—*Re VICENTA SOTTO* (1912), 7 Hong Kong L. R. 139.—*HONG KONG.*

6949 ii. ———. ———. ———. In a multiplepointing, brought for distribution of part of the deceased's estate, the exor.'s title was objected to by a competing claimant, who alleged that he had right to the fund *in medio* by an assignation *inter vivos*. From the opinion of English counsel it appeared that an office copy of a judgment was not evidence in another ct. & in another cause than that in which it was pronounced.—*Held*: the exor. was entitled to support it by evidence that it had been examined with the original record, & was a correct copy.—*STIVEN v. MYER* (1868), 6 Macph. (Ct. of Sess.) 885; 40 Sc. Jur. 504.—*SCOT.*

l. Certificate from clerk of court.—A foreign judgment cannot be proved by a certificate from the clerk of the foreign ct. that judgment has been entered for a certain sum in favour of *pltf.*—*NORTON v. POST* (1836), 5 O. S. 137.—*CAN.*

m. Whole proceedings produced.—The whole of the proceedings in a suit in a foreign Court should be produced to prove the judgment.—*MILLAN v. RITCHIE* (1851), 2 All. 212.—*CAN.*

n. Judge's book—Proof of handwriting & signature.—Debt on a judgment rendered in an inferior ct. in U.S.A. It was proved that the ct. had no seal, & the judge's book was produced containing the judgment, & his handwriting & signature proved.—*Held*: sufficient.—*KERRY v. ELLIOTT* (1856), 13 U. C. R. 367.—*CAN.*

o. Must be strictly proved.—It is necessary that the foreign judgment sued on should be strictly proved.—*DENNY v. SAYWARD* (1895), 4 B. C. R. 212.—*CAN.*

PART XI. SECT. 8, SUB-SECT. 2.

p. Examined copy.—In an action on a foreign judgment reference may be made to the evidence filed of record with the judgment according to the course of the foreign ct. on proof by examined copies, to show the grounds of the judgment; but where the cause in the foreign ct. was undefended, & *pltf.* admitted a set-off there, *def.* here is not bound by such admission.—*BREWSTER v. THOMAS* (1840), 2 Ont. Dig. 3632.—*CAN.*

q. Certified copy—Under seal of court.—In an action on a note indorsed to *pltf.*, in the State of New York, by the administrators of the payee, to prove the administrators' authority, an exemplification of letters of administration was put in, granted

Sect. 8. Proof of judicial documents: Sub-sect. 2. Sects. 9 & 10.]

1833 (c. 74), was taken at Milan, the ct. allowed a certified copy of an Act of the Civil Tribunal of that city to be received & filed in lieu of the affidavit verifying the certificate of the comrs., upon the production of an affidavit from a competent party, showing that by the law of that country, depositions on oath are always deposited amongst the records of the ct. & office, or certified copies only delivered out to the parties.—*Re CLEGGHETTI* (1855), 15 C. B. 762; 139 E. R. 626.

6953. Authenticated copy under Evidence Act, 1851 (c. 99), s. 10.—Affidavit before master of Irish Chancery Court.]—An affidavit, purporting to be sworn before a master extraordinary of the Ct. of Ch. in Ireland, is, under above Act, s. 10, admissible in evidence in a matter before this ct., without proof of the signature or official character of the person before whom it is stated to have been sworn.—*Re MAHON'S TRUST* (1852), 9 Hare, 459; 22 L. J. Ch. 75; 68 E. R. 590.

6954. Authenticated copy under Evidence Act, 1851 (c. 99), s. 7.—Belgian patent.]—Where a document purported to be an official copy of a Belgian patent sealed with the Belgian seal, it was admitted without proof of its being an examined copy or proof of the seal, inasmuch as it came within the words "or other act of state" in above sect.—*RE BETT'S PATENT* (1862), 1 Moo. P. C. C. N. S. 49; 9 Jur. N. S. 137; 11 W. R. 221; 15 E. R. 621; *sub nom. Ex p. BETTS*, 7 L. T. 577, P. C.

Annotations:—Mentd. Re Poole's Patent (1867), L. R. 1 P. C. 514; *Re Saxby's Patent* (1870), 7 Moo. P. C. C. N. S. 82; *Re Johnson's Patent* (Wilcox v. Gibbs) (1871), L. R. 4 P. C. 75; *Re Winn's Patent* (1872), L. R. 4 P. C. 93; *Re Blake's Patent* (1873), L. R. 4 P. C. 535; *Re Adair's Patent* (1881), 6 App. Cas. 176; *Lake's Patent*, [1891] A. C. 240; *Re Semet & Solvay's Patent*, [1895] A. C. 78; *Re Hughes' Patent* (1898), 15 L. P. C. 370; *Re Wuterich's Patent*, [1903] A. C. 206; *Re Lawrence & Kennedy's Patent* (1910), 27 R. P. C. 252.

6955. Authenticated copies under Extradition Act, 1870 (c. 52), ss. 10, 14, 15.—Depositions not

by the surrogate ct. of the city, of . . . in New York, where the payee had died, & purporting to be signed by the surrogate, who certified it to be a copy of the original record of the letters, & a seal was affixed described as his seal of office. Attached to this was a certificate under the great seal of the State of New York, purporting to be signed by the governor, verifying the signature & office of the surrogate Judge, & the seal of his ct.—*Held: sufficient.*—*HARD v. PALMER* (1861), 21 U. C. R. 49.—**CAN.**

r. —.—Where it is sought to put in evidence copies of the proceedings of a foreign Ct. under 19 Viet. c. 41, s. 5 (Consol. Stat. c. 46, s. 12), one certificate is sufficient, & each document need not be separately certified. The statement in the certificate that there are no other papers on file in the cause will not invalidate the certificate, if good in other respects.—*R. v. WRIGHT* (1877), 1 P. & B. 363.—**CAN.**

s. —.—Copies of the depositions of witnesses taken by means of stenography in the Courts of New York duly certified & authenticated by the competent officers of such ct., though not read over to, nor signed by the witnesses, constitute legal evidence of the facts therein.—*GREENE v. VALLEE* (1905), Q. R. 14 K. B. 261.—**CAN.**

t. —.—Deft., F. D., objected to the admission in evidence of an order of adjudication & an order of reference made in bkpcy. proceedings

in a foreign ct. against the defts, W. D. & F. A. N., on the ground that the certified copies of these orders produced were not under the seal of the foreign Ct., but under the hand of the referee in bkpcy. only.—*Held: upon the facts proved by an expert witness at the trial, the referee's certificate was sufficient.*—*MINOT GROCERY Co. v. DUNICK* (1913), 23 W. L. R. 270; 3 W. W. R. 904; 10 D. L. R. 126.—**CAN.**

a. —.—The record of proceedings in a Ct. of Justice is presumed to be genuine & accurate, if it is certified as directed by Evidence Act, s. 86. But the proceedings may be proved by an official of the ct. speaking to what takes place in his presence & also to an uncertified record thereof. The latter thereby becomes secondary evidence under sects. 65 & 66 of the certified record (being a public document under sect. 74) admissible without notice to the adverse party when the person in possession thereof is out of the jurisdiction.—*HARANUND CHETLANGIA v. RAM GOPAL CHETLANGIA*, L. L. R. 27 Calc. 639; L. R. 27 Ind. App. 1; 4 C. W. N. 429.—**IND.**

b. —.—Copies of foreign notarial acts authenticated by the attestation of the notary are admissible in evidence; the attestation of the notary proves the copies, & his seal need not be proved.

c. —.—fact of the person attesting being a notary may be proved by the contents of the documents.—*FURNELL v. STACKPOOLE* (1829), Milw. 247.—**IR.**

taken in presence of accused.]—In the schedule to above Act, extradition crimes are enumerated, accessories being nowhere mentioned. Amongst others are "crimes by bkpts. against bkpcy. law":—*Held: (1)* this could not be extended to complicity, by a person not himself a bkpt., in a fraudulent bkpcy. *Seemle: (2)* under sect. 14, depositions, duly authenticated, are admissible in proceedings under the Act, though not taken in the presence of the accused, nor on the particular charge.—*Re COUNHAYE* (1873), L. R. 8 Q. B. 410; 28 L. T. 761; 21 W. R. 883; *sub nom. Ex p. COUNHAYE*, 42 L. J. Q. B. 217; 38 J. P. 39.

Annotations:—As to (2) Reid. R. v. Brixton Prison, [1911] 2 K. B. 82. *Generally. Mentd. R. v. Ganz* (1882), 9 Q. B. D. 93; *Re Castioni*, [1891] 1 Q. B. 149; *R. v. Brixton Prison*, *Ex p. Servini*, [1914] 1 K. B. 77.

6956. — Foreign warrant of arrest.]—A document produced before a magistrate as the "foreign warrant" of arrest under sect. 10 of above Act was sealed with the seal of the department of justice at the Hague, & purported to be a copy of the record or minutes of a certain order or decree of the criminal ct. of justice there, setting forth the charges against the criminal whose extradition was sought, & authorising proceedings against him & his arrest:—*Held: the production of such a document before the magistrate was a sufficient compliance with the provisions of above sect., which provides that the magistrate may commit the criminal to prison if (inter alia) the foreign warrant authorising his arrest is duly authenticated. Seemle: such document must be regarded as in the nature of an original for this purpose.*—*R. v. GANZ* (1882), 9 Q. B. D. 93; 51 L. J. Q. B. 419; 40 L. T. 592, D. C.

Annotations:—Reid. Ex p. Plot (1883), 48 L. T. 120. *Mentd. R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1056; *R. v. Brixton Prison, R. v. Holloway Prison*, [1912] 2 K. B. 578.

See, generally, EXTRADITION.

6957. Document under seal of court.—Drawn up by notary.]—A document under the seal of the Ct. of Holy Office or Inquisition of Rome, but apparently drawn up by the notary whose name

c. —.—*Seemle: the certified copy of proceedings in bkpcy. in a Scottish court, must be authenticated as such by some authentic notarial certificate.*—*THE SIMON GLOVER* (1848), 17 Ir. Jur. 284.—**IR.**

d. —.—*Re HUMPHREYS* (1839), 2 Swin. 356.—**SCOT.**

e. —.—A certificate of probate, signed by the judge of the Probate Court of Monroe, United States, was produced. The ct. held there was no evidence that the signature was that of the judge. The evidence of the mayor of a town or of a notary public, who, in virtue of his office had a sort of world-wide character, was often made use of in such cases.—*DISBROW v. MCINTOSH* (1852), 1 W. R. 134.—**SCOT.**

f. Document under seal of court.]—Documents authenticated by the seal of the Grand Ducal Superior Ct. of Baden, & also by the signature of the judge of instruction of such Ct. are legal evidence.—*Ex p. SEITZ* (1899), Q. R. 8 Q. B. 392.—**CAN.**

g. Original proceedings.]—It is not competent to prove on the cross-examination of a witness that he has made a different statement relative to the subject matter of the suit in his examination in bankruptcy in England, without producing the original proceedings in bankruptcy. A certified copy of the proceedings is not sufficient. *r. GILBERT* (1862), 5 All.

420.—CAN.

h. Report of case.—Verified by affidavit.]—After judgment at the trial

is attached to it, from a record in that et., but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that et., the *ratio decidendi* not being stated, although it is admissible in support of an allegation in a plea of justification that such a judgment has been pronounced. —*R. v. NEWMAN* (1853), as reported in *Dears. C. C.* 85.

Annotations.—*Mentd.* *R. v. Labouchere* (1880), 14 Cox, C. C. 419; *R. v. Labouchere, Vallombrosa's Case* (1884), 50 L. T. 177; *Fleming v. Dollar* (1889), 23 Q. B. D. 388.

Grants of probate & letters of administration.—*See* CONFLICT OF LAWS, Vol. XI., pp. 377–381, Nos. 562–595.

SECT. 9.—PROOF OF COLONIAL STATUTES.

See, now, Colonial Laws Validity Act, 1865 (c. 63), s. 6; Evidence (Colonial Statutes) Act, 1907 (c. 16), s. 1 (1).

6958. Production from Colonial Office.—Of certified copy.—*Re* — (1818), 11 L. T. O. S. 169.

6959. —Of printed copy.—In support of a plea of discharge by a Jamaica et. of insolvency, a printed copy of the Colonial Act from the Colonial Office was received, with evidence that there was an insolvent debtors' et. in Jamaica, & production of the schedule & order for discharge purporting to have the seal of the et.:—*Qu.*: whether this would be sufficient evidence to sustain the plea. —*CLARKE v. EMERY* (1859), 1 F. & F. 445, N. P.

6960. Production from India Office.—Of book containing Acts of Legislative Council of India.—A book containing the Acts of the Legislative Council of India was produced by a clerk from the India Office:—*Held*: sufficient evidence of the Acts therein contained. —*GARDNER v. WRIGHT* (1866), 15 L. T. 325, N. P.

6961. Necessity for proof by evidence.—Appet. was arrested in England as a fugitive offender from the British colony of Victoria on a warrant charging him with larceny in that State. Three warrants for larceny had been previously issued against him in Victoria, & were put in evidence before the magistrate, together with the depositions taken there, which included evidence by a senior constable of police that by the Crimes Act, 1890, an Act then in force in the colony of Victoria, the crime of larceny was punishable by imprisonment with hard labour for any term not exceeding five years, but no further evidence of the law of Victoria was given. The magistrate committed the applicant for return to the colony, & on the argument of a rule nisi for a writ of *habeas corpus*, it was admitted that the facts did not amount to an offence within the Crimes Act, 1890, a Victorian statute, but it was contended that they were made an offence by Crimes Act, 1890, Amendment Act, 1896, a Victorian statute, & that evidence of the principal Act having been given, the et. was

bound to take judicial notice of the amending Act:—*Held*: colonial law, like foreign law, must be proved by evidence. —*R. v. BRIXTON PRISON (GOVERNOR), Ex p. PERCEVAL*, [1907] 1 K. B. 696; 76 L. J. K. B. 619; 96 L. T. 545; 71 J. P. 148; 23 T. L. R. 238; 21 Cox, C. C. 387, D. C.

6962. Adoption of Imperial Act by colony.—In cases under Matrimonial Causes (Dominion Troops) Act, 1919 (c. 28), Evidence (Colonial Statutes) Act, 1907 (c. 16), s. 1 (1), makes it unnecessary, in order to prove that the Act has been adopted by a self-governing Dominion, to file an affidavit by an expert verifying the Govt. printer's copy of the Act of the Dominion Parliament. —*GIBSON v. GIBSON* (1920), 37 T. L. R. 124; 65 Sol. Jo. 175.

6963. Copy without government printer's imprint.—Proof that copy officially sent to Bar Library.—Omission of the imprint of the Govt. printer from copies of colonial statutes supplemented by evidence that the copies in question had been sent to the Bar Library in accordance with official regulations. —*TAYLOR v. TAYLOR & HOOPER* (1923), 129 L. T. 30; 39 T. L. R. 225.

SECT. 10.—BRITISH LAW ASCERTAINMENT ACT, 1859.

See British Law Ascertainment Act, 1859 (c. 63), ss. 1–1.

6964. Discretion of court to refer.—In a case of conflict of opinions on a question of pure & difficult Scottish law, the et. will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scottish et. But it is a matter of discretion in the et. —*LORD v. COLVIN* (1800), 1 Drew. & Sm. 24; 29 L. J. Ch. 297; 1 L. T. 427; 6 Jur. N. S. 189; 8 W. R. 201; 62 E. R. 287; subsequent proceedings, 3 L. T. 228; 8 W. R. 254. *Annotation*:—*Fold*, *Eglinton v. Lamb* (1867), 15 L. T. 657.

6965. Case sent to Scottish court.—*LORD v. COLVIN*, No. 6964, *ante*.

6966. ——Where a power of appointment was created by a Scottish deed over a sum of money charged on estates in Scotland, the Ct. of Ch. in England declined to decide the validity of appointments made under it without first ascertaining the law of Scotland on the subject; & for that purpose directed a case to be stated for the opinion of the Ct. of Session, pursuant to the provisions of British Law Ascertainment Act, 1859 (c. 63). —*TOPHAM v. PORTLAND (DUKE)* (1863), 1 De G. J. & Sm. 517; 1 New Rep. 496; 32 L. J. Ch. 257; 8 L. T. 180; 11 W. R. 507; 46 E. R. 205, L. J.; on appeal, *sub nom.* *PORTLAND v. TOPHAM* (1864), 11 H. L. Cas. 32, H. L.

Annotations:—*Fold*, *Eglinton v. Lamb* (1867), 15 L. T. 657. *Mentd.* *Rankine v. Barnes* (1864), 3 New Rep. 669; *Cooper v. Cooper* (1869), 5 Ch. App. 203; *Preston v. Preston* (1869), 21 L. T. 346; *Thacker v. Key* (1869), L. R. 8 Eq. 408; *de Huish's Charity* (1870), L. R. 10 Eq. 5; *Palmer v. Locke* (1880), 15 Ch. D. 294; *Whelan v.*

but before the argument in *banc*, debts put in the report of a case bearing upon the question, decided in the Supreme Ct. of the United States, verified by affidavit:—*Held*: admissible. —*RICE v. GUNN* (1884), 4 O. R. 579.—*CAN.*

k. Copy of indictment & true bill.—Copies of the indictment & of true bills found by the grand jury of the State of New York cannot be admitted in Canada as *prima facie* proof of the offence on a demand for extradition. —*EX p. ENO* (1884), 10 Q. L. R. 194.—*CAN.*

l. Deposition.—*EX p. HORE* (1886), 14 L. L. O. S. 705.—*CAN.*

m. Foreign warrant.—*Re BONGARD*

(1900), 5 Terr. L. R. 10; 6 Can. Crim. Cas. 74.—*CAN.*

n. Copies of prison registers.—*Qu.*: whether copies duly authenticated of the prison registers of New Caledonia are sufficient evidence of the facts stated therein. —*GARDNER'S CASE* (1888), 6 N. Z. L. R. 604.—*N.Z.*

PART XI. SECT. 9.

o. Printed copy.—Foreign statute law may be proved in the et. of New South Wales by putting in evidence a printed copy of the foreign statute, as provided for by 55 Vict. No. 5, s. 11, but the construction of a statute so put in evidence is for the et. to decide;

that sect. does not authorise the putting in evidence of books of reported decisions of the foreign country to show what interpretations judges in that country have put upon their own statute.—*Homebush v. BOUND GOLD MINING CO. (No Liability)* v. *McFERRON* (1896), 17 N. S. W. Eq. 291.—*AUS.*

p. Foreign statute.—The state of Maine is a foreign state, & an Act of the Legislature of that state may, under the Consol. Stat. cap. 46, s. 12, be proved in this province by a copy thereof, certified by the Secretary of the State, & under the seal thereof. —*PALMER v. OCEAN MARINE INSURANCE CO.* (1890), 29 N. B. R. 501.—*CAN.*

Law Ascertainment Act, 1859.]

Palmer (1888), 39 Ch. D. 648; *Re Somers, Cocks v. Somerset* (1895), 39 Sol. Jo. 705; *Viant v. Cooper* (1897), 76 L. T. 768; *Molynx v. Fletcher*, [1898] 1 Q. B. 648; *Saunders v. Shafte* (1904), 91 L. T. 282; *A.-G. v. Richmond* (No. 1), [1908] 2 K. B. 729; *Cloutte v. Storey*, [1911] 1 Ch. 18; *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595.

6967. ——.]—In a suit instituted in this country, where a question of Scottish law arises, the ct. has power under British Law Ascertainment Act, 1859 (c. 63), to order a case to be settled for the opinion of the Scottish ct., & on a return of the judgment of such ct., to apply the facts to such decision, & make an order accordingly.—*WILSON v. MOORE* (1861), 11 L. T. 102; 12 W. R. 1137.

6968. ——.]—Where, previously to the marriage of a domiciled Englishman to a domiciled Scots-woman in Scotland, a settlement was executed in

Scottish form, the ct. declined to decide questions arising out of the terms of the settlement & affecting the husband's property in England, without being informed as to the construction which would be put upon the instrument by a Scottish ct.; & it therefore directed a case to be sent to the Ct. of Session, under British Law Ascertainment Act, 1859 (c. 63), to ascertain the law of Scotland applicable to the settlement.—*EGLINTON (EARL) v. LAMB* (1867), 15 L. T. 657.

6969. Case sent to Supreme Court of Calcutta.—Form of reference.]—Form of reference to the Supreme Ct. of Calcutta of questions of Hindu Law under British Law Ascertainment Act, 1859 (c. 63).—*LOGIN v. COORG (PRINCESS)* (1862), 30 Beav. 632; 54 E. R. 1035.

Compare Foreign Law Ascertainment Act, 1861 (c. 11).

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EXCHANGE.

See COMPULSORY PURCHASE OF LAND AND COMPENSATION; REAL PROPERTY AND CHATTELS
REAL; STOCK EXCHANGE.

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EXCHEQUER BILLS.

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END OF VOL. XXII.

